



“Legislating Morality”: An Analysis

For decades, those on the left have clashed swords with those on the right over the issue of “legislating morality.” The latter believes, not only that it is appropriate for law makers to “legislate morality,” but that it is impossible to avoid doing so. The former, in contrast, rejects both contentions.



Typically, the leftist will insist that in a free society of the sort that Americans inhabit, a society whose members subscribe to a staggering plurality of distinct and often mutually incompatible understandings of morality, legislators should always refrain from “imposing” a vision of morality upon citizens who do not share it.

Let us first note that his protestations to the contrary aside, no one remotely familiar with either the robustness of the leftist’s moral vision or the relentlessness with which he seeks to advance it could for a second accept his sincerity on this score. The leftist’s commitment to “legislating morality” is second to none. When he argues otherwise, it is *the other guy’s* morality to which he refers.

But on its face, the leftist’s stated position on this issue *is*, at least in part, correct. It is also, however, partially incorrect. And what is true of the leftist’s view is equally true of his opponent’s perspective.

That both the leftist’s and the rightist’s claims appear to contain some measure of plausibility is due, I think, to the confusion that prevails on both sides of the political aisle with respect to the natures of [morality](#), [freedom](#), and the kind of association we compose as citizens of the United States of America.

Morality — any morality—presupposes free agency, *persons* with the capacity and the opportunity to make *choices* among alternative courses of action, however constrained these options may be. Morality postulates *freedom*.

Now, freedom can be and has been defined variously. Without getting bogged down in this debate, it suffices for our purposes to establish two things.

First, whether or not the phenomenon of “[free will](#)” is a mass illusion, as “[determinists](#)” of one sort or another contend, is neither here nor there. What matters is that outside of a tiny minority of theoreticians, people find it impossible to elude their gut intuition that they are indeed free. In fact, even the tiny minority of “deep thinkers” who reject this in theory have just as impossible time as everyone else denying it in fact.

Second, both in regard to morality generally and politics in particular, freedom demands no more than the absence of *coercion*. To put it another way, freedom demands that with respect to his own actions, the agent be *sovereign*.

This last point needs to be qualified. In his moral philosophy, [Thomas Aquinas](#) distinguished “acts of a



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human being” from “human acts.” Acts of humans, like breathing, digesting, scratching, etc., are devoid of moral import — i.e. they are neither morally right nor morally wrong — for they preclude choice and, thus, are not uniquely human. On the other hand, because human acts, having been chosen, *are* unique to human beings, it is appropriate to praise or blame, reward or condemn them. Human acts are either morally right or morally wrong (immoral). So, it is respect to one’s activities in this second, moral sense, with respect to which an agent must have sovereignty.

How do these ideas of freedom and morality relate to our political situation?

The modern state that is America is a certain kind of association. It is usually thought of as a [civil association](#). But what is a civil association?

Since the emergence of the modern state in the post-Renaissance era some four centuries ago, political philosophers have labored mightily to discern the character of the modern state. Some have conceived it as a civil association. Others have read it in terms of a very different kind of association, what the conservative philosopher [Michael Oakeshott](#) called an “enterprise association.” The differences between the two kinds of associations are stark.

An enterprise association is distinguished on account of the *end* or *goal* for the sake of which it exists. This end is a substantive state of affairs toward the realization of which all of the associates are expected to contribute. Enterprise associations are the stuff of which human life consists, the stuff from which human beings derive a sense of meaning, purpose, and even identity. It is understandable that the state should be seen as but another instance of this kind of association. But the state is a *compulsory* organization. What this means is that when the state is regarded as an enterprise association, the associates — citizens — are compelled to pursue the ends of another, ends that have been imposed upon them. Only those activities that don’t threaten to impede the realization of the common good are then permitted.

In a civil association, however, there is no common good or end or goal. Unlike in an enterprise association which is held together by *policy*, the members of a civil association are related to one another in terms of *law*. Laws, in contrast to policies, are *not* action-specifying; they do not tell us *what* to do. Rather, laws prescribe *how* we must do whatever it is we *choose* to do. Laws are nothing more or less than the conditions we are obligated to fulfill in all of our self-chosen engagements. To put it another way, laws specify, not the enterprises upon which we must embark, but *the obligations* we must discharge while deciding upon enterprises for ourselves.

It should be obvious that a civil association is a fundamentally different kind of association than an enterprise association. The goals of an enterprise association are of moral import, but if — as in the case of a state — the associates are conscripted in the service of these goals that are not of their own making, the association can no longer be considered a moral association. Such is not the case, however, with a civil association.

A civil association is indeed a moral association because the associates are *free* to pursue their own ends.

There is not now nor has there have ever been a state that has perfectly embodied either of these two kinds of association. Rather, in reality, states have been mixtures of the two, usually with a tendency toward one kind of association dominating over the other. The United States, I think most of us would agree, was originally intended to be a civil association. This impulse toward civil association is not altogether dead, but ideologues on both the left and the right have done much to insure that it be



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eclipsed by the impulse toward enterprise association.

So, there is clearly a case in you “can’t legislate morality.” Once agents are compelled to devote their resources to fulfilling someone else’s moral vision — Equality, say, or Piety — they are no longer treated as moral agents, *subjects* deserving of praise and blame; they are, instead, reduced to *objects*, servants of a purpose from which they are, of necessity, alienated. There is, though, another sense in which it is wholly inaccurate to think of the government of a civil association as being neutral or indifferent to morality, for the state conceived as such *is* a moral association.

And it is a moral association because of the freedom that it presupposes.



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