Ladies and gentlemen, I am privileged and it’s a pleasure to be among you this morning, and it’s a pleasure and a privilege to be a member of the Center for the Study of Law and Religion, John Witte’s threats notwithstanding.

One of the Center’s projects is called the Christian Jurisprudence Project. The book I’m writing for that project is tentatively titled *Liberal Democracy, Religious Faith, and Moral Controversy*. The two principal moral controversies I address in the book are abortion and same-sex marriage.

My comments this morning are drawn from one of that book’s chapters. In the chapter of the book that precedes the chapter from which my comments this morning are drawn, I set forth what I judge to be the fundamental warrant for liberal democracy’s embrace of the right to freedom of religious practice.

Then in this chapter, I turn to the question whether given the fundamental warrant for liberal democracy’s commitment to the right to freedom of religious practice, liberal democracy should be committed as well to what I call the right to freedom of moral practice.

The latter right, as I conceive it, is analogous to the former right which, in the words of Article 18 of the International Covenant on Civil and Political Rights, protects one’s freedom – either individually or in community with others – and, in public or private, to manifest one’s religion in worship, observance, practice, and teaching. Whereas the right to freedom of religious practice is, to put it simply, the right to practice one’s religion. The right to freedom of moral practice is the right to practice one’s morality. The former right protects one’s freedom to live one’s life on the basis of one’s religious beliefs, by which I mean here one’s belief that God exists or one’s beliefs about the nature, activity, or will of God. The latter right protects one’s freedom to live one’s life on the basis of one’s moral beliefs, by which I mean here simply one’s beliefs about who, about what kind of person, it is good for one to be; about the kind of life it is good for one to live; about what it is good for one to do or not to do.
The typical religious believer’s moral beliefs, at least her most fundamental moral beliefs, are also religious beliefs. Her moral beliefs are inextricably bound up with her beliefs about the nature, activity, or will of God. Because the nature, activity, will of God is what it is, this is the kind of person I should be. This is the kind of life it is good for me to live. This is what, in this circumstance, is good for me to do.

So our religious believers’ moral practice is also religious practice, and as such is protected by the right to freedom of religious practice. By contrast, none of a non-believer’s moral beliefs are religious beliefs, so a non-believer’s moral practice is not religious practice, and is therefore not protected, at least not obviously protected, by the right to freedom of religious practice. A non-believer’s moral practice would be protected, however, by the right to freedom of moral practice; moreover, a believer’s moral practice, a believer’s moral practice which includes her prayers and religious rituals, would be protected by the right to freedom of moral practice, which protects religiously grounded moral practice just as the right to freedom of speech, for example, protects religious speech. If legislated, therefore, the right to freedom of moral practice, which is not religion-specific, would render the right to freedom of religious practice superfluous.

Is there good reason for liberal democracy to embrace the right to freedom of religious practice, but not the right – the broader right – to freedom of moral practice? Is there a good reason, that is, for liberal democracy to limit government’s authority to regulate one’s moral practice if one’s moral practice is religiously grounded, but not an authority to regulate one’s moral practice if one’s moral practice is not religiously grounded?

Given the serious suffering it causes, government’s denial to some or all its citizens of the freedom to practice their morality is unjustified, and the serious suffering it causes is therefore unwarranted unless government has a good reason to do so. This is so without regard to whether their morality is religiously grounded.

According to the right to freedom of moral practice, understood as analogous to the right to freedom of religious practice, government has good reason to ban or otherwise regulate a moral practice if, but only if, the regulation is necessary to protect a public good; necessary, that is, and here I quote the formulation in Article 18 of the International Covenant: “To protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.”

Why might one believe that government can have good reason to regulate a moral practice even if the regulation is not necessary to protect the public good? The same two responses, the same two arguments come to mind here that came to mind in the preceding chapter where I addressed the analogous question about governments regulating a religious practice. The argument from truth and the argument from the unity and stability of a society, except that now the two arguments are about morality rather than religion.

The argument from truth – certain moral teachings are true; for example, the teaching that homosexual sexual activity is immoral, and no government should lack authority to ban or otherwise regulate practices that may lead some people to reject those teachings. That argument is not persuasive to those of us who, after reflecting on historical experience, are skeptical not just about government’s ability, that is, about a political majority’s ability, to discern religious
truth, but also about its ability to discern moral truth. We are wary not just about trusting
government as an arbiter of religious truth, but also about trusting it as an arbiter of moral truth,
and as Michael McConnell, who’s known to many of you, has written – I have here in a
parenthesis – “Locke’s civil magistrate is no more competent a judge of the truth about human
sexuality than about religion,” said McConnell.

We agree with Locke that the business of laws is not to provide for the truth of opinions, but for
the safety and security of the commonwealth, and of every man’s, particular man’s, goods and
persons. In our judgment, government should have authority to ban or otherwise regulate a
moral practice, but only if, but only if, the regulation is necessary to protect a public good.

It would be more precisely accurate to say that we are wary about trusting government as an
arbiter of some, but not all, moral truth. As I explained early in the book from which these
comments are drawn, liberal democracy is constitutively committed to the inherent dignity and
inviolability of every human being. That commitment is, in part, what makes a democracy a
liberal democracy. That every human being has inherent dignity and is inviolable is axiomatic
for liberal democracy. So we are not wary about government proclaiming and acting in accord
with the moral proposition that every human being has inherent dignity and is inviolable.

Secondly, government must protect the public good. It must protect public safety, public order,
public health, and public morals and the fundamental rights and freedoms of its citizens and
others subject to its jurisdiction. Decisions about how to do so are, whatever else they are, moral
decisions. So we are not wary about – at least we must accept – government as an arbiter of
moral disagreements about how to protect the public good. But we are wary about – and we
need not accept – government as an arbiter of moral disagreements that do not implicate the
public good.

The second argument – the argument from the unity stability against the right to freedom of
moral practice, as it were. It is sometimes important to the unity and stability of a nation that the
morality that supports that unity and stability, whether that morality be true or not, be nurtured
and protected from attack. No government should lack authority to ban or otherwise regulate
practices that may weaken the credibility of such a morality. But that response is farfetched.
Unless it is necessary to protect a public good, the coercive imposition of moral uniformity – like
the coercive imposition of religious uniformity – is, if anything, more likely to corrode the unity
of a liberal democracy than to nurture it. Therefore, government should not ban or otherwise
regulate a moral practice unless it must do so in order to protect the public good – a public good.

So the fundamental warrant for the right to freedom of moral practice is substantially the same as
the fundamental warrant for the right to freedom of religious practice. Just as government should
not be trusted as an arbiter of religious truth, it should not be trusted as an arbiter of moral truth.
More precisely, it should not be trusted as an arbiter of moral disagreements that do not implicate
the public good.

Moreover, the coercive imposition of moral uniformity, like the coercive imposition of religious
uniformity, is not necessary to achieve or maintain the unity and stability of a liberal democracy.
Indeed, again, the coercive imposition of moral uniformity is, if anything, more likely to corrode
than nurture the unity and stability of a liberal democracy, especially if the liberal democracy is – as liberal democracies typically and increasingly are – morally as well as religiously pluralistic. Government has good reason to ban or otherwise regulate – and should have the authority to ban or otherwise regulate a moral practice or a religious practice if, but only if, the regulation is necessary to do what every government should do – and therefore must be legally free to do – protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

Recall that according to the best – of course, it’s hard for you to recall, since you didn’t read the preceding chapter – but recall that, according to the best understanding of the right to freedom of religious practice, government not only may not regulate a religious practice – this does not threaten the public good – government also may not pass judgment on, government must remain steadfastly agnostic about, the truth or falsity of a religious belief that animates, or the religious belief that animates, such a practice.

Analogously, according to the best understanding of the right to freedom of moral practice, government not only may not regulate a moral practice that does not threaten the public good; government also may not pass judgment on; government must remain steadfastly agnostic about the truth or falsity of the moral belief that animates the practice. A basic reason for the right to freedom of moral practice, after all, is profound wariness about government – about a political majority – as an arbiter of moral disagreements that do not implicate a public good.

As it happens, the world’s liberal democracies not only should, in my judgment, embrace the right to freedom of moral practice, they already do embrace it, albeit only in the following limited sense. Recall that the International Covenant on Civil and Political Rights is a treaty to which the United States, and the world’s other liberal democracies, have subscribed, and many others as well.

Now look again at Article 18 of the International Covenant – and I’ll read it to you a little more in full here – “Everyone shall have the right to freedom of thought, conscience, and religion. No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.” It talks about the states parties undertake – they undertake to have respect for the liberty of parents and, when applicable, legal guardians to assure the religious and moral education of their children in conformity with their own convictions. So Article 18 plainly protects not only one’s freedom to practice one’s religion, but also one’s freedom to practice one’s morality, including the freedom, “liberty” of parents and, when applicable, legal guardians, to assure the moral education of one’s children in conformity with one’s own convictions.

Like the International Covenant, two other important human rights treaties, the European Convention and the American Convention on Human Rights, protect not only freedom of religious practice, but also freedom of moral practice.

Now just as the right to freedom of religious practice is not – because it cannot be – absolute, so to the right to freedom of moral practice is not, because it cannot be absolute. Government may regulate, even to the point of banning a practice, if necessary to do so in order to protect the public safety, etcetera. But notice in that litany of things that count as the public good is the phrase public morals. What are public morals? Assume that a political majority is morally
opposed to one’s practice without regard to whether the practice threatens public safety, public order, or public health, or the rights and freedoms of others. If such opposition were to count as a sufficient public morals justification for regulating the practice, both the right to freedom of religious practice and the right to freedom of moral practice would be illusory rights. Anytime a political majority judged one’s practice to be immoral, even if the practice did not threaten public safety, public order, or public health, or the fundamental rights and freedoms of others, a political majority could ban or otherwise regulate the practice.

What should count, then, as a sufficient public morals justification for regulating a religious or moral practice? There are many practices that, when done in private, are unproblematic, but that, if done in public, would be quite problematic even if we assume that they do not threaten public safety, public health, or public order, or the rights and freedoms of others.

For example, a married couple copulating. Imagine a practice that fits this profile. If done in public, the practice would not threaten public safety, public order, public health, or the rights and freedoms of others; nonetheless, if done in public, the practice would be highly likely to cause an ordinary onlooker – including an ordinary onlooker with his or her young children in tow – to be greatly uncomfortable, embarrassed, or the like. A ban on the public doing of such a practice is surely a legitimate way to protect public morals in, obviously, different cultures. In any event, if the mere fact that a political majority judged one’s practice to be immoral – immoral without regard to whether the practice threatened public safety, public order, public health, and so forth – if that were to count as a sufficient public morals justification for regulating the practice, then the right to freedom of moral practice would be illusory.

There are two important related questions I don’t address in this chapter. In a liberal democracy such as the United States, should courts play any role in enforcing against government the right to freedom of moral practice? If so, how deferential or non-deferential – that is, to the country’s lawmakers and other policy makers – should the courts be in enforcing the right? I have addressed such questions elsewhere at length, and my reference here is to a book in constitutional theory that I have finished that will be published next year.

Assume that in a particular liberal democracy the courts play no role in enforcing the right to freedom of moral practice, in which case, the right is not what we conventionally recognize as a legal – that is, judicially enforceable -- right. It may nonetheless be the case that in that liberal democracy, the “right” is a fundamental political, moral norm in the culture of that liberal democracy.

Now for reasons I’ve given in this chapter, I think the right should be in the culture of every liberal democracy, at least the fundamental, political, moral norm; and as such, the right – the norm – can play an important role, as my chapters on abortion and same-sex marriage illustrate, in shaping the liberal democracy’s discourse about vexing political moral controversies such as those in the United States over abortion (“should it be criminalized?”) and same-sex marriage (“should it be legalized?”).

The right to freedom of moral practice is, I think, a compelling broadening of the right to freedom of religious practice; a broadening animated by the logic, so to speak, of the
fundamental warrant for liberal democracy’s commitment to the right to freedom of religious practice. In a democracy, the cardinal function of the right to freedom of religious practice is not to prevent government from regulating any religious practice whatsoever but to prevent it from regulating a religious practice if there is no better reason to do so than that a political majority disapproves of – is hostile to – the practice.

Similarly, the cardinal function of the right to freedom of moral practice is to prevent government from regulating a moral practice if there’s no better reason to do so than hostility to the practice on the part of the powers that be; and as with the right to freedom of religious practice, so to with the broader right to freedom of moral practice, the fundamental warrant for the right to freedom of moral practice is one all citizens of liberal democracy – Catholics no less than non-Catholics, Christians no less than non-Christians, believers no less than non-believers – have reason to affirm.

Political majorities are not to be trusted beyond a certain point as arbiters of moral truth. Moreover, the coercive imposition of moral uniformity has not been necessary to achieve or maintain – and indeed, if anything, is more likely to corrode than to nurture – unity and stability in democracies.

Religious believers – and actually, Cathy, I’m thinking of Mark Lilla’s book when I write this paragraph – religious believers do not have less reason than non-believers. Indeed, religious believers and non-believers have the same fundamental reason. So this is a kind of political theology to insist that government not ban or otherwise regulate a moral practice unless the regulation is necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others. “In necessary things, unity; in disputed things, liberty; in all things, charity,” so said, in the 17th century, Puritan Richard Baxter.

Last weekend, at the annual meeting of the Editorial Board of the Journal of Law and Religion, my friend and former Chicago colleague, Robin Lovin, whom I think may be here this morning – who meant to be – presented me and the other editors with some comments on this chapter, and I want to conclude by quoting some of what Robin had to say because maybe it’s even more interesting than the chapter.

Robin said, “It is important to recognize that freedom of moral practice is a moral commitment, because although the moral arguments for it are the same as the moral arguments for religious freedom, we cannot offer the same practical or prudential incentives for moral tolerance that Locke, for example, could offer his contemporaries for accepting religious tolerance. He could suggest, plausibly, that religious toleration would reduce the social friction of religious conflict, and for a nation that still had a wary eye to the recent history of religious warfare – that was often a good enough reason to try it. Freedom of moral practice, I think, is not likely to reduce conflict but to shift its terms. We will spend less time, energy, and argument trying to impose moral standards on other people, but we can hardly avoid a more intense conflict over exactly what it means for government to protect public safety, order, health, morals, or the fundamental rights and freedoms of others.”
“To adopt freedom of moral practice would not end the debate about law and morality, but it would shift the grounds from questions about personal choice and individual behavior to questions about justice and human rights. So,” said Robin, “if we adopt Michael’s proposal about moral tolerance and the purposes of government, we will need to be candid that we are not proposing it as an end to social conflict over moral issues. We are proposing that, if we are going to make morality the subject of political discussion – which, of course, we must do – the questions that issue must concern things with which government is necessarily involved, not simply those issues in which some of us want to use the coercive powers of government to keep other people from doing things we think they ought not to do.”

“I, for one,” said Robin, “would welcome that shift in the terms of public moral argument, but I wouldn’t expect it to be any less contentious than the arguments we are having now.”

Unfortunately for you to see what payoff, if any, there is for my proposed right to freedom of moral practice, as one of the things that structures political discourse about issues like abortion and same-sex marriage, I’d have to present to you those two chapters so you can see how it works, but my colleague, John Witte, is threatening, and so I’m gonna beat a quick retreat back to my seat.

Thank you.