REGENT UNIVERSITY LAW REVIEW

VOLUME 20 2007–2008 NUMBER 2

CONTENTS

ADDRESS

GOD, GAIA, THE TAXPAYER, AND THE LORAX: STANDING, JUSTICIABILITY, AND SEPARATION OF POWERS AFTER *MASSACHUSETTS* AND *HEIN*
Jonathan H. Adler 175

ARTICLES

THE USE AND SCOPE OF EXTRINSIC EVIDENCE IN EVALUATING ESTABLISHMENT CLAUSE CASES IN LIGHT OF THE *LEMON* TEST'S SECULAR PURPOSE REQUIREMENT
Mark DeForrest 201

GUARDING THE THRESHOLD OF BIRTH
Kevin J. Mitchell 257

THE ROLE OF RELIGION IN PUBLIC DEBATE

RELIGIOUS LIBERTIES: THE ROLE OF RELIGION IN PUBLIC DEBATE
Diane S. Sykes 301

RELIGIONS AS WAYS OF LIFE
James W. Skillen 305

THE ROLE OF RELIGIOUS CONSIDERATIONS IN THE PUBLIC DISCOURSE OF PLURALISTIC DEMOCRACIES
Robert Audi 309

RELIGIOUS CONVICTION AND POLITICAL PARTICIPATION
Michael W. McConnell 313

BRIEF COMMENTS ON AN INTERMEDIATE POSITION
Kent Greenawalt 317

PANEL DISCUSSION AND COMMENTARY
321

NOTES

TRUTH BE TOLD: TRUTH SERUM AND ITS ROLE IN THE WAR ON TERROR
Seth Lowry 337

THE DEFENSE OF MARRIAGE ACT AS AN EFFICACIOUS EXPRESSION OF PUBLIC POLICY: TOWARDS A RESOLUTION OF *MILLER V. JENKINS* AND THE EMERGING CONFLICT BETWEEN STATES OVER SAME-SEX PARENTING
Cort I. Walker 363

REGENT UNIVERSITY
LAW REVIEW

Volume 20 2007-2008 Number 2

GOD, GAIA, THE TAXPAYER, AND THE LORAX: STANDING, JUSTICIABILITY, AND SEPARATION OF POWERS AFTER *MASSACHUSETTS* AND *HEIN*

*Jonathan H. Adler**

INTRODUCTION

The Supreme Court's October 2006 term marked the onset of a conservative legal revolution, according to many press accounts and commentaries.[1] The addition of Chief Justice John Roberts and Associate Justice Samuel Alito created "the Supreme Court that conservatives had long yearned for and that liberals feared," according to Linda Greenhouse of the *New York Times*.[2] Professor Erwin Chemerinsky declared the October 2006 term to be "the most overwhelmingly conservative term since the 1930s."[3] By such accounts, a five-Justice majority consistently moved the Court's jurisprudence in a rightward direction in a string of ideologically charged cases, from abortion restrictions and race-based school assignments to campaign-finance regulations and litigant access to federal courts.[4]

---

* Professor and Director, Center for Business Law & Regulation, Case Western Reserve University School of Law. This Article is based upon remarks delivered on November 30, 2007 at the *Regent University Law Review* symposium, "Justiciability After *Hein* and *Massachusetts*: Where Is the Court Standing?" I would like to thank Erik Jensen, Melvyn Durchslag, John Eastman, and David Wagner for their comments. All errors or omissions are mine alone.

1 Where this Article uses the terms "conservative" and "liberal" to describe shifts in legal doctrine, it is adopting the conventional usages of these terms in legal commentary.

2 Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at 1, *available at* http://www.nytimes.com/2007/07/01/washington/01scotus.html?ex=1341028800&en=43ad643ff11e471e&ei=5124&partner=permalink&exprod=permalink; *see generally* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (2007) (discussing emergence of conservative majority on Supreme Court).

3 Erwin Chemerinsky, *Conservative Justice*, L.A. TIMES, June 29, 2007, at A35, *available at* http://www.latimes.com/news/opinion/la-oe-chemerinsky29jun29,0,5235222.story.

4 *See* Greenhouse, *supra* note 2 ("Fully a third of the court's decisions, more than in any recent term, were decided by 5-to-4 margins. Most of those, 19 of 24, were decided along ideological lines, demonstrating the court's polarization whether on constitutional

There is no question that the October 2006 term was marked by an unusually high number of 5-4 decisions decided along seemingly ideological lines. A single Justice, Anthony Kennedy, was in the majority in every 5-4 decision,[5] meaning that the outcome of a case often depended on whether he broke to the right or to the left. But the Court's apparent rightward drift could have been an artifact of case selection and the Court's ever-dwindling docket.[6] In some cases, such as the Court's approach to Article III standing, any conservative shift was wholly illusory.

The Supreme Court considered standing in two high-profile cases during the October 2006 term: *Hein v. Freedom from Religion Foundation*[7] and *Massachusetts v. EPA*.[8] Both were 5-4 decisions in which the Court decided along traditional, ideological lines, and both decisions may provide an indication of the future direction of the Supreme Court. Yet neither case fits the conventional narrative of a narrow majority shifting the law in a conservative direction.

In *Hein*, a five-Justice majority denied taxpayer standing to challenge the Bush Administration's so-called "faith-based initiatives" as a violation of the First Amendment's Establishment Clause. Writing in *The New York Review of Books*, Anthony Lewis claimed that in *Hein* a five-Justice majority "covertly overruled earlier decisions . . . recognizing the standing of members of the public to challenge measures that assist religious activities."[9] Yet what is striking about *Hein* is not that it overturned prior decisions or shifted the Court's jurisprudence, but rather that it hewed closely to precedent, leaving the law of standing in place.

Massachusetts was a far more consequential case than *Hein*, even if it did not receive the same level of attention at the close of the Court's

---

fundamentals or obscure questions of appellate procedure."); *see also* Jeffrey Toobin, *Five to Four*, THE NEW YORKER, June 25, 2007, at 35, *available at* http://www.newyorker.com/talk/comment/2007/06/25/070625taco_talk_toobin.

5 *See* Greenhouse, *supra* note 2, at 18.

6 *See, e.g.*, Jonathan H. Adler, *How Conservative Is this Court?*, NAT'L REV. ONLINE, July 5, 2007, http://article.nationalreview.com/?q=Y2Y3NjNkM2ZkYTcxNzQwYTBhZWZkNzEyZGYyMWExMjE=.

7 127 S. Ct. 2553 (2007).

8 127 S. Ct. 1438 (2007).

9 Anthony Lewis, *The Court: How 'So Few Have So Quickly Changed So Much'*, THE N.Y. REV. OF BOOKS, Dec. 20, 2007, at 58, 59, *available at* http://www.nybooks.com/articles/20899. *See also* Stephanie Mencimer, *Supreme Court: Taking Care of Business*, MOTHER JONES, Jan. 25, 2008, *available at* http://www.motherjones.com/washington_dispatch/2008/01/supreme-court-pro-business-out-of-touch.html (stating that the decision in *Hein* "overturned years of precedent").

term.[10] In *Massachusetts*, the Court broke new ground as it took several steps in a decidedly "liberal" direction.[11] The five Justice majority's conclusion that Massachusetts had standing to challenge the Environmental Protection Agency's refusal to regulate greenhouse-gas emissions from new motor vehicles is potentially quite consequential. *Massachusetts* may have produced greater substantive change than any other decision of the October 2006 term, despite the Court majority's claims of adhering to precedent.[12]

Both *Hein* and *Massachusetts* are potentially significant standing opinions—the latter for what it did, and the former for what it did not do. Both decisions involved generalized grievances about federal-government policies that affect citizens as a whole, but point in opposite directions. Only Justice Kennedy joined the judgment in both opinions—indeed, only Justice Kennedy seemed satisfied with the two holdings. In many respects, the opinions are in significant tension with each other and embrace competing conceptions of the role of the judiciary in the separation of powers. What neither decision did, however, is etch a conservative imprint on the law of standing.

The rather modest aim of this Article is to untangle what the Supreme Court did, or did not do, with regard to standing last term. This analysis may not produce any profound conclusions about the future course of the Roberts Court. It can, however, illuminate how the current Court approaches the question of justiciability and, as a consequence, the Court's approach to the separation of powers and its conception of its own role in policing executive conduct in contested policy areas.

Part I of this Article provides a brief overview of standing doctrine as it has been traditionally conceived and its role in the separation of powers, particularly in the context of generalized grievances. Parts II and III turn to *Hein* and *Massachsuetts* respectively, explaining what the Court did (and did not do) with regard to standing in each case. Part IV considers what the *Hein* and *Massachusetts* decisions suggest about the Court's conception of separation of powers and highlights some tensions between and conceptual problems within the Court's approach to judicial oversight of executive action in the two cases.

---

[10] One potential explanation for the relative lack of attention to *Massachusetts* at the end of the Court's term is the timing of the respective opinions. Whereas *Hein* was among the high-profile decisions handed down at the end of the term, *Massachusetts* was decided over two months earlier, on April 2, 2007.

[11] *See* Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 61 (2007), http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf (discussing the legal implications of *Massachusetts*); Ronald A. Cass, Massachusetts v. EPA: *The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 73 (2007), http://www.virginialawreview.org/inbrief/2007/05/21/cass.pdf (discussing departures from precedent in the *Massachusetts* decision).

[12] *See* Cass, *supra* note 11.

I. STANDING AND SEPARATION OF POWERS

Standing is a key element of justiciability. For a plaintiff to invoke the jurisdiction of an Article III court, he or she must demonstrate the existence of standing. This entails satisfying requirements that demonstrate a given plaintiff is the proper individual to bring the issue to federal court. Without standing, there is no "case or controversy" under Article III of the Constitution.[13] "Courts resolve *cases,* not philosophical disputes, beauty contests, or questions of foreign policy," comments Professor Eugene Kontorovich.[14] Standing cases are particularly important because standing doctrine helps determine who can, and who cannot, pursue certain claims in federal court.

There is some debate over the constitutional grounding and historical provenance of the standing requirement.[15] Scholars dispute whether the text or original meaning of Article III imposes a standing requirement. By some accounts, standing did not emerge as a requirement of justiciability until the early twentieth century, as courts sought to limit litigation against the growing administrative state.[16] What is not in dispute, however, is that standing is now understood to be an essential component of justiciability under Article III.

There are several justifications for the standing requirement, such as the need to ensure sufficient adversity between the parties[17] and to

---

[13] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

[14] Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1670 (2007).

[15] *See, e.g.*, Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

[16] *See, e.g.*, John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) (arguing standing doctrine was fabricated by the Supreme Court in the twentieth century).

[17] *See, e.g.*, Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 545–49 (2006) (Article III's case or controversy requirement ensures adequate adversity between the parties.). *But see* Richard A. Epstein, *Standing and*

vindicate individual rights.[18] For several decades, however, standing doctrine has been grounded in contemporary notions of separation of powers and the role of the judiciary in providing a check on the other branches. As Justice O'Connor wrote for the Court in 1984, "the law of Art. III standing is built on a single basic idea—the idea of separation of powers."[19] The law of standing helps define the role of the federal judiciary under the Constitution. Indeed, it can be said that "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'"[20]

Contemporary standing doctrine grows out of the 1923 case of *Frothingham v. Mellon* in which the Court held that generalized grievances, such as a federal taxpayer's complaint that federal funds are being spent in an illegal or unconstitutional fashion, are insufficient to confer standing on a litigant.[21] In *Frothingham*, a taxpayer sought to challenge the constitutionality of the federal Maternity Act of 1921 on the ground that the law exceeded the scope of Congress's spending power.[22] Rather than address the merits of the petitioner's claims, the Court dismissed the case for want of jurisdiction, explaining that an individual taxpayer did not have a sufficiently personal injury to invoke federal-court jurisdiction.[23] The Court explained that

> interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.[24]

The principles motivating contemporary-standing doctrine predate *Frothingham*, however, and can be traced to the founding era. As Chief Justice John Marshall noted in *Marbury v. Madison*, "[t]he province of the court is, solely, to decide on the rights of individuals . . . ."[25] Such

---

Spending—The Role of Legal and *Equitable Principles*, 4 CHAP. L. REV. 1, 46–47 (2001) (arguing ideological plaintiffs are likely to be sufficiently adverse to satisfy this concern).

[18] *See, e.g.*, Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 306–15 (1979) (among the purposes of standing is the proper representation of individuals and self-determination); *see also* Kontorovich, *supra* note 14, at 1666 (standing "prevent[s] inefficient dispositions of constitutional entitlements" and enables individuals to determine the best use of their own rights).

[19] Allen v. Wright, 468 U.S. 737, 752 (1984).

[20] Raines v. Byrd, 521 U.S. 811, 818 (1997) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976)).

[21] 262 U.S. 447, 486–87 (1923).

[22] *Id.* at 479.

[23] *Id.* at 480, 487.

[24] *Id.* at 487.

[25] 5 U.S. (1 Cranch) 137, 170 (1803).

cases stand in contrast to those that are "political" in that "[t]hey respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."[26] Where the rights of individuals are at stake, the judiciary is within its element, and properly exercises the authority of judicial review, even if that means second-guessing or overruling the actions of a coordinate branch. Yet when individual rights are not at stake, constitutional questions are properly left to the political branches, each of which has an independent obligation to uphold and enforce the Constitution. As Chief Justice Roberts observed in a law review article in 1993, "By properly contenting itself with the decision of actual cases or controversies at the instance of someone suffering distinct and palpable injury, the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution."[27]

All citizens may have an interest in seeing to it that the government complies with the Constitution and laws enacted pursuant to constitutional authority. But this does not mean that all citizens suffer a judicially cognizable injury when the federal government fails to abide by the legal limits of federal power. As the Court explained in *Lujan v. Defenders of Wildlife*, "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, . . . does not state an Article III case or controversy."[28] Such grievances are best brought to the attention of elected representatives and the electorate at large, rather than Article III courts.

One thing that flows from these principles is that federal courts lack jurisdiction to hear claims that consist of nothing more than "generalized grievance[s]" that are "'common to all members of the public.'"[29] As the Court explained in *Schlesinger v. Reservists Committee to Stop the War*, "To permit a complainant who has no concrete injury to require a court to rule" on important questions of national—or even international—importance "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'"[30] This would not be a proper role for the judiciary. As Chief Justice Marshall himself warned, "If the judicial power extended . . . to every *question* under the laws . . . of the

---

[26] *Id.* at 166.

[27] John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1229 (1993).

[28] 504 U.S. 555, 573–74 (1992).

[29] United States v. Richardson, 418 U.S. 166, 176–77 (1974) (quoting *Ex parte* Levitt, 302 U.S. 633, 634 (1937) (per curiam)).

[30] *Schlesinger*, 418 U.S. at 222.

United States[,] . . . [t]he division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary."[31] This is so even if this means that there are constitutional questions that, as a consequence, may never come before the courts in a justiciable case. As strange as it may sound to some, not all constitutional questions must be resolved in federal court. Some constitutional questions are left to the political branches.

The constitutional requirements of standing to sue in federal court are injury,[32] causation,[33] and redressability.[34] Article III standing requires an "injury-in-fact" that is both actual or imminent and concrete and particularized.[35] The cause of this injury must be "'fairly . . . trace[able] to the challenged'" conduct.[36] Finally, the injury must be redressable by a favorable ruling on the merits of the claim.[37] Taken together, these three elements are understood as the "irreducible constitutional minimum" required to demonstrate standing.[38]

These traditional requirements create problems for federal taxpayers who wish to challenge the expenditure of funds by the federal government.[39] While the illegal or unconstitutional expenditure of tax dollars may well constitute a concrete injury, federal taxpayers, as such, do not suffer any *particularized* injury from such expenditures, nor can they claim that any injury to them, again *as taxpayers*, will be redressed by a favorable court ruling. In the typical case, a federal taxpayer cannot plausibly claim that a court judgment that a given expenditure or appropriation is unconstitutional will reduce his or her tax burden.

The traditional requirements for standing have also posed a particular problem for environmentalist plaintiffs. Environmental injuries have not always translated into judicially cognizable injuries-in-fact, fairly traceable to allegedly illegal government conduct that can be redressed by a favorable court ruling. Much environmental litigation involves alleged harms to the environmental commons—unowned or

---

[31] C.J. John Marshall, Speech at the House of Representatives, on the Resolutions of The Honorable Edward Livingston (Mar. 7, 1800), *in* 4 THE PAPERS OF JOHN MARSHALL 82, 95 (Charles T. Cullen & Leslie Tobias eds., 1984).

[32] *Lujan*, 504 U.S. at 560 (citing Allen v. Wright, 468 U.S. 737, 756 (1984)).

[33] *Id.*

[34] *Id.* at 561 (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)).

[35] *Id.* at 560 (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); *Allen*, 468 U.S. at 756).

[36] *Id.* (quoting *Simon*, 426 U.S. at 41).

[37] *Id.* at 561 (citing *Simon*, 426 U.S. at 38, 43).

[38] *Id.* at 560.

[39] *See* Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771 (2003) (noting differences between standing for federal taxpayers in suits against the federal government and standing for state or local taxpayers suing state or local governments).

public spaces in which few, if any, have distinct and particularized legal interests. Especially where such plaintiffs have sought to address widespread environmental harms, such as those due to global climate change or other widely dispersed phenomena, it is difficult for plaintiffs to demonstrate that they have suffered actual, discrete, particularized injuries of the sort that Article III requires.

Both federal taxpayers and environmentalist plaintiffs present claims that are often best characterized as the sort of "generalized grievances" unfit for judicial resolution in an Article III court. Over the past few decades, federal courts have been required to revisit the standing of federal taxpayers and environmental plaintiffs time and again. In *Hein* and *Massachusetts*, the Court addressed both, but with not entirely consistent results.

II. *HEIN V. FREEDOM FROM RELIGION FOUNDATION*

The *Hein* litigation arose from a challenge to the Bush Administration's so-called "faith-based initiative."[40] In 2001, the President created the Office of Faith-Based and Community Initiatives ("OFCI") as a part of the Executive Office of the President through an executive order.[41] The stated purpose of this office was to provide religious organizations the opportunity to "compete on a level playing field" with their secular counterparts in receipt of federal funds and provision of social services.[42] No legislation specifically authorized the creation of this office.[43] Rather, the President created the faith-based initiative unilaterally and funded its activities out of general appropriations to the Executive Branch.[44]

The Freedom from Religion Foundation ("FRF") filed suit in federal court alleging that the initiative violated the First Amendment's Establishment Clause.[45] Specifically, FRF objected to conferences organized by OFCI at which speakers used excessively religious imagery and extolled the effectiveness of faith-based organizations at delivering needed social services.[46] Particularly objectionable to FRF was the suggestion that faith-based programs might be more effective *because* they are faith-based. Such activities, FRF maintained, had the intent or

---

[40] *Hein*, 127 S. Ct. at 2559.

[41] *See id.*; Exec. Order No. 13,199, 3 C.F.R. 752 (2001), *reprinted in* 3 U.S.C. Ch. 2 (Supp. I). Through separate executive orders, the President also created similar offices in various executive agencies.

[42] *Hein*, 127 S. Ct. at 2559; Exec. Order, *supra* note 41.

[43] *Hein*, 127 S. Ct. at 2560.

[44] *Id.*

[45] *Id.* The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

[46] *Hein*, 127 S. Ct. at 2560.

effect of promoting religious social service organizations over their secular counterparts, in violation of the First Amendment's prohibition on the establishment of religion.[47] From the start, this was a "lawsuit destined to go nowhere . . . ."[48] Under existing precedent, FRF's substantive claims were quite a stretch. Yet the case nonetheless found its way to the High Court on the threshold question of FRF's standing to raise its claim at all.

FRF lacked the sort of connection to the OFCI's activities that would normally suffice to establish standing for an Establishment Clause claim. No member of FRF was subjected to these remarks or attended the relevant OFCI conferences, nor did any members of FRF claim that they had been excluded from participation in OFCI activities because of their secular orientation or criticism of religious organizations. Rather, the *sole* asserted basis for FRF's standing to challenge the OFCI was that the plaintiffs were federal taxpayers who were "'opposed to the use of Congressional taxpayer appropriations to advance and promote religion.'"[49]

FRF's only alleged injury was the expenditure of taxpayer dollars by OFCI on activities that allegedly violated the Establishment Clause. This made FRF's case difficult from the start. As noted above, taxpayer standing is generally disfavored. Under longstanding precedent, federal taxpayers do not have distinct interests that can justify invoking the power of the federal courts. In simple terms, "interests of the taxpayer are, in essence, the interests of the public-at-large . . . ."[50] Were such suits allowed, and "every federal taxpayer could sue to challenge any Government expenditure," the result would be that "the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus."[51]

FRF sought to rely on *Flast v. Cohen*, a 1968 case in which a divided Court found taxpayer standing to challenge Congressional appropriations allegedly violative of the Establishment Clause.[52] *Flast* involved a challenge to federal grants to religious schools under the Elementary & Secondary Education Act of 1965.[53] In *Flast*, the Court held that taxpayers could have standing to challenge legislative

---

[47] *Id.* at 2561.

[48] Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle:* Hein v. Freedom from Religion Foundation *and the Future of Establishment Clause Adjudication* 1–2, 2008 BYU L. REV. 115, 116.

[49] *Hein*, 127 S. Ct. at 2561 (quoting Petition for Writ of Certiorari, app. at 69a ¶ 10, *Hein*, 127 S. Ct. 2553 (No. 06-157), 2006 WL 2161324).

[50] *Id.* at 2563.

[51] *Id.* at 2559.

[52] 392 U.S. 83 (1968).

[53] *Id.* at 85.

exercises of the federal taxing and spending power under Article I, Section 8 of the Constitution that allegedly exceed specific constitutional limitations on federal power, such as the Establishment Clause.[54] Whereas citizens cannot generally sue the federal government seeking nothing more than compliance with the Constitution, a taxpayer could challenge the constitutionality of a Congressional appropriation that allegedly violated the prohibition on government establishment of religion.

As handled by the Court's majority, *Flast* created an exception for challenges to a subset of federal *legislative* acts involving exercise of the Congressional taxing and spending power.[55] *Hein*, on the other hand, involved a challenge to an *executive* act: the administration of funds used by the presidentially created OFCI. Therefore, plaintiffs could not avail themselves of the *Flast* exception to the bar on taxpayer standing. As a consequence, FRF lacked standing and federal courts lacked Article III jurisdiction over the case. That the expenditures at issue were ultimately derived from appropriations approved by Congress was deemed immaterial, as the specific expenditures were not expressly approved by a legislative act.[56] The OFCI was wholly a creation of the Executive Branch.

The *Flast* distinction relied upon by the Court's majority is not particularly compelling. Indeed, a majority of the *Hein* Court joined opinions explicitly rejecting any constitutional grounds for differentiating between challenges to legislative and executive acts for standing purposes. Justice Scalia, joined by Justice Thomas, concurred separately to call for overruling *Flast* entirely,[57] while four Justices—Stevens, Ginsburg, Souter and Breyer—dissented, arguing for a more permissive approach to taxpayer standing in Establishment Clause cases.[58]

Justice Alito's opinion for the Court, joined by Chief Justice Roberts and Justice Kennedy, repeatedly stressed that it declined to extend *Flast*

---

[54] *Id.* at 102.

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.

Id.

[55] *Hein*, 127 S. Ct. at 2566 ("*Flast* 'limited taxpayer standing to challenges directed only [at] exercises of congressional power' under the Taxing and Spending Clause." (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 479 (1982) (alteration in original)).

[56] *Id.* at 2566–69.

[57] *See id.* at 2573–74, 2582–84 (Scalia, J., concurring).

[58] *See id.* at 2584–86 (Souter, J., dissenting).

to permit challenges to executive allocations of federal tax dollars,[59] and that the executive–legislative distinction had been embraced in subsequent decisions such as *Valley Forge Christian College v. Americans United for Separation of Church and State*.[60] Yet Justice Alito's opinion conspicuously failed to defend the *Flast* holding on its own terms.[61] Rather, Justice Alito explained, principles of *stare decisis* did not require expanding such a questionable precedent "to the limit of its logic."[62]

Only one member of the Court, Justice Kennedy, sought to defend the *Flast* holding without seeking to expand it to all taxpayer Establishment Clause challenges to allegedly unconstitutional use of federal funds. "*Flast* is correct and should not be called into question," Justice Kennedy briefly explained, because it embraced "the Constitution's special concern that freedom of conscience not be compromised by government taxing and spending in support of religion."[63] At the same time, Justice Kennedy stated that *Flast* did not require judicial oversight of executive activities. Allowing challenges to discretionary executive functions, such as the content and conduct of conferences sponsored by various White House offices, would involve excessive intrusion into the functioning of the Executive Branch, threatening to turn courts into "speech editors for communications issued by executive officials and event planners for meetings they hold."[64] This did not relieve the Executive Branch of its constitutional obligations, Justice Kennedy hastened to add. Denying standing to federal taxpayers in such cases would not excuse executive-branch officials "from making constitutional determinations in the regular course of their duties" and obeying constitutional limitations on federal power.[65] It would, however, limit judicial enforcement of such constitutional limits.

Justice Kennedy's opinion did not offer a particularly compelling defense of the *Flast* rule as applied in *Hein*. Perhaps this is because such

---

[59] *Id.* at 2565–66, 2568 (majority opinion).

[60] 454 U.S. 464 (1982).

[61] Justice Alito's opinion even criticized *Flast* for its failure to give sufficient weight to separation of powers concerns. *Hein*, 127 S. Ct. at 2569.

[62] *Id.* at 2571; *see also id.* at 2568 ("*Flast* focused on congressional action, and we must decline this invitation to extend its holding to encompass discretionary Executive Branch expenditures.").

[63] *Id.* at 2572 (Kennedy, J., concurring). Justice Kennedy explained that "[t]he courts must be reluctant to expand their authority by requiring intrusive and unremitting judicial management of the way the Executive Branch performs its duties." *Id.* at 2573.

[64] *Id.*

[65] *Id.*

a rule is difficult to defend.[66] As noted above, Justice Kennedy is the only member of the Court to even suggest that whether a taxpayer seeks to challenge legislative or executive action should make a difference for standing purposes.

The most compelling explanation offered for the Court's holding was stare decisis.[67] *Flast* contained limiting language stressing the "nexus" between a federal taxpayer and the authorization of funds by Congress under the taxing and spending power of Article I, Section 8.[68] The Court's subsequent decision in *Valley Forge Christian College* explicitly reaffirmed the distinction between legislatively authorized expenditures and discretionary allocations of federal dollars by executive officials.[69] Thus, whatever *Hein*'s faults, overturning (or even curtailing) existing precedent was not among them. While the decision may not have yielded a particularly coherent holding, nothing in *Hein* explicitly or implicitly moved the law in a "conservative" direction or closed the courthouse door on parties that previously had access. For good or ill, it applied existing precedent and left the law as it was.

---

[66] During a humorous portion of the *Hein* oral argument, United States Solicitor General Paul Clement noted the difficulty of making sense of *Flast* and other related precedents:

> JUSTICE ALITO: General Clement, are you—are [you] arguing that these lines that you're drawing make a lot of sense in an abstract sense? Or are you just arguing that this is the best that can be done that this is the best that can be done [sic] within the body of precedent that the Court has handed down in this area?
> GENERAL CLEMENT: The latter, Justice Alito.
> (Laughter.)
> GENERAL CLEMENT: And I appreciate—I appreciate the question.
> JUSTICE SCALIA: Why didn't you say so?
> (Laughter.)
> JUSTICE SCALIA: I—I've been trying to make sense out of what you're saying.
> (Laughter.)
> GENERAL CLEMENT: Well, and I've been trying to make sense out of this Court's precedents.
> (Laughter.)

Transcript of Oral Argument at 20, *Hein*, 127 S. Ct. 2553 (No. 06-157), 2007 WL 609740.

[67] *See Hein*, 127 S. Ct. at 2571.

[68] *Flast*, 392 U.S. at 102; *see also Hein*, 127 S. Ct. at 2565 ("Given that the alleged Establishment Clause violation in *Flast* was funded by a specific congressional appropriation and was undertaken pursuant to an express congressional mandate, the Court concluded that the taxpayer-plaintiffs had established the requisite 'logical link between [their taxpayer] status and the type of legislative enactment attacked.'" (quoting *Flast*, 392 U.S. at 102)).

[69] *See* 454 U.S. at 479 (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974)).

III. *MASSACHUSETTS V. EPA*

Whereas *Hein* conformed to existing (albeit irrational) precedent, *Massachusetts* staked out new territory. In finding that the Commonwealth of Massachusetts had standing to challenge the EPA's failure to regulate greenhouse-gas emissions under the Clean Air Act, the Court departed from existing precedent and invented new doctrine.[70] Even where the Court purported to follow prior decisions, it applied those holdings in a particularly flexible fashion. While *Massachusetts* did not produce what most would characterize as a "conservative" result, it was nonetheless one of the most consequential decisions of the term.

The *Massachusetts* litigation arose out of a rulemaking petition filed with the EPA in 1999 calling upon the Agency to regulate greenhouse-gas emissions from new motor vehicles under Section 202 of the Clean Air Act.[71] At the time, the EPA's General Counsel accepted the claim that the EPA possessed the authority to adopt such regulations,[72] but under the Clinton Administration the EPA declined to act, neither accepting nor rejecting the rulemaking petition. Once the Bush Administration took over, the EPA disavowed any intention to regulate greenhouse gases under the Clean Air Act. When environmentalist groups threatened legal action, the Bush EPA formally rejected the initial petitions on the grounds that the EPA lacked the legal authority to regulate greenhouse gases without express approval from Congress.[73] Although there is language in the Clean Air Act that could be applied to greenhouse gases, the EPA maintained that these provisions were designed to address conventional air pollution problems, such as soot and smog, rather than control global atmospheric pollutants.[74] Even if the EPA had such authority, the EPA now argued, it would be unwise to do so given scientific uncertainty and the need for coordinated international action on climate change.[75]

After the EPA denied the rulemaking petition, several states and environmentalist groups promptly filed suit, alleging that the EPA had adequate statutory authority to control vehicular emissions of greenhouse gases and that the agency failed to offer an adequate

---

[70] *See* Adler, *supra* note 11; Cass, *supra* note 11.

[71] Clean Air Act, sec. 202, § 202(a)(6), 104 Stat. 2399, 2473–74 (1990) (codified as amended at 42 U.S.C. § 7521(a)(1) (2000)).

[72] *See* Memorandum from Jonathan Z. Cannon, General Counsel, EPA, to Carol M. Browner, Administrator, EPA (Apr. 10, 1998), *available at* http://www.virginialawreview.org/inbrief/2007/05/21/cannon-memorandum.pdf.

[73] *See* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 59,925–29 (Sept. 8, 2003).

[74] *See id.* at 59,926–27.

[75] *See id.* at 52,931.

explanation for failing to regulate.[76] A three-judge panel of the United States Court of Appeals for the District of Columbia Circuit splintered over the petitioners' substantive claims, as well as over the threshold question of whether Massachusetts or any other party had standing to file suit.[77] Judge Tatel would have found that Massachusetts had standing to sue because of the threat of sea-level rise posed to the Commonwealth's coastline.[78] Judge Sentelle, on the other hand, argued that global climate change, as a global phenomenon, did not produce the sort of particularized injury standing requires.[79] Judge Randolph assumed standing, without resolving the question, and held for the EPA on other grounds, producing a 2-1 split in favor of the Agency.[80] Given the fractured ruling of the D.C. Circuit, and the subsequent opinions dissenting from the Circuit's denial of rehearing en banc,[81] Supreme Court review was inevitable.

It was always clear standing would figure prominently in the Court's decision. Standing questions occupied a significant portion of oral argument. Yet few expected the Court to cavalierly loosen existing standing requirements, let alone announce a new rule for state standing in lawsuits brought against the federal government—and yet that is what the Court did. Faced with a claim that did not easily satisfy the traditional requirements of standing, a five-Justice majority proceeded to put its thumb on the scales so the case could proceed.

An initial difficulty for petitioners' standing claim was the undifferentiated nature of greenhouse warming. Global climate change, by definition, affects the *global* climate. Emissions anywhere on the globe affect the overall concentration of greenhouse gases in the atmosphere for the earth as a whole. The resulting greenhouse effect is likewise a global phenomenon, even if it could produce different effects in different regions. As a consequence, injuries predicated on global warming would seem to constitute the archetypal "generalized grievance" common to all members of the public and thus be unfit for judicial resolution. In this regard, claims of injury from global warming are much like the claims of injury asserted by federal taxpayers in

---

[76] *See* Final Brief for the Petitioners in Consolidated Cases at 14, 54–56, Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005) (Nos. 03-1361 to 03-1368), 2005 WL 257460.

[77] Massachusetts v. EPA, 415 F.3d 50, 54–56 (D.C. Cir. 2005), *rev'd*, 127 S. Ct. 1438 (2007).

[78] *Id.* at 65 (Tatel, J., dissenting) (citing Tozzi v. U.S. Dep't of Health & Human Servs., 271 F.3d 301, 310 (D.C. Cir. 2001)).

[79] *Id.* at 60 (Sentelle, J., dissenting in part and concurring in the judgment).

[80] *Id.* at 55–56, 58 (majority opinion).

[81] Massachusetts v. EPA, 433 F.3d 66, 67 (D.C. Cir. 2005) (per curiam) (denying Petition for Rehearing En Banc).

taxpayer suits. The common and undifferentiated nature of the injury precludes justiciability. The question is not whether climate change is real, or whether human activities have contributed and will contribute to a warming of the atmosphere, but rather whether global changes that affect all citizens of the United States—indeed all citizens of the world—are sufficiently concrete and particularized to satisfy Article III's requirements.

Insofar as petitioners alleged current harm from changes in the global climate, they alleged a grievance they "suffer[] in some indefinite way in common with people generally."[82] Indeed, one could argue that the harms from anthropogenic climate change are even more dispersed and generalized than the injuries allegedly suffered by individual taxpayers when funds are spent unconstitutionally. Current changes in the global climate are felt by all U.S. citizens—indeed by all citizens of the world. Yet as the Court noted in another context, "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury *to the plaintiff*."[83] That climate change is an urgent concern matters not at all in the standing analysis, for the question is one of whether federal *courts* should intervene, not whether a given question is worthy of federal action.

Massachusetts's injury—or at least the only injury considered by the majority—was its claim of present and future sea-level rise exacerbated by human contributions to the greenhouse effect.[84] While some portion of sea-level rise is due to natural phenomena, the petitioners submitted affidavits detailing estimates and projections of future increases in sea level over the next several decades that would be due, in part, to human emissions of greenhouse gases. Insofar as petitioners' standing claim was dependent on such future projections, such as potential losses of coast "by 2100,"[85] the injuries alleged were too remote and distant in time to satisfy the traditional requirement that an alleged injury be "actual or imminent"; a *future* injury would not do. In

---

[82] Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

[83] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181 (2000) (emphasis added).

[84] It is worth noting that the majority opinion misquotes the relevant affidavits so as to overstate the contribution of global warming to sea-level rise. The majority asserts that "global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming." *Massachusetts*, 127 S. Ct. at 1456. Yet the affidavit cited for this proposition is more circumspect, merely stating that warming-induced melting of glaciers and thermal expansion of the oceans "were the major contributions" to the estimated sea-level rise of 10 to 20 centimeters over the past century. *Massachusetts*, 127 S. Ct. 1438, J.A. at 225 (2007) (No. 05-1120) (Declaration of Michael MacCracken at ¶ 5(c)) 2006 WL 2569818.

[85] *Massachusetts*, 127 S. Ct. at 1456 n.20 (citing Declaration of Christian Jacqz) (discussing "possible" effects of sea-level rise over the next century).

this regard, the *Massachusetts* petitioners faced a dilemma: It might be possible to argue that their injuries were concrete and particularized *or* actual or imminent, but not both at the same time.

Justice Stevens's opinion for the majority took two steps to avoid these difficulties and ease the path to standing, altering or inventing precedent in the process. First, he declared "that States are not normal litigants for the purposes of invoking federal jurisdiction."[86] Rather, Stevens announced, states are subject to "special solicitude" when seeking to invoke the jurisdiction of federal courts.[87] Such a special standard had not been identified before; it was a totally new rule. Where did it come from? A century-old case called *Georgia v. Tennessee Copper Co.*[88]

In *Tennessee Copper,* the State of Georgia brought suit in federal court against a polluting factory across the border in Tennessee under the federal common-law of nuisance.[89] The case had nothing to do with standing. Rather it was an interstate-nuisance suit of the sort that would be preempted by the Clean Air Act were it brought today.[90] Specifically, the case involved Georgia's effort to obtain an injunction against upwind polluters across the Tennessee state border.[91] Justice Holmes held for the Court that Georgia could obtain equitable relief—unavailable to private parties—because of the state's "*quasi*-sovereign" interest in its territory.[92] Yet, it is one thing to hold that one state cannot foul the air of its neighbor and that the neighboring state may seek equitable relief on behalf of its citizenry in federal court. It is quite another to maintain that a state's ability to vindicate such a claim on behalf of its citizens gives rise to a "special solicitude" when a state sues in federal court to invoke the regulatory apparatus of administrative agencies.

---

[86] *Id.* at 1454.

[87] *Id.* at 1455.

[88] 206 U.S. 230 (1907).

[89] *Id.* at 236–37.

[90] *See* Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance,* 55 ALA. L. REV. 717, 768–69 n.476 (2004) (citing Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law To Affect the Location of Pollution,* 27 ENVTL. L. 403, 474 (1997)).

> Although the Supreme Court has not directly addressed the question of whether the federal Clean Air Act preempts federal common law in disputes over transboundary air pollution, it is widely assumed to do so, particularly in light of the Clean Air Act Amendments of 1990, which created a comprehensive federal permit scheme similar to that established by the Clean Water Act.

Id.

[91] *Tennessee Copper,* 206 U.S. at 236.

[92] *Id.* at 237.

Interestingly enough, *Tennessee Copper* was nowhere to be found in Massachusetts's briefs. Neither, for that matter, was it cited by any of the parties or amici in their briefs, nor was it considered by any of the opinions below. State amici Arizona et al., argued that states had unique interests worthy of consideration in the standing inquiry, but still did not mention *Tennessee Copper*.[93] This was not surprising for, as noted above, *Tennessee Copper* had nothing to do with the law of standing. So why did the Court rely on *Tennessee Copper*? As best as one can tell, the idea of relying upon *Tennessee Copper* came from Justice Kennedy, the swing vote in *Massachusetts*, who referenced the *Tennessee Copper* opinion as Massachusetts's "best case" supporting standing during oral argument.[94]

Even with *Tennessee Copper* supporting injury, Massachusetts faced a significant standing hurdle—a hurdle the majority opinion leaped without much care for the meaning of prior caselaw. The *Massachusetts* Court was not simply "solicitous" of states. It weakened the traditional requirements for Article III standing as well. As noted above, under *Lujan v. Defenders of Wildlife*, standing requires that the plaintiff have suffered an "injury in fact" that is "actual or imminent" and "concrete and particularized."[95] The injury must be "fairly trace[able]" to the conduct complained of, and it must be likely that "the injury will be 'redressed by a favorable decision.'"[96] The Court purported to adhere to this "most demanding" standard in evaluating Massachusetts's claims. In actuality the *Massachusetts* majority interpreted *Lujan's* requirements in a most forgiving way, particularly with regard to causation and redressability.

To evade the traditional standing requirements, the majority opinion relied upon language from *Lujan* noting that the "normal standards for redressability and immediacy" are relaxed when a statute vests a litigant with a "procedural right . . . ."[97] In Justice Kennedy's words, "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'"[98] This is the rationale for recognizing environmental litigants' standing to enforce other laws that impose only procedural

---

[93] *See* Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners, *Massachusetts*, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 2563380.

[94] Transcript of Oral Argument at 15, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120), 2006 WL 3431932.

[96] *See supra* Part I.

[96] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 41–43 (1976)).

[97] *Id.* at 572 n.7.

[98] *Massachusetts*, 127 S. Ct. at 1453 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)).

obligations on regulatory agencies, such as the National Environmental Policy Act of 1969,[99] ("NEPA"), which requires government agencies to conduct environmental analyses before undertaking actions that could have adverse environmental effects.[100] Such provisions are common in environmental law, NEPA being the paradigmatic example. Section 307(b) of the Clean Air Act is not such a provision, however. Rather, Section 307(b) is a simple jurisdictional provision; it does not create a new cause of action.[101] Nor did it meet the requirement, restated by the majority, that "'Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.'"[102] The Court cited this provision and the language in *Lujan* justifying a relaxed consideration of the redressability requirement nonetheless.

If the majority stretched the standing inquiry at the margins to accommodate the petitioners' claim of injury, it rent *Lujan*'s fabric in considering causation and redressability. Under *Massachusetts*, *any* contribution of *any* size to a cognizable injury is sufficient for causation, and *any* step, no matter how small, is sufficient to provide the necessary redress. While citing the requirement that a favorable decision must "'relieve a *discrete injury*'" to the plaintiff,[103] the majority held that any government action that, all else equal, reduces (or at least retards the growth of) global emissions of greenhouse gases by *any* amount, however small, will suffice. After all, Justice Stevens explained, "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."[104] Yet, given the rate of growth in greenhouse-gas emissions worldwide, irrespective of what happens in the United States, this is anything but a self-evident proposition. The most Massachusetts could hope for is a reduction of projected sea-level rise of a few centimeters over the next century. It is hard to argue that such insignificant relief would satisfy a "rigid" application of the redressability requirement outlined in prior cases. If *Hein* involved the narrow application of precedent, there was nothing particularly precedented about the holdings in *Massachusetts*.

---

[99] 42 U.S.C. §§ 4331–4347 (2000).

[100] *See id.* § 4332 (2000 & Supp. IV).

[101] *See* Clean Air Act of 1970 § 307(b), 42 U.S.C. § 7607(b)(1) (2000).

[102] *Massachusetts*, 127 S. Ct. at 1453 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)).

[103] *Id.* at 1458 (emphasis added) (quoting Larson v. Valente, 456 U.S. 228, 244 n.15 (1982)).

[104] *Id.*

IV. SEPARATION OF POWERS IN *HEIN* AND *MASSACHUSETTS*

Both *Hein* and *Massachusetts* involved types of generalized grievances. As such, both involved the sort of claim for which separation of powers concerns are greatest. Of the two cases, *Massachusetts* challenged settled law and modified current doctrine. *Hein*, on the other hand, upheld and stood fast by an older precedent, albeit a precedent that was poorly reasoned and widely criticized.

The two cases' respective treatment of precedent is not the only respect in which the two cases differ. Below the surface, the two decisions embody contrasting conceptions of the role of standing in the separation of powers. It may not be fair to ascribe this doctrinal tension to the Court as a whole, however. Only one member of the Court, Justice Kennedy, was in the majority in both cases. Yet insofar as Justice Kennedy is the controlling vote in cases such as these in which the Court is closely divided, and insofar as each case's holding was responsive to Justice Kennedy's own idiosyncratic views about standing and justiciability, this doctrinal tension warrants investigation.

In preserving *Flast*, *Hein* embraced the importance of allowing taxpayer standing to challenge legislative exercises of the taxing and spending power that violate the Establishment Clause. The Executive Branch, on the other hand, should, in the words of Justice Kennedy, "be free, as a general matter, to discover new ideas, to understand pressing public demands, and to find creative responses to address governmental concerns."[105] According to Justice Kennedy, "courts must be reluctant to expand their authority by requiring intrusive and unremitting judicial management of the way the Executive Branch performs its duties."[106] Even if there were no individual with standing to challenge the conduct at issue, executive officials "are not excused from making constitutional determinations in the regular course of their duties. Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations."[107] Yet the existence of such an obligation does not ensure compliance with constitutional limitations, nor does it obviate any need for judicial review. Preserving executive latitude in policymaking and administration may increase the likelihood of Establishment Clause violations, even if only because of an occasional, poorly informed understanding of relevant constitutional limits. It will also reduce the proportion of such violations that are ever redressed. This is the

---

[105] *Hein*, 127 S. Ct. at 2572 (Kennedy, J., concurring).

[106] *Id.* at 2573.

[107] *Id.*

unavoidable consequence of ensuring the Executive is free to "discover new ideas" and "find creative responses" to new issues. Limiting judicial review of executive actions effectively prevents the full enforcement of relevant constitutional limitations.

This permissive approach to potential Executive-Branch misconduct is quite different from that which we observe in the environmental context. Most major federal environmental laws contain expansive citizen-suit provisions that authorize private suits against implementing agencies and regulated firms. The explicit purpose of these provisions is to allow for "private attorneys general" to invoke the jurisdiction of the courts to oversee executive fealty to the law. Such private attorneys general are delegated authority to assume the mantle of the Lorax and "speak for the trees."[108] Trees cannot have standing themselves, but people can have standing to sue in their stead.

Environmental citizen-suit provisions typically provide standing to the limits of Article III. The rationale here is that such broad standing is necessary because the Executive cannot be trusted to fully enforce existing environmental laws. Government agencies are constrained by limited resources, dispersed information, and political pressures. Different administrations will also have different priorities for regulatory implementation and enforcement. Even assuming that every administration would like to fully enforce those environmental rules on the books—a highly questionable assumption—this is not possible.[109] As in the Establishment Clause context, citizen suits are "a mechanism for controlling unlawfully inadequate enforcement of the law."[110] In the words of the late Judge Skelly Wright, citizen suits help ensure "that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."[111]

Insofar as the Court has adopted a broad conception of judicially cognizable injuries in environmental cases, it has endorsed the idea that judicial oversight of executive activity is necessary and proper. Insofar as *Massachusetts* expands the ability of states, and perhaps individuals, to

---

[108] *See* DR. SEUSS, THE LORAX 23 (1971) ("I am the Lorax. I speak for the trees . . . for the trees have no tongues.").

[109] *See* Richard Lazarus, *Panel II: Public Versus Private Regulation*, 21 ECOLOGY L.Q. 431, 472 (1994) ("It is not feasible to assume that the government is going to engage in the inspections and the enforcement necessary to ensure compliance with the standards . . . .").

[110] Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 (1992).

[111] *See* Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971); *cf.* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983) (arguing that one purpose of standing limitations is to allow some actions to be "lost or misdirected" within the federal bureaucracy).

invoke federal jurisdiction for fairly broad, undifferentiated harms, it provides for further judicial oversight of executive compliance with relevant legal requirements. *Massachusetts* explicitly suggested that this is necessary because states surrendered portions of their sovereignty in adopting the Federal Constitution, justifying "special solicitude" to state requests for judicial intervention.[112]

The argument for broad standing in environmental cases runs counter to the rationale for limiting taxpayer standing to challenges of legislative actions. Unlike in the Establishment Clause context, environmental citizen-suits seek to enforce statutory mandates, rather than constitutional limitations. An underlying premise is that Congress is unable (or unwilling) to enforce its own enactments. Yet why is this so? The legislative branch maintains many oversight and enforcement powers. If it wants environmental laws to be followed to the letter, it can use statutory mandates, the appropriations process, and oversight hearings to ensure adequate enforcement. In this context, the argument for second-guessing executive decision-making when there is a broad, generalized grievance—a "political" matter as discussed in *Marbury*[113]—seems relatively weak. Where an environmental concern affects the nation as a whole, however, why should we assume that ideologically or otherwise motivated private litigants are in a better position to ensure the proper level of environmental enforcement than the people's representatives in Congress and the Executive? If the legislature fails to exercise effective oversight of executive implementation of a federal statute, perhaps this indicates that legislative majorities no longer support pre-existing statutes.[114] After all, Congress routinely fails to provide adequate funding for complete enforcement of regulatory programs. Less-than-complete enforcement of environmental statutes may be the result of majority preferences. If not, there is at least a potential opportunity for political redress.

Contrast this with the dynamic observed in the Establishment Clause context. The reason for the Establishment Clause is to prevent a religious majority from enshrining its religious preferences at the expense of a religious minority. In taxpayer suits, the purpose of standing is to prevent the allocation of tax dollars to support

---

[112] *Massachusetts*, 127 S. Ct. at 1455.

[113] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

[114] Such underenforcement may also reflect the political obstacles to effective mobilization of diffuse constituencies that support greater environmental protection. *See* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 45 (2001) (summarizing arguments). The difficulty with these and other theoretical arguments suggesting a need for broad citizen-suit standing is that they do not seem to conform with the available empirical evidence and may not actually enhance environmental protection. *See id.* at 46–51.

majoritarian religious preferences at the expense of those with minority preferences. Whatever degree of "separation" one believes the Establishment Clause requires, this is the nature of the harm that judicial review is designed to avoid. If a religious majority were to establish religion at the expense of religious minorities through legislative action, there is little prospect of a sufficient "political" remedy for a disadvantaged religious (or even secular) minority. In such cases, broad standing is necessary for judicial review to serve a counter-majoritarian function and protect minority interests

This rationale would seem to apply equally to executive action. If the Executive Branch were to establish a minority religious preference, we have relatively high confidence that political remedies will be sufficient to curtail the violation. A religious majority has ample means to protect its interests through the political process, so the legislature is unlikely to sit idly by where the Executive acts unconstitutionally in this regard. Yet where the Executive takes action to establish a majority religious preference, we have comparatively little confidence in the likelihood of effective legislative or political oversight.[115] A religious majority is much less likely to seek to correct such unconstitutional actions; it may even support them. If anything, given the unitary nature of executive authority, and inertia within the legislative process, the risk of executive transgressions would seem to be greater than the risk of legislative violations.

The point here is not that the Court should have granted standing in *Hein*. Rather, the point is that *if* the justification for allowing taxpayer standing in Establishment Clause cases is to check the tendency of the political process to entrench majoritarian religious preferences, then the argument for broad citizen standing would seem to be *greater* in the Establishment Clause context than in the environmental context, for it is only in the former that the judiciary is called upon to play a counter-majoritarian role. If legislative oversight and political checks are ever sufficient to obviate the need for judicial review of executive action, it will be where the legislature is protecting its own interests, or those of a political majority. Such checks will be *least* sufficient where executive violations of constitutional limitations come at the expense of political minorities. Thus, the Court—or at least the controlling vote of Justice Kennedy—has it backwards. In *Hein* and *Massachusetts*, the Court is more permissive where the argument for judicial oversight is stronger, and exercises greater scrutiny where the case for judicial oversight is weaker.

---

[115] *Cf. Hein*, 127 S. Ct. at 2571 ("In the unlikely event" of executive actions violating the Establishment Clause "Congress could quickly step in.").

The argument sketched here only concerns the relative strength of the arguments for altering traditional standing rules in the context of generalized grievances. If both cases involve questions of generalized grievances one could still conclude that neither (or both) should be justiciable. Both cases involved questions of extreme importance that relate to fundamental values—our relationship with God and our obligations to the earth and future generations. Yet such value-laden questions are typically matters left to the political process, rather than the judiciary, save in rare circumstances where judicial review is necessary to play a counter-majoritarian role.

CONCLUSION

Hein and *Massachusetts* did not capture as much public or media attention as other cases from the October 2006 term. Citizen standing may not be as "sexy" a topic as abortion, race, or free speech. Yet standing cases are particularly important within our legal system, and have implications for the separation of powers. Whether Article III jurisdiction extends to certain classes of cases directly affects the extent of judicial oversight of the political branches.

Separation of powers is a fundamental aspect of American constitutional government. As the Court observed over thirty years ago, "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787."[116] The importance of separation-of-powers principles "transcends the convenience of the moment."[117] Thus it should raise concerns that recent cases reflect a confused understanding or arbitrary application of separation-of-powers principles. In my view, the urgency of environmental concerns or the importance of the Establishment Clause do not justify transgressing the traditional bounds of Article III. All I have sought to show here, however, is that the importance of such matters cannot justify the particular contours of standing doctrine embedded in the Court's recent standing holdings.

It may be unsettling to consider that standing doctrine presumes that some cases can never be heard in federal court. Some constitutional questions must be resolved through the political process. Standing is but one way of enforcing such limits on judicial power, but it is a limitation that courts may be reluctant to impose. The jurisprudence of what we might call the "Kennedy Court" exhibits a reluctance to acknowledge the

---

[116] Buckley v. Valeo, 424 U.S. 1, 124 (1976) (per curiam).

[117] Clinton v. City of New York, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring) (citing Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276–77 (1991)).

existence of issues lying beyond the scope of judicial power. *Massachusetts* involved the omnipresent concern of global warming, and a court majority could not bear to stay away. Even where limitations on judicial authority are maintained, as in *Hein*, the Court clings to its reluctance to shut the courthouse door on such claims.

In the long run, excessive judicial involvement could threaten the vitality of separation of powers and can undermine the vitality of self-government. This is particularly so in areas such as the environment and religious establishment, that touch upon fundamental, deeply held values. When we think about the purposes of standing, we may wish to consider the words of Justice Sutherland from his opinion in *Frothingham v. Mellon*:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. . . . We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented[,] the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.[118]

What Justice Sutherland contemplates is a more limited role for federal courts in pressing social and political conflicts. It is a far cry from

---

[118] 262 U.S. 447, 488–89 (1923).

the "judicial supremacy" that marked the Rehnquist Court,[119] but it may well be a more proper role for the Court in our democratic republic.

[119] *See* Walter Dellinger, *In Memoriam: William H. Rehnquist, the Man Who Devised the Natural Law of Federalism*, SLATE, Sept. 4, 2005, http://www.slate.com/id/2125685/ ("Chief Justice Rehnquist's most significant jurisprudential contribution will not ultimately be states' rights, however, but the steps his court took firmly to entrench the supremacy of the judicial branch over the president, the Congress, and the states."); Jeffrey Rosen, *Rehnquist the Great?*, THE ATLANTIC, April 2005, at 79, 87 ("[U]nder [Rehnquist's] leadership the Court indulged in an overconfident rhetoric of judicial supremacy and struck down thirty federal laws in one seven-year period—a higher rate than in any other Court in history.").

THE USE AND SCOPE OF EXTRINSIC EVIDENCE IN EVALUATING ESTABLISHMENT CLAUSE CASES IN LIGHT OF THE *LEMON* TEST'S SECULAR PURPOSE REQUIREMENT

Mark DeForrest[*]

"The Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life."
–Justice William Brennan[1]

"Freedom sees in religion the companion of its struggles and its triumphs, the cradle of its infancy, and the divine source of its rights. It considers religion as the safeguard of mores, and mores as the guarantee of laws and the pledge of its own duration."
–Alexis de Tocqueville[2]

I. INTRODUCTION: THE INTERSECTION OF POLITICS, RELIGION, AND LAW 202
II. AN OVERVIEW OF THE USE OF EXTRINSIC EVIDENCE IN ESTABLISHMENT CLAUSE CASES 206
A. General Principles Regarding the Use of Extrinsic Evidence in Religion Cases 206
B. The Establishment Clause and the Secular Purpose Requirement 212
C. The Use of Extrinsic Evidence in the Recent Ten Commandments Cases 216
III. SHOULD EXTRINSIC EVIDENCE OF RELIGIOUS MOTIVATION INVALIDATE GOVERNMENT ACTION ON ESTABLISHMENT CLAUSE GROUNDS? 220
A. A Moderate Exclusionist View 221
B. A Stronger Exclusionist View 225
IV. PROBLEMS WITH THE RESTRICTIONIST AND THE EXCLUSIONIST APPROACH TO THE USE OF EXTRINSIC EVIDENCE IN ESTABLISHMENT CLAUSE CASES 228

---

[*] Assistant Professor of Legal Research and Writing, Gonzaga University School of Law, Spokane, Washington; J.D., Gonzaga University School of Law (1997); B.A., Western Washington University (1992). I would like to thank my staff assistant, Pam Pschirrer, for her assistance in the preparation of this Article. I would also like to thank my Gonzaga Law School colleagues, Professor David K. DeWolf and Fr. Robert John Araujo, S.J., for their comments on earlier drafts of this Article. Special thanks go to my wife Azelle for her encouragement and support during the writing of this Article.

[1] McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

[2] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 43–44 (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chicago 2000) (1835).

A. Overbreadth 228
B. What Would the Founders Do? 235
1. The Historical Context of the Establishment Clause 235
2. The Example of the Founders 240
C. Equal Citizenship and Religious Motivation 249
1. Religion and the Law: Harmonizing and Coinciding 249
2. The Compartmentalization of the Human Person 252
V. CONCLUSION 254

I. INTRODUCTION: THE INTERSECTION OF POLITICS, RELIGION, AND LAW

"We are a religious people whose institutions presuppose a Supreme Being."[3] These words, written by Justice William O. Douglas in *Zorach v.*

---

[3] Zorach v. Clauson, 343 U.S. 306, 313 (1952); *see also* Van Orden v. Perry, 545 U.S. 677, 683 (2005) ("Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens."); Holy Trinity Church v. United States, 143 U.S. 457, 465 (1892). *But see* Treaty of Peace and Friendship, Between the United States of America, and the Bey and Subjects of Tripoli, of Barbary, U.S.-Tripoli, art. XI, Nov. 4, 1796, 8 Stat. 154, 155 (1846) ("[T]he government of the United States of America is not in any sense founded on the Christian religion . . . ."). Many, if not most, state constitutions recognize in their preambles the foundational role of religious faith in American civic institutions. *See, e.g.*, ALASKA CONST. pmbl. ("We the people of Alaska, grateful to God and to those who founded our nation and pioneered this great land, in order to secure and transmit to succeeding generations our heritage of political, civil, and religious liberty within the Union of States, do ordain and establish this constitution for the State of Alaska."); ARK. CONST. pmbl. ("We, the People of the State of Arkansas, grateful to Almighty God for the privilege of choosing our own form of government; for our civil and religious liberty; and desiring to perpetuate its blessings, and secure the same to our selves and posterity; do ordain and establish this Constitution."); CAL. CONST. pmbl. ("We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution."); FLA. CONST. pmbl. ("We, the people of the State of Florida, being grateful to Almighty God for our constitutional liberty, in order to secure its benefits, perfect our government, insure domestic tranquility, maintain public order, and guarantee equal civil and political rights to all, do ordain and establish this constitution."); IDAHO CONST. pmbl. ("We, the people of the state of Idaho, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this Constitution."); ME. CONST. pmbl. ("We the people of Maine, in order to establish justice, insure tranquility, provide for our mutual defence, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity, so favorable to the design; and, imploring His aid and direction in its accomplishment, do agree to form ourselves into a free and independent State, by the style and title of the State of Maine and do ordain and establish the following Constitution for the government of the same.") (emphasis omitted); MONT. CONST. pmbl. ("We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution."); NEV. CONST. pmbl. ("We the people of the State of Nevada Grateful to Almighty God for our freedom in order to secure its blessings, insure domestic tranquility, and form a more perfect Government, do establish this CONSTITUTION."); N.J. CONST. pmbl. ("We, the people of the State of New

Clauson,[4] express what may have seemed like a truism when written, but which in much of modern American discourse is a disputed proposition.[5] On one side of the dispute are a host of voices that seek to exclude or vigorously curtail the effect of faith and religious ideas from American public life and law.[6] Other voices seek a robust role, within the

---

Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution."); N.Y. CONST. pmbl. ("WE, THE PEOPLE of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH THIS CONSTITUTION."); N.C. CONST. pmbl. ("*We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign Ruler of Nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do, for the more certain security thereof and for the better government of this State, ordain and establish this Constitution.*"); N.D. CONST. pmbl. ("We, the people of North Dakota, grateful to Almighty God for the blessings of civil and religious liberty, do ordain and establish this constitution."); WASH. CONST. pmbl. ("We the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution."); W.V. CONST. pmbl. ("Since through Divine Providence we enjoy the blessings of civil, political and religious liberty, we, the people of West Virginia, in and through the provisions of this Constitution, reaffirm our faith in and constant reliance upon God and seek diligently to promote, preserve and perpetuate good government in the State of West Virginia for the common welfare, freedom and security of ourselves and our posterity."); WIS. CONST. pmbl. ("We, the people of Wisconsin, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquility and promote the general welfare, do establish this constitution."). For an example of a state constitution that does not reference God or religious conviction as part of the basis of constitutional government, see OR. CONST. pmbl. ("We the people of the State of Oregon to the end that Justice be established, order maintained, and liberty perpetuated, do ordain this Constitution.").

[4] *Zorach*, 343 U.S. at 308.

[5] *See generally* MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 814–15 (2002); Scott W. Breedlove & Victoria S. Salzman, *The Devil Made Me Do It: The Irrelevance of Legislative Motivation Under the Establishment Clause*, 53 BAYLOR L. REV. 419, 447–49 (2001). For a detailed overview from a progressive perspective on the need for the inclusion of religious perspectives in political debate, see Jason Carter, *Toward a Genuine Debate About Morals, Religion, Politics, and Law: Why America Needs a Christian Response to the "Christian" Right*, 41 GA. L. REV. 69, 79–86 (2006). For a critique of the view that religion should be limited in the public square because of concerns over its divisiveness, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006). The general contours of the debate regarding the role of religion in American public life is set out by Professor Stephen Monsama. *See* STEPHEN V. MONSMA, POSITIVE NEUTRALITY 62–68 (1993). On a pessimistic note, Monsama states, "U.S. culture simply has no theoretical framework or paradigm with which to deal with socially and politically relevant religious faith." *Id.* at 68.

[6] *See generally* EDGAR BODENHEIMER, TREATISE ON JUSTICE 63 (1967) ("[R]eligious convictions (which are usually not shared by everybody) should not be used as the basis of a law of the state unless they are supported by rational considerations pertaining to the general welfare of society."); PHILIP B. KURLAND, RELIGION AND THE LAW 18 (1962) ("[T]he proper construction of the religion clauses of the first amendment is that the freedom and separation clauses should be read as a single precept that government cannot utilize

permissible boundaries of the Constitution, for religiously grounded ethical and moral principles to be expressed in positive law.[7] Regardless of the accuracy of Justice Douglas's observation, it remains beyond question that the American public has a strong religious component today, both in terms of overall belief and in terms of religious practice.[8] In such a society, the role of religious believers in its public square is both inevitable and important. It is inevitable because citizens who profess religious faith possess the same political rights as those citizens who are not religious—the same rights to vote, to seek political and judicial office, to comment on public affairs. The activity of religious believers in the civic decision-making process is important because people of faith make up a majority of the population in the United States, and in our constitutional republic, the majority elect those who craft the positive law through the political branches of our government. And, despite a recent outpouring of books advocating a hostile approach to religion both in the public square and in the broader culture, the relative proportion of religionists in American society is unlikely to radically diminish in the foreseeable future.[9] Further, as constitutional

---

religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden."); MONSMA, *supra* note 5, at 199–202; Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197–201 (1992); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1320–35 (2007); Paul Jefferson, Note, *Strengthening Motivational Analysis Under the Establishment Clause: Proposing a Burden-Shifting Standard*, 35 IND. L. REV. 621 (2002).

[7] *See, e.g.*, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 105–23 (1993); Jean Bethke Elshtain, *The Bright Line: Liberalism and Religion*, *in* THE BETRAYAL OF LIBERALISM: HOW THE DISCIPLES OF FREEDOM AND EQUALITY HELPED FOSTER THE ILLIBERAL POLITICS OF COERCION AND CONTROL 139, 139–55 (Hilton Kramer & Roger Kimball eds. 1999); Robert J. Araujo, *Contemporary Interpretation of the Religious Clauses: The Church and Caesar Engaged in Conversation*, 10 J.L. & RELIGION 493, 505–07 (1994); L. Scott Smith, *From Promised Land to Tower of Babel: Religious Pluralism and the Future of the Liberal Experiment in America*, 45 BRANDEIS L.J. 527, 548–53 (2007).

[8] According to a 1993 Gallup poll, more than "nine out of ten Americans believe in God and some four out of five pray regularly." CARTER, *supra* note 6, at 4 & n.2 (citing Ari L. Godlman, *Religion Notes*, N.Y. TIMES, Feb. 27, 1993, at 9). Additionally, of the ninety-six percent of people who identified themselves as believers in the poll, the overwhelming majority, eighty-two percent, described themselves as Christians. *Id.* More recent data also supports these figures, with only minor divergence; according to a 2007 *Newsweek* poll conducted by Princeton Survey, ninety-one percent of respondents believed in God, and eighty-two percent of the respondents claimed to be Christians. *See* Jon Meacham, *Is God Real?*, NEWSWEEK, Apr. 9, 2007, at 54, 55; Michael Novak, *Remembering the Secular Age*, FIRST THINGS, June/July 2007, at 35, 35.

[9] For an analysis of the reasons why secularism and the recent flurry of atheistic advocacy is unlikely to result in a radical shift in the role of religion in American life, see Novak, *supra* note 7, at 35–40. For an overview of the increasing appeals to faith by political candidates, see Lew Daly, *In Search of the Common Good: The Catholic Roots of*

law professor Robert C. Post has observed, "Public discourse lies at the heart of democratic self-governance, and its protection constitutes an important theme of First Amendment jurisprudence."[10] Given Post's observation, it is logical to conclude that the proper role of religious motivation in public life has an obvious and significant impact on the nature of American public discourse.

Since many religious believers are politically active, the question that faces citizens, politicians, lawyers, and judges is the extent to which the Constitution warrants religious believers to be influenced by religious convictions when formulating public policy.[11] This question also raises a practical issue regarding judicial interpretation and review of legislative and executive enactments under the Establishment Clause: namely, to what extent is it appropriate for judges reviewing legislative and executive action to look at the possible religious motivations of legislators and executive branch decision makers in crafting public policy? This Article addresses both of these concerns by examining the proper scope of the judiciary's use of extrinsic evidence when evaluating legislative and executive action under the First Amendment's Establishment Clause. This Article first discusses the pattern of use regarding extrinsic evidence in Establishment Clause cases in general, and argues that Establishment Clause jurisprudence of the Supreme Court of the United States, stretching back to the nineteenth century, supports the use of extrinsic evidence in determining whether government action violates the First Amendment's protections against religious establishment. Second, this Article examines both scholarly and case authority that supports the use of such extrinsic evidence in

---

American Liberalism, BOSTON REV., May/June 2007, at 23; John J. DiIulio, Jr., *Spiritualpolitique*, WKLY. STANDARD, May 14, 2007, at 24; Mike Dorning, *Democrats Find Religion on Campaign Trail*, CHI. TRIB., May 6, 2007, § 1, at 1; Nancy Gibbs & Michael Duffy, *Leveling the Praying Field*, TIME, July 23, 2007, at 28; Beth Reinhard & Alexandra Alter, *The Religious Left Lifts Its Voice in Campaign 2008*, MIAMI HERALD, June 4, 2007, at A1.

[10] ROBERT C. POST, CONSTITUTIONAL DOMAINS 177 (1995).

[11] Michael Perry raises this as the "fundamental question about religion in politics . . . ." Michael J. Perry, *Religion in Politics*, 29 U.C. DAVIS L. REV. 729, 730 (1996). Of course, one should not presume that a robust role for religion in the American public square will necessarily lead to a uniformity of religiously-themed public discussion. Both the current political climate and the political arena of times past dispel the notion that religious influence in public life leads in practice to a uniform "religious position" on virtually any given issue. *See generally* JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY (1995) (noting that religious groups have not been hegemonic in their approach to social or moral concerns); George McKenna, *The Blue, the Gray, and the Bible*, FIRST THINGS, Aug./Sept. 2007, at 29. It should also be noted that not all religious groups or religious traditions encourage their adherents to bring their faith traditions to bear on public life. For those that do, however, it is simply not realistic to assume that adherents of those faiths will not bring their religious views to bear on matters of public life. Smith, *supra* note 7.

support of limiting or even excluding religious motivation from the public square. This Article then discusses three substantive objections to such an approach to using extrinsic evidence, arguing that attempts to exclude religious motivation from public policy overreach by conflating purpose and motivation, violating not only the deeper purposes and functions of the Establishment Clause, but also critically impacting the idea of equal citizenship of religious believers and secularists within the American constitutional framework. Throughout this Article, I also hope to uphold the idea of a strong institutional distinction between government and religion, upholding the secular nature of government action—a secular nature which has served both the government and religious believers and organizations quite well over the history of the United States.

II. AN OVERVIEW OF THE USE OF EXTRINSIC EVIDENCE IN ESTABLISHMENT CLAUSE CASES

A. General Principles Regarding the Use of Extrinsic Evidence in Religion Cases

It is a mild understatement to say that the use of extrinsic evidence in statutory and constitutional construction has been the subject of strenuous debate.[12] While legal scholars and jurists continue to argue over the normal circumstances in which extrinsic evidence such as legislative history may be used for purposes of statutory and

---

[12] *See generally* Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998) (providing an overview of the increasing use of legislative history in statutory construction, as well as the arguments for and against its use); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29–41 (1997); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 U. KAN. L. REV. 815 (1990). For a detailed historical view of the use of extrinsic evidence in constitutional interpretation up until 1939, see the five-part series of articles by Jacobus tenBroek titled, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CAL. L. REV. 287, 437, 664 (1938), and *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CAL. L. REV. 157, 399 (1939). It should be noted that the debate over the use of legislative history in statutory construction has not been limited to the United States, but has also taken place in the English judicial system as well. *See* William S. Jordan, III, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F. L. REV. 1 (1994). On a related note, for a fairly negative assessment of the Supreme Court's use of historical analysis, see Leonard Levy's comment that

> the Court resorts to history for a quick fix, a substantiation, a confirmation, an illustration, or a grace note; it does not really look for the historical conditions and meanings of a time long gone in order to determine the evidence that will persuade it to decide a case in one way rather than another.

LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 322–23 (1988)

constitutional construction, there is a long-standing judicial practice of consulting legislative history and other extrinsic sources when examining laws that intersect with religion and the Establishment Clause. In most cases that involve application of enacted law that does not impact church-state relations—including statutory interpretation carried out under the ambit of judicial review—that application begins with the text of the enacted law being discussed, applied, or evaluated by the reviewing court.[13] As a practical matter, most judicial action regarding enacted law begins with the text and any case precedent that has interpreted or applied that text. The use of extrinsic evidence to resolve questions of textual meaning is usually undertaken only to address problems that result from textual ambiguity,[14] such as might be the consequence of poor legislative or regulatory word usage, or a difficulty in reconciling a particular enacted law with other laws presently on the books.

But, within the context of enacted laws that deal with religion, the Supreme Court has long relied upon extrinsic evidence more broadly, looking to legislative history and the general history of the nation to provide context to government action and to guide the Court as it undertakes its responsibility of judicial review.[15] And this use of extrinsic evidence emerged relatively early in the Court's religion jurisprudence, most notably in the nineteenth-century case of *Church of the Holy Trinity v. United States*.[16] While not dealing directly with the application of the Establishment Clause, the Supreme Court's decision is

---

[13] *See, e.g.*, Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594 (1995) ("'[N]o one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which in our democracy has lodged in its elected legislature.'" (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947))). Schacter describes the traditional approach to statutory interpretation:

> If the words of the statute unambiguously reflect legislative intent, the court should go no further. On the orthodox originalist view, if the words used by the legislature are open to more than one interpretation—as is often the case in disputes about meaning that reach the courts—the court must look harder and longer and consider the legislative purpose behind the statute, the legislative history, and perhaps the canons of construction. Whether "intent" or "purpose" or some other similar measure serves as the benchmark, the traditional approach assumes a discoverable legislative design, and the court's cardinal obligation remains to identify and execute that design.

Id. at 594–95 (footnotes omitted).

[14] *Id.*

[15] *See generally* Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OR. L. REV. 563 (2006) (discussing the Supreme Court's use of historical analysis when evaluating the religion clauses).

[16] 143 U.S. 457 (1892).

critical for understanding both the roots and the utility of the use of extrinsic evidence in evaluating claims impacting government actions that impact religion.

In *Holy Trinity*, the Court undertook to describe the parameters of religion's place in the public square by using evidence outside of the strict text of either the Constitution or the statute that was at the heart of the legal claim in the case. The relevant facts are brief. In 1887, Holy Trinity parish in New York state brought the Reverend E. Walpole Warren from the United Kingdom to the United States to pastor the church.[17] Warren entered into an employment agreement with the church while residing in England.[18] The United States government claimed that Warren's immigration to take up the pastorate violated a federal statute that prohibited importing foreign workers into the United States.[19] The language in the applicable federal statute read as follows:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia."[20]

The lower court held in favor of the government, and the case was appealed to the Supreme Court, which held, miraculously enough, that the good reverend's employment agreement did not fall within the parameters of the statute.[21]

The Court had to discern whether Congress had meant to include professional workers like clergy under the statute prohibiting the importation of workers who would engage in "labor or service of any kind . . . ."[22] What did those words mean? The statute itself did not define them, although by using such sweeping terms it could well be argued that the meaning of the statute was reasonably clear: workers engaging in "any kind" of "labor or service" came under the statute's prohibition. The term "any kind" would, presumably, include the work of a professional, such as an ordained minister. Indeed, the Court "conceded"

---

17 *Id.* at 457–58.

18 *Id.*

19 *Id.* at 458.

20 *Id.* (quoting Law of Feb. 26, 1885, ch. 164 § 2, 23 Stat. 332 (repealed 1952)).

21 *Id.* at 458, 472.

22 *Id.* at 458–59.

that the congregation's action in seeking a pastor from outside the country fit within the statute's prohibitory language;[23] however, the Court declined to end its analysis there, reasoning that "a thing may be within the letter of the statute and yet not within the statute, because [the thing is] not within its spirit, nor within the intention of its makers."[24] While formally refusing to substitute its judgment for that of the legislature, the Court's language indicated that it declined to be too tightly bound by the overt meaning of the statute.[25] Instead, the Court chose to rely on extrinsic evidence from the legislature—such as general legislative history, committee reports, and the title of the act itself—as well as the Court's own examination of the "contemporaneous events," which led Congress to prohibit the importation of foreign workers.[26] The Court's examination of extrinsic evidence found that the purpose of the statute was to prevent the importation of "cheap unskilled labor" rather than professional workers such as clergy.[27] The employment agreement between Reverend Warren and Holy Trinity parish, therefore, lay outside the scope of the statute.

With that conclusion, one might think that the Court's use of extrinsic evidence in the case would have come to an end—but not so. In addition to the extrinsic evidence relating to the statute itself, the Court also sought support for its decision in this country's general history regarding the intersection of religion and public life.[28] Going as far back as the Spanish royal commission to Christopher Columbus, the Court used examples of colonial and early American history to support its contention that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."[29] The Court explained how the colonial charters, the Declaration of Independence, the preambles of several state constitutions, the Establishment Clause itself, and the exclusion of Sundays as a day of business in Article 1 Section 7 of the Constitution all supported that principle.[30] Further, the Court looked beyond history to the role of religion in the public functioning of government.[31] Including the popular "form of oath universally prevailing . . . with an appeal to the Almighty," the Court looked to a host of popular practices that indicated the pronounced status of religion in American life: the practice of "opening

---

23 *Id.*

24 *Id.* at 459.

25 *Id.*

26 *Id.* at 462–65.

27 *Id.* at 465.

28 *Id.* at 465–71.

29 *Id.* at 465–66 (referring to the people of the United States).

30 *Id.* at 466–70.

31 *Id.* at 471.

sessions of all deliberative bodies . . . with prayer;" the use of religious language in wills; Sunday closing laws affecting both private business and governmental operations on the Sabbath; and the almost universal presence of religious congregations, missionary societies, and charitable organizations throughout the country, as well as other unspecified "unofficial declarations" regarding the role in public life.[32] Closing its examination of this extrinsic evidence, the Court concluded that it was simply unbelievable that Congress intended to criminalize a domestic church's hiring of a foreign pastor.[33]

The Court's use of extrinsic evidence in *Holy Trinity* raises legitimate concerns regarding the free-wheeling use of historical sources in judicial decision-making. With few exceptions, judges and attorneys rarely receive professional historical training, and the reliance of judges and lawyers on what is sometimes unflatteringly called "law-office history" is cause for concern.[34] Looking at the historical analysis used in

---

[32] *Id.*

[33] *Id.*

[34] For a critical view of "law-office history," see Velasquez v. Frapwell, 160 F.3d 389, 393–94 (7th Cir. 1998), *vacated in part*, 165 F.3d 593 (7th Cir. 1999). Justice Scalia has noted the daunting difficulties involved in historical analysis in constitutional law:

> [W]hat *is* true is that it is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.

Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989); *see also* Steven K. Green, *"Bad History": The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717 (2006); Robert J. Hume, *The Use of Rhetorical Sources by the U.S. Supreme Court*, 40 LAW & SOC'Y REV. 817, 839 (2006). Levy summarizes some of the primary arguments against judicial use of historical analysis, including a lack of professional historical training on the part of judges. *See* LEVY, *supra* note 12, at 322–23. Perhaps the most troubling concern regarding judicial use of historical analysis is that judges may engage in such analysis only to impose their own views of policy instead of the law. *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 922 (1992).

For an overview of the complexities of the place of religion in American history, see generally PHILLIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002). *See also* Frank J. Conklin & James M. Vaché, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411 (1985); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 110 MICH. L. REV. 279 (2001); Robert F. Utter & Edward J. Larson, *Church and*

Holy Trinity, the Court's recitation of the role of religion in American public life was cursory and lacked sophistication and nuance in regard to its treatment of minority religions in the nineteenth-century American experience.[35] Additionally, it is possible to look at the Court's examination of extrinsic evidence and suspect that it engaged in an outcome determinative process, reaching for whatever evidence it could plausibly find to support its decision to evade statutory language that appears to be unambiguous. Yet, despite such criticism, the Court's use of history and the general practice of American government at the time is an informative part of the *Holy Trinity* decision because it was part and parcel of the broader methodology of statutory interpretation developed by the Court in that case. Much of the Court's recitation in support of its decision may no longer be relevant to analyzing church-state relations, but the Court's deployment of legislative history, general history, and the custom and popular usage of the country set a powerful tone for future judicial evaluation of government acts that impact church-state affairs. The Court summarized its approach in the case this way:

> It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.[36]

By this statement and by the reasoning used in its decision, the Court indicated that when dealing with matters of religious faith and public law, extrinsic evidence, even extrinsic evidence beyond the immediate legislative background of the statute, was fair game for judicial examination. And the relevance of the Court's approach in *Holy*

State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution, 15 HASTINGS CONST. L.Q. 451, 462 (1988).

[35] For example, nineteenth-century America could be a very hostile place for minority religious traditions. RAY ALLEN BILLINGTON, THE PROTESTANT CRUSADE 1800–1860 (1938); Philip Hamburger, *Illiberal Liberalism: Liberal Theology, Anti-Catholicism, & Church Property*, 12 J. CONTEMP. LEGAL ISSUES 693, 708–09 (2002); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 282 (2001); *see also* Frank J. Conklin & James M. Vaché, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411, 430–36 (1985); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 557–73 (2003).

[36] *Holy Trinity*, 143 U.S. at 472.

Trinity has not lessened over time. As the Court's jurisprudence regarding religion and the Establishment Clause became more developed and sophisticated, the role of extrinsic evidence has become even more crucial to the process of judicial review. This Article now turns to that topic.

B. The Establishment Clause and the Secular Purpose Requirement

The exact content of what constitutes an establishment of religion, so far as the Supreme Court is concerned, has been the subject of a great deal of litigation and scholarly comment, and the Court has shown precious little consistency in developing a uniform standard in this area. In most cases, the Supreme Court and the lower federal courts apply a test first fully enunciated in the case of *Lemon v. Kurtzman*.[37] The "*Lemon* test" incorporates earlier formulas used by the Court to determine breaches of the Establishment Clause.[38] In order to meet the *Lemon* test a government action must meet three criteria: 1) it must have a secular legislative purpose; 2) its principal or primary effect must neither advance nor inhibit religion; and 3) it must not foster excessive government entanglement with religion.[39] When formulating the outlines of the *Lemon* test, the Supreme Court expressly noted that it was designed to prohibit the "three main evils" that the Establishment Clause was meant to prevent: "'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[40] With this statement, the Court gave critical guidance to prevent the institutional alliance of church and state.

The *Lemon* test has proven to be notoriously unpopular, and the Supreme Court has not always applied the test when evaluating Establishment Clause challenges.[41] In spite of its unpopularity and its

---

[37] 403 U.S. 602, 612–13 (1971). For an overview of the development of the *Lemon* test, see Amy Louise Weinhaus, *The Fate of Graduation Prayers in Public Schools After* Lee v. Weisman, 71 WASH. U. L.Q. 957, 960–967 (1993).

[38] *Lemon*, 403 U.S. at 612–13. For an example of a pre-*Lemon* use of the first two prongs of the *Lemon* test, see Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963). For an example of the pre-*Lemon* use of the third prong of the *Lemon* test, see Walz v. Tax Comm'n, 397 U.S. 664, 674–76 (1970).

[39] *Lemon*, 403 U.S. at 612–13.

[40] *Id.* at 612 (quoting *Walz*, 397 U.S. at 668).

[41] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (criticizing the test and citing two cases—Marsh v. Chambers, 463 U.S. 783 (1983) and Larson v. Valente, 456 U.S. 228 (1982)—in which the Court declined to apply *Lemon*). Cases in which the Court has not applied the test when evaluating possible Establishment Clause violations include *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 531 U.S. 793 (2000); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995); and *Marsh v. Chambers*, 463 U.S. 783 (1983).

inconsistency in application, the *Lemon* test remains the dominant test used by the federal courts when evaluating church-state issues.

An examination of the Establishment Clause problems that have reached the Court both before and after *Lemon* reveal a consistent approach to defending religious liberty by curtailing institutional connections between religion and the government. For example, the Court has held that direct tax support by the government for religion is prohibited.[42] The Court has also held that government sponsored prayer and Bible reading in the public schools are prohibited.[43] The Court has found that official displays that give the appearance of government sponsorship of religion violate the Establishment Clause.[44] Finally, religious groups cannot be brought in during public school hours to teach religion classes in the public school.[45] Among the government actions that the Court has found do not violate the Establishment Clause include released time programs where students are dismissed from public school to attend religion classes off campus;[46] public provision of transportation to parochial school students if such transportation is made available to all children in both public and private schools;[47] and the teaching of the Bible as literature in the public schools, so long as such teaching is done in an objective and non-devotional manner.[48]

When the Court has employed the Establishment Clause to strike down government actions that intersect with religious activity, the Court's overwhelming concern has been to guard against the institutional co-mingling of church and state.[49] In particular, the Court's use of the Establishment Clause has focused on government efforts to direct financial support to religion and on activities that may cause governmental coercion in regard to religious beliefs or practices.[50] For

---

[42] Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

[43] Engel v. Vitale, 370 U.S. 421, 425 (1962); *Schempp*, 374 U.S. at 223–25.

[44] County of Allegheny v. ACLU, 492 U.S. 573, 621 (1989).

[45] McCollum v. Bd. of Educ., 333 U.S. 203, 211–12 (1948); *see also* Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985) (holding that a school district's use of shared time and community education programs violated the Establishment Clause).

[46] Zorach v. Clauson, 343 U.S. 306, 314–15 (1952).

[47] *Everson*, 330 U.S. at 17–18.

[48] Stone v. Graham, 449 U.S. 39, 42 (1980); *Schempp*, 374 U.S. at 225.

[49] *E.g.*, *Everson*, 330 U.S. at 15–16.

[50] *Id.*; *see also* Lee v. Weisman, 505 U.S. 577, 588 (1992). Justice Kennedy, writing for the Court in *Weisman*, observed that the Establishment Clause was not meant to eradicate religion from American society, but to protect American society from corruption at the hands of the government:

> [R]eligious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that

this reason, direct tax payments to churches that would create an institutional link between particular religious bodies and the government are prohibited.[51] This particular concern by the Court makes a good deal of sense in light of *Lemon*'s overarching concern to prevent institutional connections between religious institutions and government entities; for the state or federal government to provide money to religious groups to enable those groups to carry on their religious work makes that work directly dependent upon government financing, and hence, government control. Teaching activities by religious instructors on public schools are prohibited because they create an institutional tie where religion is interjected into the functioning of the education apparatus of the state.[52] Such religious education places the public education system at the service of religion, and integrates religious education with the secular education provided by the state.[53] Government orchestrated prayer and Bible reading are prohibited for the same reason, because it creates a tie between the government and religion by using the government's employees and facilities to carry out religious devotion and worship.[54]

While preventing institutional overlap between church and state, the Supreme Court's approach has not created a vacuum-tight seal between the two. Governmental activities which do not result in official financial support of religion or in governmental coercion in regards to

---

> while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference.

Id. at 589–90.

[51] *Everson*, 330 U.S. at 16.

[52] McCollum v. Bd. of Educ., 333 U.S. 203, 209 (1948).

[53] *Id.* at 209–10.

[54] *See Weisman*, 505 U.S. at 589 ("The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice *committed to the private sphere* . . . ." (emphasis added)); Stone v. Graham, 449 U.S. 39, 42 (1980) ("[T]he mere posting of the [Ten Commandments] under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits." (quoting Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963))); *Schempp*, 374 U.S. at 222 (There is a danger of a "fusion of governmental and religious functions or a concert or dependency of one upon the other . . . ."). For the proposition that the purpose prong of the *Lemon* test is aimed at preventing the government from having the purpose of endorsing or disapproving of religion, see Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (citing Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). Justice O'Connor has commented:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Lynch, 465 U.S. at 690 (O'Connor, J., concurring).

faith generally have not been held unconstitutional by the Court. Thus, release time programs, which accommodate religious practice without requiring the government to pay for or supervise religious activities, are permitted because there is no direct link between the government and religion.[55] Government programs that provide benefits to individuals rather than to groups also may benefit religious institutions because the benefit in those cases flows not directly to the religious body but to a third party who then uses the benefit to support a religious activity.[56] Such actions do not create the impression or the reality of direct government support of religion. Rather, since the government is conferring a general benefit on the population as a whole, religious institutions receive the same benefit as any other institution in society.[57] Finally, the reading of the Bible in public schools as a literary work, or as an historical text, or as a foundational document of Western civilization is permissible so long as it is done in an objective manner "as part of a secular program of education"[58] and does not create the impression that the government supports the teachings of the Bible anymore than the reading of the play King Lear in a literature class conveys the message that the government endorses Shakespeare. The golden thread, of course, that unites all of these examples in light of the Court's actions is the simple fact that none of these outcomes results in a strong institutional link between religious institutions and the government.

In light of the Court's overarching concern, both prior to and after the *Lemon* test was formally announced, it makes a good deal of sense that the courts would resort to the use of extrinsic evidence when evaluating the institutional links between religious institutions, churches, synagogues, mosques, and other places of worship and the government in either its state or federal forms. This is particularly true given the *Lemon* test's incorporation of the Court's already then-extant requirement that laws have a "secular purpose"—a purpose which often requires the use of extrinsic evidence to accurately identify. Thus, in *McGowan v. Maryland*, a pre-*Lemon* case, the Court looked at both the general history and legislative history underlying a state Sunday closing law in order to ascertain whether the purpose of the law was suitably

---

55 Zorach v. Clauson, 343 U.S. 306, 308–09, 315 (1952).

56 *Everson*, 330 U.S. at 17–18; *see also* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Wolman v. Walter, 433 U.S. 229 (1977); Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

57 *Everson*, 330 U.S. at 17–19.

58 *Schempp*, 374 U.S. at 225.

secular to avoid running afoul of the First Amendment.[59] In holding that the Maryland law in question was constitutionally permitted, the Court stated that such a statute would be held unconstitutional "if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion."[60] The Court's basic approach regarding the use of extrinsic evidence to determine the purpose of government action in evaluating its constitutionality under the Establishment Clause was followed in the pre-*Lemon* cases of *Board of Education v. Allen*,[61] and *Epperson v. Arkansas*,[62] and in the post-*Lemon* cases of *Stone v. Graham*,[63] *Wallace v. Jaffree*,[64] *Edwards v. Aguillard*,[65] and *Santa Fe Independent School District v. Doe*.[66] In each of these cases the Court used extrinsic evidence to aid in its determination of the constitutionality of a government action that impacted on church-state relations.

C. The Use of Extrinsic Evidence in the Recent Ten Commandments Cases

While the Court's use of extrinsic evidence in Establishment Clause cases is most pronounced when it applies the secular purpose requirement of the *Lemon* test, the Court has also relied on extrinsic evidence in Establishment Clause cases when it has not used the *Lemon* test. For instance, the two most recent cases in which the Court has robustly employed extrinsic evidence in evaluating government action under the Establishment Clause are both cases involving public displays of the Ten Commandments. In *McCreary County v. ACLU of Kentucky*, the Court applied the *Lemon* test to strike down a government display of the Ten Commandments.[67] In *Van Orden v. Perry*, though, the Court declined to apply the *Lemon* test and instead opted for a more historically-oriented approach to evaluate and uphold a differing

---

[59] 366 U.S. 420, 431–45 (1961). The Court in *School District of Abington Township v. Schempp* also looked at general historical context to determine the scope of the Establishment Clause. 374 U.S. at 212–15.

[60] *McGowan*, 366 U.S. at 453.

[61] 392 U.S. 236, 247–48 (1968).

[62] 393 U.S. 97, 108–09 (1968).

[63] 449 U.S. 39, 41–42 (1980).

[64] 472 U.S. 38, 56–60 (1985).

[65] 482 U.S. 578, 586–87, 589–93 (1987). "A court's finding of improper purpose behind a statute is appropriately determined by the statute on its face, its legislative history, or its interpretation by a responsible administrative agency." *Id.* at 594; *cf. id.* at 599–602 (Powell, J., concurring) (examining legislative history but only after finding that the statute on its face was ambiguous as to its purpose).

[66] 530 U.S. 290, 307–08 (2000).

[67] 545 U.S. 844 (2005).

government display of the Ten Commandments.[68] In each case, despite the opposite outcomes, the Court relied on extrinsic evidence for at least part of the support undergirding its decision.

Looking first at *McCreary*, that case involved two local county governments that had posted copies of the Decalogue in their county courthouses.[69] After the commandments were posted, the ACLU brought suit, contending that the counties' actions in posting the Ten Commandments violated the Establishment Clause.[70] In light of the ACLU's suit, the counties altered the display to include a statement explaining that the Decalogue was part of the laws of the state of Kentucky. The counties also included in the displays, though less prominently, other historical documents that highlighted religion in some way.[71] Despite the changes, a federal district judge applied the *Lemon* test and issued an injunction requiring the counties to take down the displays.[72] After some additional legal maneuvering, the counties again set up a display featuring the Ten Commandments, along with the Magna Carta, the Declaration of Independence, the Bill of Rights, the National Anthem, the national motto of "In God We Trust," along with a host of other historical documents, some of a religious nature and some not.[73] The ACLU sued again and the federal judge supplemented the first injunction, finding that the new displays violated the Establishment Clause because of the decision to post the Decalogue; the counties appealed and the United States Court of Appeals for the Sixth Circuit affirmed the district court's injunction.[74] The Supreme Court then granted certiorari.[75]

The Supreme Court found that the counties' actions violated the Establishment Clause under the *Lemon* test because their decision to post the commandments lacked a sufficient secular purpose.[76] Justice Souter, writing for the Court, reaffirmed the continuing validity of the *Lemon* test and the test's secular purpose prong.[77] In addition, the Court made plain that the judicial branch rightly shows deference to a legislative body's stated secular purpose when interpreting government action, but "the secular purpose required has to be genuine, not a sham,

---

68 545 U.S. 677 (2005).

69 *McCreary*, 545 U.S. at 851.

70 *Id.* at 852.

71 *Id.* at 852–54.

72 *Id.* at 854–55.

73 *Id.* at 855–56.

74 *Id.* at 856–57.

75 *Id.* at 858.

76 *Id.* at 871.

77 *Id.* at 848, 871.

and not merely secondary to a religious objective."[78] Legislative branches must act in a manner such that the purposes of government action truly are in accord with the Establishment Clause's requirements.[79] "[T]he Court required more than a sham purpose and would not abandon its role in analyzing whether a truly secular purpose existed for a government's actions."[80] As part of its evaluation as to whether a sham purpose exists, the Court stated that it would rely on numerous sources, including the language of the government enactment establishing the display, the display's history, the documents contained within it, and the general circumstances surrounding the display.[81] All of this material is necessary in order to provide context for the Court to evaluate whether an "objective" or reasonable observer would find that the creation of the display offended the underlying values of the Establishment Clause; the reasonable observer is deemed to be familiar with the text of the enactment in question, as well as extrinsic evidence regarding the enactment, including legislative history and the "implementation of the statute."[82]

The Court's use of historical evidence to decide *McCreary* was strongly vindicated not only in Justice Souter's decision applying the *Lemon* test's secular purpose prong but also in the Court's second Ten Commandments case argued and decided the same day as *McCreary*, but which produced a different result. In *Van Orden v. Perry*,[83] the Court ruled on the constitutionality of a display of the Decalogue dating from the early 1960s at the Texas State Capital in Austin, Texas.[84] The specific display was carved into a large granite monument measuring "6-feet high and 3-feet wide."[85] It was included as part of a larger complex of "monuments" and "historical markers" of various types covering twenty-two acres of the capital grounds, commemorating various aspects of the

---

[78] *Id.* at 864.

[79] *Id.*

[80] Susan Hanley Kosse, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases:* McCreary County v. ACLU of Kentucky *and* Van Orden v. Perry, 4 FIRST AMEND. L. REV. 139, 155 (2006). For an overview of the Court's approach to "sham" secular purposes in relation to government displays of the Decalogue, see Susanna Dokupil, *"Thou Shalt Not Bear False Witness": "Sham" Secular Purposes in Ten Commandments Displays*, 28 HARV. J.L. & PUB. POL'Y 609 (2005).

[81] *McCreary*, 545 U.S. at 861–63.

[82] *Id.* at 862 (quoting Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring)).

[83] 545 U.S. 677 (2005). For a critical examination of the case arguing that *Van Orden* should not be relied upon as precedent, see W. Jesse Weins, Note, *A Problematic Plurality Precedent: Why the Supreme Court Should Leave* Marks *Over* Van Orden v. Perry, 85 NEB. L. REV. 830 (2007).

[84] *Van Orden*, 545 U.S. at 681.

[85] *Id.*

history of Texas.[86] In addition to its "primary content" of the text of the Decalogue, the specific display included other smaller symbols, some secular and some religious in nature: "[a]n eagle grasping the American flag, an eye inside of a pyramid, and two small tables with what appears to be an ancient script" were included above the Decalogue.[87] Underneath the Ten Commandments were included "two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ."[88] At the monument's base was an inscription noting that it had been donated by the Fraternal Organization of Eagles in 1961 "TO THE PEOPLE AND YOUTH OF TEXAS . . . ."[89]

The federal district court upheld the constitutionality of the display against an Establishment Clause challenge.[90] The United States Court of Appeals for the Fifth Circuit affirmed.[91] At the Supreme Court, Chief Justice Rehnquist, writing for a plurality of the Court, characterized the Texas display as "passive," and declined to apply the *Lemon* test.[92] The plurality based its decision on the recognition of religion found in various public contexts throughout American history since the Revolution.[93] While acknowledging limits to the constitutionality of posting the commandments in a public school setting,[94] on the basis of American history the plurality found that the Decalogue has "an undeniable historical meaning," and that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[95]

Justices Scalia, Kennedy, and Thomas joined Justice Rehnquist's opinion. The most interesting concurring opinions, however, are by Justices Thomas and Breyer. Justice Thomas, while arguing that the Court should abandon the vast majority of its modern Establishment Clause jurisprudence, joined the plurality "in full" because of the plurality's historical analysis, which "recognize[d] the role of religion in this Nation's history and the permissibility of government displays acknowledging that history."[96] Justice Breyer concurred in the judgment, based ultimately on the historical context of the Texas Decalogue display. Eschewing the use of any pre-existing test to resolve the

---

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.* at 681–82.

90 *Id.* at 682.

91 *Id.* at 682–83.

92 *Id.* at 686.

93 *Id.* at 686–89.

94 *Id.* at 690.

95 *Id.*

96 *Id.* at 692–93 (Thomas, J., concurring).

constitutional question,[97] Justice Breyer looked instead at extrinsic evidence involving the circumstances surrounding the Texas display: the physical setting of the display amid the other monuments reflecting Texas' history; the "primarily secular" nature of the donating group—the Fraternal Order of Eagles—and the fact that the tablets "prominently acknowledge that the Eagles donated the display"; and most "determinative," the fact that the display had stood for forty years before being challenged.[98] All of this evidence supported Justice Breyer's view that the state's intention was to focus on the "nonreligious aspects" of the Ten Commandments, allowing their secular meaning to "predominate."[99] In light of this historical and, for lack of a better phrase, positional evidence, Justice Breyer found that the display was constitutionally permissible.[100]

Justice Breyer, like Justice Thomas and the other justices of the plurality, relied in large extent on the use of extrinsic evidence. Ironically, a majority of the Court in *McCreary* also relied on extrinsic evidence to support an opposite conclusion. As the foregoing discussion establishes, this use of extrinsic evidence is not unusual in the context of the Establishment Clause. It has been, from the late nineteenth century to the present, an integral part of the Court's methodology when examining the intersection of law, religion, and government action, whether the *Lemon* test is used or not. Acknowledging the reality of the use of extrinsic evidence in Establishment Clause cases, however, does not provide us with an answer regarding the proper scope of the use of such evidence.

III. SHOULD EXTRINSIC EVIDENCE OF RELIGIOUS MOTIVATION INVALIDATE GOVERNMENT ACTION ON ESTABLISHMENT CLAUSE GROUNDS?

Despite the almost endless amounts of ink spent criticizing its various approaches to the subject, the Supreme Court has on the whole done a reasonably good job preventing the kind of church-state institutional connections that the Establishment Clause has been aimed at thwarting. But the Court's Establishment Clause rulings have left murky the constitutionally permissible scope of religious activism in the public square. In some of its rulings, the Court has invalidated such activism by finding government action motivated either in whole or in part by religious sentiments to be problematic in varying degrees. This area is further made difficult by the fact that it is not always an easy task to discern religious purpose when dealing with public policy.

---

[97] *Id.* at 699–700 (Breyer, J., concurring).

[98] *Id.* at 701–02.

[99] *Id.* at 701.

[100] *Id.* at 703–04.

A distinction between religious and secular purpose is not always easy to apply, and is complicated by the conception of public purpose in constitutional jurisprudence generally. The United States is a modified liberal state. Its constitutional jurisprudence, reflecting a conception of ordered liberty, of liberty subject to due process of law, inevitably has raised issues about the proper purposes of government. In the nineteenth century, United States jurisprudence accepted that government may legislate to serve public but not private purposes, and public purposes were defined as including safety, health, morals and the general welfare. But what is a public purpose and the concept of "general welfare" in particular, have proved to be neither simple nor clear.[101] In light of these problems, some have proposed solutions to simplify and resolve the issue of how much a given government enactment may reflect or be motivated by religious values or ethical principles.

A. A Moderate Exclusionist View

One school of thought regarding the role of religion and politics postulates that religious ideas and motivations should have a restricted but permissible place in the public square. Legal scholar Kent Greenawalt proposes that religious believers can legitimately base their public policy views on their faith, but only within certain defined limits.[102] Greenawalt seeks to create a cautious middle path between what he describes as the "inclusive position"[103] in regards to religion and politics and the "exclusive position."[104] The inclusive position, in his view, seeks to justify religious involvement in politics on the ground that religious believers cannot separate their religious convictions from their secular views.[105] Religion thus cannot be outside of the permissible boundaries for political participation, because for most believers their religious and secular views are "interwoven together."[106]

Greenawalt characterizes the exclusive position as one that seeks to base politics on "shared methods of understanding."[107] Under this paradigm, religion, religious values, and religious ethical principles are allowed to impact personal and cultural affairs, but cannot be used as the basis for public policy.[108] The government should only use coercive

---

[101] Louis Henkin, *The Wall of Separation and Legislative Purpose*, *in* RELIGION, MORALITY, AND THE LAW 143, 147 (J. Roland Pennock & John W. Chapman eds., 1988).

[102] Kent Greenawalt, *Religious Expression in the Public Square—The Building Blocks for an Intermediate Position*, 29 LOY. L.A. L. REV. 1411 (1996).

[103] *Id.* at 1411.

[104] *Id.* at 1412.

[105] *Id.* at 1411–12.

[106] *Id.* at 1411.

[107] *Id.* at 1412.

[108] *Id.*

force through law when the laws "rest on grounds that the people coerced should reasonably accept as valid."[109] Under the general approaches as to which grounds of belief are excluded under this approach, religious grounds are excluded every time.[110] Greenawalt recognizes an intermediate path between the inclusive and exclusive positions that results in the formulation of his primary principle, that religion can be used as a basis for government decision, so long as it is done in such a way that the law "protects interests . . . that are comprehensible in nonreligious terms, and the law does not impose on other people's religions."[111] Such laws are constitutional in Greenawalt's view, and should be judicially enforced.[112]

A second legal scholar who has taken a moderate approach supporting some carefully crafted limitations on the role of religious belief and motivation in politics is Michael J. Perry.[113] Perry has argued that the fundamental question involved in the issue of religion and politics is the role of religious arguments in the debate over government policy.[114] Perry has contended that the Establishment Clause prevents the government from grounding any policy, particularly policies concerning morality, "on the view that a religious belief is closer to the truth or otherwise better than one or more competing religious or nonreligious beliefs."[115] The Establishment Clause, in this view, precludes governmental action that is based solely on religious ideology.[116] Only government actions that can be justified by secular argument can meet the requirements of the Establishment Clause.[117] Perry, however, notes that many religionists in public life do not base their political views simply on their religious beliefs.[118] Political choices are often supported by both secular and sacred rationales.[119] Because of this, Perry has asserted the necessity under the Establishment Clause for a law to have a secular justification that, standing alone, is strong enough to support the government's actions without an additional religious justification.[120]

---

[109] *Id.*
[110] *Id.*
[111] *Id.* at 1417.
[112] *Id.*
[113] Perry, *supra* note 11.
[114] *Id.* at 734–35.
[115] *Id.* at 735.
[116] *Id.*
[117] *Id.* at 735–36.
[118] *Id.* at 736.
[119] *Id.*
[120] *Id.* at 737.

Interestingly, while Perry has stated in principle that the secular basis for the government's decision would have to be sufficient on its own to justify an action, he acknowledges in practice that "it would be extremely difficult for a court to discern whether [the] government based the choice solely on the secular argument or, instead, partly on the secular argument and partly on the religious argument."[121] Perry concludes that, because of this difficulty, the Establishment Clause as a practical matter must require the government to refrain from making political decisions concerning moral matters "in the absence of a plausible secular rationale."[122] The role of courts in examining an Establishment Clause question is to determine if the secular reason behind the government's decision is "plausible."[123] Additionally, legislators should only support government action in regard to moral issues if "a persuasive secular rationale exists."[124] Thus, as Perry has contended, religious believers may influence public policy and law, but only to the extent that their political viewpoints overlap and are supported by plausible, independent secular arguments.[125]

The moderate approach to limiting the role of religious motivation in public life is paralleled in the two Supreme Court cases *Lynch v. Donnelly*[126] and *Wallace v. Jaffree*.[127] In *Lynch* the Court addressed the constitutionality of a city-sponsored Christmas display containing a nativity crèche.[128] The Court ruled that the city's action was permissible under the Establishment Clause.[129] Writing for the Court, Chief Justice

---

[121] *Id.* at 736. In his more recent work, Perry has acknowledged a richer role played by religion in the public square, arguing that religious principles have played a foundational role in the development of the concept of human rights. Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 EMORY L.J. 97 (2005). Perry has voiced concerns that the concept of the inviolability of the human person, one of the linchpins of modern human rights theory, cannot survive outside of the context of a religiously-oriented worldview:

> The point is not that morality cannot survive the death of God. There is not just one morality, indeed, there are many moralities. The serious question is whether the morality constituted by the claim that each and every human being is inviolable—which includes any morality constituted by the morality of human rights—can survive the death (or deconstruction) of God.

Id. at 150 (footnote omitted). In a more recent book, Perry's view of the constitutionally appropriate role of religion in the public square, while still guarded, is much more positive. *See* MICHAEL PERRY, UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY (2003).

[122] Perry, *supra* note 10, at 737–38.

[123] *Id.* at 738.

[124] *Id.* at 739.

[125] *Id.*

[126] 465 U.S. 668 (1984).

[127] 472 U.S. 38 (1985).

[128] *Lynch*, 465 U.S. at 671.

[129] *Id.* at 687.

Burger reasoned that the history of the United States "is replete with official references to the value and invocation of Divine guidance," particularly in the writings of the Founders.[130] He pointed to the religious nature of both Thanksgiving and Christmas, and to "countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage."[131] While the Court's defense of the display of religious symbols as part of the heritage of the nation is a strong reaffirmation of the permissibility of religious expression in the civic arena, the Court in *Lynch* was not entirely supportive of religious motivation in public life. Stated clearly, "[t]he Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations."[132]

While there can be no doubt that the Court's ruling in *Lynch* went a long way in securing the permissibility of government recognition of the nation's religious heritage, the Court's ruling also affirmed that a government enactment supported solely by religious motivation, absent secular justification, would be constitutionally problematic.[133] The Court's basic position as outlined in *Lynch* is that some religious motivation is acceptable in public life, but it cannot be the only motive behind the government's public policy decisions—those policies must also be justified by secular reasons.[134]

The Court reiterated this view concerning religious motivation and public policy in *Wallace v. Jaffree*.[135] In *Wallace*, the Court struck down an Alabama law requiring public schools to open each day with a moment of silence to permit students to engage in voluntary prayer.[136] The purpose behind the law was to advance religion, thus failing the first prong of the *Lemon* Test.[137] The Court emphasized that the *Lemon* test's secular purpose prong permitted statutes to be motivated in part by a religious purpose.[138] A partial religious motivation does not make a law unconstitutional;[139] but, if a law's passage is entirely motivated by a purpose to advance religion, as the Court found in *Wallace*, then the law

---

[130] *Id.* at 670, 675.
[131] *Id.* at 677.
[132] *Id.* at 680 (compiling cases).
[133] *Id.*
[134] *Id.*
[135] 472 U.S. 38 (1985).
[136] *Id.* at 59–60.
[137] *Id.* at 56–57, 60.
[138] *Id.* at 56.
[139] *Id.*

violates the Establishment Clause.[140] The ruling in *Wallace* reinforces the holding of *Lynch*: religious believers can be motivated by their religious traditions, so long as they are also motivated by secular purposes.[141] With this holding, the *Wallace* case would seem to accord well with the view of religion and politics put forward by Greenawalt and Perry: If the law enacted has a legitimate secular purpose religious motivation is permissible so long as it is not the sole reason for the legislative enactment.

B. A Stronger Exclusionist View

A second ideological position seeking to limit the role of religion in public life argues that the Establishment Clause creates a wall between church and state that cannot be breached, and that religious ideas and motivations must be kept out of the governing and law-making processes as a matter of constitutional integrity. A major proponent of this position is Kathleen M. Sullivan.[142] Sullivan has argued that the First Amendment religion clauses require a completely secular state.[143] Just as the government cannot command a believer to violate what he or she believes to be a divine command, so too the government cannot compel a person to live according to God's will.[144] Since the Constitution prohibits the establishment of religion in society, it "implies the affirmative 'establishment' of a civil order for the resolution of public moral disputes."[145] In Sullivan's view, the strong secular nature of this civic order is mandated by the need for peace between striving sectarian groups.[146] To allow religious ideas to be the basis of decisions regarding government action would be to invite "inter-denominational strife,"[147] the exact thing that Sullivan believes the Establishment Clause was crafted to prevent.[148] According to Sullivan, while it is permissible for religious

---

[140] *Id.*

[141] *Id.*

[142] Sullivan, *supra* note 6.

[143] *Id.* at 198.

[144] *Id.* at 197.

[145] *Id.*

[146] *Id.* at 197–98.

[147] *Id.* at 198.

[148] *Id.* Sullivan unfortunately provides no historical authority to support her conclusion that the Establishment Clause was designed to prevent religious strife rather than to provide for religious liberty. Sullivan argues that the state must be "fully agnostic," otherwise, religious strife will erupt. *Id.* at 198 n.10. Her only cited authority in support of the "agnostic" state is John Rawls's, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987). Other scholars have noted that one of the purposes of the Establishment Clause was to remove religion from political life out of a concern for social peace. *See, e.g.*, LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 102 (1999). Leonard Levy asserts, "the establishment clause was also meant to depoliticize religion, thereby

believers to influence the secular order, the resolution of civic moral disputes must be accomplished by the use of principles "articulable in secular terms."[149]

In Sullivan's view, faith may not be translated into public policy.[150] Religious individuals or groups have no right to use their religious views as a basis for law.[151] Thus, "[n]either Bible nor Talmud may directly settle, for example, public controversy over whether abortion preserves liberty or ends life."[152] To Sullivan, religious liberty in the public square is permitted, but only "insofar as it is consistent with the establishment of the secular public moral order."[153] The Establishment Clause prohibits the government from giving any official approval to religion, making religion "off limits to government in the course of its own activities . . . ."[154] According to Sullivan, the price of religious peace in our constitutional order "is the banishment of religion from the public

---

defusing the potentially explosive condition of a religious heterogeneous society. By separating government and religion the establishment clause enables such a society to maintain some civility among believers and unbelievers as well as among diverse believers." *Id.* Levy, however, like Sullivan, fails to provide any historical support for his assertion regarding the purpose of the clause. Historical support that one (but not the only) purpose of the Establishment Clause was to prevent political strife among different religions in the early American nation is provided by Russell Kirk:

> The second reason advanced in favor of the [Establishment Clause] was a desire to avert disunity among the several states. The differences in theology and church structure between Congregationalist New England and Episcopalian Virginia were conspicuous enough. Still more formidable, in some ways, were the doctrinal disputes among Presbyterians, Quakers, Baptists, Methodists, Dutch Reformed, deists, and other denominations or religious and quasi-religious associations. Had any one of these churches been established nationally by Congress, the rage of other denominations would have been irrepressible. The only security lay in forbidding altogether the designating of a national church.

RUSSELL KIRK, RIGHTS AND DUTIES: REFLECTIONS ON OUR CONSERVATIVE CONSTITUTION 154 (1997).

Note, however, that Kirk's explanation of this historical concern underlying the Establishment Clause does not support the idea that the clause was intended to prevent religious motivation in public life; instead, the purpose, as Kirk explains it, was to prevent an institutional connection between church and state in order to effectuate a practical solution to the problem of religious strife caused by an *overt* institutional alliance between the national government and a particular religious organization or denomination. "It was out of expediency, not from anti-religious principle, that Congress accepted, and the states ratified, the first clause of the First Amendment," which includes the Establishment Clause. *Id.* at 155.

[149] Sullivan, *supra* note 6, at 197.

[150] *Id.* at 198.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* at 206.

square . . . ."[155] With no surprise, the core of Sullivan's view, the insistence that civic debate and public policy take place in an environment denuded of any religious influence or input, has both many supporters and many detractors among those who comment on the intersection of law and religion.

The two Supreme Court decisions that most closely resemble the exclusionist view are *Epperson v. Arkansas*[156] and *Edwards v. Aguillard*,[157] both cases dealing with the teaching of "creation science" in public school curricula.[158] In *Epperson*, the Court addressed an Arkansas statute that prohibited public school teachers from teaching the theory of evolution in the science curricula.[159] In evaluating the constitutionality of the Arkansas statute, the Court conspicuously noted that the statute lacked any discernable secular purpose:

> [T]here can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence.[160]

The Supreme Court reached a similar conclusion in *Edwards* after analyzing a Louisiana law that required any public schools teaching the theory of evolution to also teach biblical creationism.[161] Under the *Lemon* test, the Louisiana statute lacked a secular purpose and therefore violated the Establishment Clause.[162] The Court looked at the legislative history of the statute to examine its purpose, particularly at the statements lawmakers made during legislative debate.[163] While the Act stated that its purpose was to promote academic freedom, statements made by legislators indicated that the underlying motivation behind the law was to promote religion and advance belief in the religious doctrine of creationism.[164] Because the law had a religious purpose as demonstrated by the motivations of individual legislators who supported the Act in the Louisiana legislature, the Court invalidated the statute

---

[155] *Id.* at 223.

[156] 393 U.S. 97 (1968).

[157] 482 U.S. 578 (1987).

[158] *Id.* at 581.

[159] *Epperson*, 393 U.S. at 98–99.

[160] *Id.* at 107–08.

[161] *Edwards*, 482 U.S. at 581–82.

[162] *Id.* at 585, 594.

[163] *Id.* at 587, 592.

[164] *Id.* at 586, 589, 592–93.

under the *Lemon* test as a violation of the Establishment Clause.[165] *Edwards* ended precisely in line with the sentiments of Sullivan and others who advocate a strong exclusion of religious values and ideas from public debate: religious motivation can be constitutionally toxic.

IV. PROBLEMS WITH THE RESTRICTIONIST AND THE EXCLUSIONIST APPROACH TO THE USE OF EXTRINSIC EVIDENCE IN ESTABLISHMENT CLAUSE CASES

A. Overbreadth

While the Supreme Court's approach to church-state issues has resulted in a very competent defense of the institutional separation of church and state, the reasoning the Court has used to arrive at some decisions creates an issue regarding the constitutional appropriateness of religious motivation in public life. For instance, there has been a noted inconsistency in applying the *Lemon* test regarding the level at which the motivations of policy makers can cross over into constitutionally troubled territory.[166] A case like *McGowan v. Maryland* seems to indicate that at least some religious motivation on the part of lawmakers is permissible so long as the basic purpose of a policy or law is designed to further a secular purpose.[167] *Edwards v. Aguillard*, however, undermines that conclusion, suggesting that legislative enactments motivated by religious conviction are per se constitutionally dubious.[168] This inconsistency by the Court has the potential to cause significant difficulties in respect to Establishment Clause jurisprudence on both a practical and a theoretical level.

While there seems to be an almost limitless discourse regarding the role of religious faith in the public square, I would like to focus on three particular problems raised by excluding religious motivation, either in whole or in part, from public life via the Establishment Clause.[169] The first problem regards the analytical difficulties raised by an overly-broad conflation of purpose and motivation for Establishment Clause purposes. Scholars and jurists who insist on reading the *Lemon* test's secular

---

[165] *Id.* at 594.

[166] *See* David K. DeWolf, *Academic Freedom After* Edwards, 13 REGENT U. L. REV. 447, 461–62 (2001).

[167] 366 U.S. 420 (1961).

[168] 482 U.S. 578 (1987).

[169] Several authors have defended religious activism in the public square, and it is beyond the scope of this Article to articulate those arguments. For a positive overview of the role of religious faith in American civic discourse, see BRENDAN SWEETMAN, WHY POLITICS NEEDS RELIGION: THE PLACE OF RELIGIOUS ARGUMENTS IN THE PUBLIC SQUARE (1996). For a detailed historical overview of religion's role in American politics, see RELIGION AND AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE PRESENT (Mark A. Noll & Luke E. Harlow eds., 2d ed. 2007).

purpose prong as requiring an exclusion of religious motivation from public life make a critical error regarding the distinction that needs to be drawn between the need for a law to have a secular purpose and the motivation legislators and other policy makers may have in supporting such a secular purpose. Even assuming that it is possible to accurately determine the motives of legislators and other policy makers (an assumption that is far from beyond dispute), the ambiguity caused by the Court's jurisprudence in this area obscures the fact that it is possible for a law to have a secular purpose and, at the same time, be supported by law makers because of religious motivations.[170]

There is scholarly support for the possibility of finding overlap between religious conviction and secular purpose in the law.[171] "Intent generally concerns the institutional or individual author's meaning which is given to the words that make up the legal text. Purpose, on the other hand, more directly involves the broader teleological issues (the goals) which the text was designed to address and accomplish."[172] By not properly distinguishing between the motivation of policy makers and the purpose of the policies enacted, the Court risks obscuring the vital distinction between intention and purpose, leading to uncertainty regarding the rights of religious believers to fully exercise political liberty.

A closer examination of the implications of *Edwards v. Aguillard*[173] demonstrates that the Court correctly struck down the Louisiana statute. The state of Louisiana had indeed violated the Establishment Clause by mandating that "creation science" and Darwinian evolution were only to be taught together.[174] But the Court made a mistake in assuming that the religious motives for supporting the law of some members of the Louisiana legislature tainted the statute.[175] The law

---

[170] *See* Epperson v. Arkansas, 393 U.S. 97, 113 (1968) (Black, J., concurring) ("And this Court has consistently held that it is not for us to invalidate a statute because of our views that the 'motives' behind its passage were improper; it is simply too difficult to determine what those motives were."). Of course, ignoring evidence of a policy maker's intention brings its own risks from an interpretive perspective—texts can be read after they have been enacted in ways that go far beyond the initial intention of their authors. *See* Stanley Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495, 503 (1982) ("Any text, whatever its conditions of production, is capable of being appropriated by any number of persons and read in relation to concerns the speaker could not have foreseen.").

[171] Robert John Araujo, S.J., *Method in Interpretation: Practical Wisdom and the Search for Meaning in Public Legal Texts*, 68 MISS. L.J. 225 (1998).

[172] *Id.* at 296.

[173] 482 U.S. at 581, 596 n.18, 597 (invalidating Louisiana statute that mandated the teaching of "creation science" from a literal reading of the Book of Genesis whenever a public school's curricula also included teaching Darwinian evolution).

[174] *Id.* at 591, 597.

[175] *See id.* at 591.

violated the Establishment Clause not because religious people supported it, but because it overtly sought to have a particular religious doctrine taught as a part of the science curriculum in Louisiana public schools. There was no need for the Court to look at the motivation of the legislators in drafting the law. The law was unconstitutional on its face: it attempted to use the public schools to teach religious doctrine.[176] Even if one accepts that the Court was correct in examining the views of the legislators who supported the Louisiana creationism law, the Court's reasoning confused the law's stated purpose with the subjective motivation of the individual legislators who supported the law. The law's overt purpose was to foster the teaching of a religious belief—a literal reading of the creation accounts in the Book of Genesis—in the public schools as a counter to the teaching of the theory of evolution. There simply was no need for the Court to proceed any further. But the Court did proceed further by examining the motivation of the legislators, looking not just at the purpose that they had hoped to achieve (which in this case was clearly unconstitutional) but also why they wished to achieve that purpose.[177] This approach to motivation and purpose implies that religious and secular values cannot share perspectives on issues, even if those perspectives are motivated by different principles and sources of meaning.

Such a broad conflation of motivation and purpose inherent in such an approach can lead to the unnecessary opening of a Pandora's box. As Justice Scalia pointed out in his dissenting opinion in *Edwards*, religious beliefs can motivate a wide range of public policy positions.[178] To deprive religious believers of the right to influence public policy could, he cautioned, have disastrous implications for movements toward social justice.[179] Justice Scalia noted, "Today's religious activism may give us the [Louisiana creationism law], but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims."[180] The conflation of purpose with motivation has the potential to imperil the validity of legislation dealing with topics that have nothing to do with the interplay of religious institutions and the government.

Running with Justice Scalia's idea, imagine that a state legislature enacted a law mandating humanitarian assistance for individuals living with HIV infection. Under this program, medical tests and medication

---

[176] *Id.* at 594; Stone v. Graham, 449 U.S. 39, 41–42 (1980) (posting of the Ten Commandments on school walls had no secular legislative purpose and violated the Establishment Clause); Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 225 (1963) (striking down an effort to use the public schools to foster devotion to the Bible).

[177] *Edwards*, 482 U.S. at 592–93.

[178] *Id.* at 615–16 (Scalia, J., dissenting).

[179] *Id.*

[180] *Id.* at 615.

are provided to low-income patients who are infected with the virus. The law arguably has a secular purpose: to provide medical assistance to individuals in need. No churches are directly funded by the program, nor are any religious activities sponsored; the law simply provides for medical tests and medication to those infected with HIV. Several members of the legislature support this law out of religious conviction. For example, they may belong to churches, synagogues, temples, mosques or other religious institutions that undertake outreach ministries to individuals with HIV, or they may believe, as a matter of general religious principle, that all individuals who suffer illness have a right to necessary medical care. In any event, these legislators' support for the law is predicated on their religious conviction—and they say so, right on the floor of the state assembly when the program is being debated prior to enactment. It simply boggles the mind that such statements of motivation could possibly trigger the Establishment Clause and render the program unconstitutional for a lack of a sufficiently secular purpose. The law has a purely secular purpose: helping those who are ill or who need treatment to prevent becoming ill, but it does lack a purely, or perhaps even predominantly, secular motivation. In such a case, the motive of the legislators in approving the humanitarian legislation should be irrelevant to the constitutionality of the law. And if motive is off-limits in this particular example, then motive should be off-limits in general. So long as a law has a secular purpose, the motivation of the legislators in voting for it should be beyond the scope of review for Establishment Clause purposes.

This is not to say that the concerns raised by either of the previously discussed exclusionist camps regarding religious motivation and religious argument in the public square are without merit. Some of the Founders shared Sullivan's concern, for example, about breeding factionalism as a result of increased religious motivation in the public square, and, as previously discussed, factionalism was one of the concerns behind the inception of the Establishment Clause.[181] The concern over factionalism was one of the key issues at the time of the founding.[182] It raised questions regarding political divisions in general, and how to control factions arising from these divisions in a way that would foster the common good of the fledgling Republic. The problem of factionalism is one that should be acknowledged, if for no other reason than the fact that many of the current political issues that religious

---

[181] Sullivan, *supra* note 6, at 202–14.

[182] THE FEDERALIST NO. 10 (James Madison); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 251 (1995) (Stevens, J., dissenting) (citing THE FEDERALIST NO. 10); Rutan v. Republican Party of Ill., 497 U.S. 62, 82 n.3 (1990) (Stevens, J., concurring); Jones v. Bates, 127 F.3d 839, 859 (9th Cir. 1997) (citing THE FEDERALIST NOS. 10, 51, 63 (James Madison), NO. 78 (Alexander Hamilton)).

values can strongly impact —abortion, same-sex marriage, embryonic stem cell research, amid others—tend to have a high temperature, so to speak, when it comes to public debate. It is questionable, though, whether excluding religious motivation from the public square would remove any of the divisiveness from these issues. It seems more likely that it is the very nature of those issues themselves that raises the temperature of public debate and not the religious faith, or lack thereof, that motivates citizens and public officials engaged in the response of the body politic to those topics.[183]

"Politics," as Harvard University political science professor Harvey Mansfield has written, "is about what makes you angry, not so much about what you want."[184] The argument that religiously motivated political activism should be constitutionally disfavored because it is divisive overlooks the fact that all politics is divisive in some way or another and that secular political motivations, no less than religious ones, can fragment the public square, as well. As Circuit Judge Michael W. McConnell has argued, the idea that religiously motivated public activism is somehow uniquely divisive "falls short on empirical grounds."[185] It also fails, he contends, to account for the fact that religious activism has been an integral part of an American political process, a process that by its very nature tends to dilute contentiousness by "fostering compromise and mutual accommodation . . . ."[186] And while there is little doubt that those who act out of religious motivation in the public square sometimes exude an excess of zeal, the participation in our political system of people "animated by deep moral commitments . . . can spur the conscience of the nation."[187] McConnell adds, "It is no accident

---

[183] *See* Harvey Mansfield, *Atheist Tracts: God, They're Predictable*, WKLY. STANDARD, Aug. 13, 2007, at 13, 14 ("It is not religion that makes men fanatics; it is the power of the human desire for justice, so often partisan and perverted. That fanatical desire can be found in both religion and atheism. In the contest between religion and atheism, the strength of religion is to recognize two apparently contrary forces in the human soul: the power of injustice and the power, nonetheless, of our desire for justice. The stubborn existence of injustice reminds us that man is not God, while the demand for justice reminds us that we wish for the divine. Religion tries to join these two forces together.").

[184] Harvey Mansfield, *How to Understand Politics*, FIRST THINGS, Aug./Sept. 2007, at 41, 42.

[185] Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 649 (1999).

[186] *Id.* at 650.

[187] *Id.* at 649; *see also* Kathleen A. Brady, *Religious Group Autonomy: Further Reflections About What is at Stake*, 22 J.L. & RELIGION 153, 167 (2007) ("Religious groups speak to us not only about the divine but also about the social and civic concerns of the larger community, and our collective progress depends upon the range of insights that

that virtually every significant social reform movement in our history has been led by religious activists."[188]

If the concern over divisiveness is insufficient to justify the exclusion of religious motivation from the public square, what about the view, similar to that put forward by Perry and Greenawalt, that religious motivation should be curtailed or at least made to partner with principles that do not reflect religious ideology? There certainly is much to be said for this approach in American public life from a prudential standpoint. America is an increasingly pluralistic society, and its religious life is becoming increasingly diverse and fragmented. Law and politics are practical endeavors and, as a practical matter, if they want to be successful in the civic arena, religious believers active in the public square will increasingly need to couch their positions in language that will appeal to individuals who do not accept their particular religious commitments and arguments. A speaker who addresses a particular public issue by saying that her interpretation of a religious doctrine or sacred text resolves a given policy question may certainly be compelling to herself, but that does nothing to convince those who do not share her belief in the normative nature of the doctrine or text or in her interpretive approach. The well-worn slogan of the evangelist—"the Bible says"—is only persuasive, after all, to those who believe in the authority of the Bible. For this reason, it is beneficial for religious believers in the public square to seek to provide non-religious arguments to support their public policy positions. In so far as such practical political considerations encourage religious believers to seek further

---

different traditions provide, including insights that may initially seem unorthodox and incorrect."). Furthermore, in modern republics,

> political liberty is more in need of the sense of doubt proper to the secular soul than the certainties of religious faith. It needs people who have strong views about political and moral values but with equal passion believe in and experience these values not as absolute truths but as possible choices alongside other possible choices.

MAURIZIO VIROLI, REPUBLICANISM 92–93 (1999). For a convincing counter-view to Viroli's position, see CHRISTOPHER LASCH, THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY 242–43 (1995). Lasch aptly notes that modern thinkers often misunderstand the relationship of religion in regard to certainty and doubt:

> In the commentary on the modern spiritual predicament, religion is consistently treated as a source of intellectual and emotional security, not as a challenge to complacency and pride. Its ethical teachings are misconstrued as a body of simple commandments leaving no room for ambiguity or doubt. . . .
>
> What has to be questioned here is the assumption that religion ever provided a set of comprehensive and unambiguous answers to ethical questions, answers completely resistant to skepticism, or that it forestalled speculation about the meaning and purpose of life, or that religious people in the past were unacquainted with existential despair.

Id.

[188] McConnell, *supra* note 185, at 649.

support for their positions beyond the shoals of doctrine and sacred texts, such considerations can be quite helpful both for those religious believers who are engaged in the civic arena and for our democratic polity in general.

But to transform such prudential concerns into an abstract legal doctrine that renders religious activism in the public square constitutionally suspect is problematic at the least. In sum, if the simple presence or preponderance of religious motivation in support of a particular law is enough to render it constitutionally suspect, then virtually no piece of legislation or government policy will be safe from constitutional challenge under the Establishment Clause. The war in Iraq, Hurricane Katrina Relief, same-sex marriage, embryonic stem-cell research, and universal access to health care—all of these issues have proponents and opponents who are motivated, at least in part, by religious faith and values. Under the exclusionist perspective toward religious motivation in public life, any government action, pro or con, on those issues could legitimately be disqualified on the basis of a violation of *Lemon*'s secular purpose requirement. As Russell Kirk once observed, "Religious concepts about order and justice and freedom powerfully influence the political beliefs of the large majority of American citizens," and that such influence "is not confined to one party."[189]

Embracing the exclusionist perspective would have wide-ranging and absurd results because of its massive undermining of public policy. Thus, that perspective will likely be avoided in one of three probable ways: 1) the courts could seek to undermine the secular purpose prong of the *Lemon* test itself; 2) the courts could adopt either a thinly-veiled or perhaps even overtly partisan approach to such issues, allowing certain religiously-motivated government acts to withstand Establishment Clause scrutiny while ruling other religiously-motivated acts unconstitutional;[190] or 3) the courts could clearly distinguish between motivation and purpose for Establishment Clause purposes. The first option would result in grave damage to the Court's religious liberty jurisprudence by depriving the courts of a useful tool to enforce the strong institutional separation of religion and government that stands as one of the core principles of the Establishment Clause. The second option would have disastrous consequences for the judiciary's fundamental integrity as a non-political branch of government. The third option better fits the Court's consistent efforts to avoid excessive co-mingling of church

---

[189] KIRK, *supra* note 148, at 157.

[190] For an argument in favor of judges applying legal texts in light of their own personal political convictions, see Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 544–45, 547 (1982).

and state on the one hand, while avoiding the pitfalls of the first two options.[191]

B. What Would the Founders Do?

1. The Historical Context of the Establishment Clause

At the risk of engaging in some "law office history," an analysis of the history surrounding the Establishment Clause will highlight the second problem raised by conflating purpose and motivation under the *Lemon* test: notably, the lack of traction such an approach would have with the historical record of the founding and the establishment of our constitutional order. A close reading of the history behind the Establishment Clause does not indicate that its purpose was to purge religious motivation from civic life.[192] Instead, as originally conceived, the Establishment Clause had two key purposes: first, to prevent the federal government from interfering in existing state establishments and second, to prevent the federal government from engaging in religious favoritism by setting up a national religious establishment.[193] As Leonard W. Levy has noted, the establishment that was targeted included such actions as setting up a government church, providing preferences for one religion over other religions, and providing institutional aid to any religious churches and organizations.[194] This

---

[191] It also has the benefit of comporting with what is largely the current practice in American democracy. As Kathleen A. Brady points out, the American model of politics is one that is open to the richness of both religious conviction and the practice of American constitutional government:

> Informed by our religious and moral traditions, we bring our basic moral values and convictions about social and political truth to bear on our political deliberations as we converse, debate and argue with one another about the appropriate resolution of political questions. We ask ourselves what is right and true when we tackle issues such as poverty, inequality, economic development, the environment, education, family and health. While general agreement may emerge from these debates, more often the outcome is a compromise settled by majority vote.

Brady, *supra* note 187, at 203.

[192] As Russell Kirk stated, "Religion in America never has been a private concern merely." KIRK, *supra* note 148, at 156.

[193] *Id.* at 153–55; *see also* LEVY, *supra* note 148, at 80–84. Levy quotes Madison for the proposition that the "great object" of the Establishment Clause was to limit "the abuse of the powers of the General Government" in the field of religion. *Id.* at 84 (quoting 7 ANNALS OF CONG. 432, 437 (1789) (James Madison, Proposal of Bill of Rights to the House of Representative on June 8); *see also* Leonard W. Levy, *Bill of Rights*, *in* ESSAYS ON THE MAKING OF THE CONSTITUTION 258, 301 (Leonard W. Levy ed., 1987) ("The amendment was meant to prevent congressional legislation concerning [state] establishments and to ensure that Congress could not do what those states were doing.").

[194] Levy, *supra* note 193, at 301. According to the historical context of the Establishment Clause, an establishment "meant public support to all denominations and sects on a nonpreferential basis, not just public support of one over others." *Id.*

institutional concern did not entail hostility to religion or religious values, nor did it exclude the idea, prevalent in the early history of the country through the nineteenth century, that religious faith in general should have a recognized role within the broader culture.[195] Originally, the Establishment Clause only applied to the federal government.[196] Since it applied only to the federal government, it ensured the autonomy of each state to determine whether it would officially recognize a particular religious tradition.[197] While most states provided for religious freedom in their constitutions, some states continued to place limitations on religious liberty by "imposing restraints upon the free exercise of religion and in discriminating against particular religious groups."[198] At the time the Constitution was enacted, almost half of the original Thirteen Colonies still had church establishments and at least four additional states had religious restrictions on public office.[199]

In the young American republic, establishment of religion on the state level was hotly debated.[200] At the time the First Amendment was

---

[195] *See* KIRK, *supra* note 148, at 156 ("[The Establishment Clause] never was meant to signify that the American government was indifferent to religion, or hostile toward it.").

[196] Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 254 (1963) (Brennan, J., concurring); *see also* Permoli v. Mun'y No. 1 of New Orleans, 44 U.S. (3 How.) 589, 606 (1845) ("The limitation of power in the first amendment of the Constitution is upon Congress, and not the states."); RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 432 (1974); Clifton B. Kruse, Jr., *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 WASHBURN L.J. 65, 84–85 (1963).

[197] CARTER, *supra* note 7, at 118; KIRK, *supra* note 196, at 436; Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 373 (1954) (stating that the Establishment Clause was meant to function "as a reservation of power to the respective states" and as a "means of forestalling any abridgement of the religious freedom of the free exercise clause on the part of the then suspect federal power"); Kruse, *supra* note 196, at 83–89; *see also* KIRK, *supra* note 148, at 155 ("[The Establishment Clause], in short, declared that the national government must tolerate all religious beliefs—short of such fanatic beliefs as might undo the civil social order; and that no particular church may be endowed by Congress with privileges of collecting tithes and the like. The purpose of the clause was placatory: America's 'dissidence of dissent' was assured that no orthodoxy would be imposed upon their chapels, bethels, conventicles, and churches.").

[198] Everson v. Bd. of Educ., 330 U.S. 1, 14 (1947).

[199] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32–33 (1998) ("In 1789, at least six states had government-supported churches—Congregationalism held sway in New Hampshire, Massachusetts, and Connecticut under local-rule establishment schemes, while Maryland, South Carolina, and Georgia each featured a more general form of establishment in their respective state constitution. Even in the arguably 'nonestablishment' states, church and state were hardly separate; at least four of these states, for example—in their constitutions, no less—barred non-Christians or non-Protestants from holding government office. According to one tally, eleven of the thirteen states had religious qualifications for officeholding.").

[200] *See, e.g.*, James Madison, Memorial and Remonstrance (1785), *reprinted in* 'IN GOD WE TRUST': THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS

ratified, it met with approval from both those who favored state establishments and those who did not.[201] Those in favor of established state churches approved of the Establishment Clause because it prevented the federal government from interfering with the state churches.[202] Those who favored disestablishment approved of the Establishment Clause because it kept the federal government from setting up a national church.[203] Neither group, however, saw in the Establishment Clause a rejection of religious principles; and despite concerns over factionalism, "Americans generally endorsed the idea of a religious foundation for their political order."[204]

Both those in favor of state establishment and those opposed to it wanted the federal government to be neutral, neither supporting state efforts to prohibit establishment or codifying existing state establishments into federal law.[205] The Establishment Clause reads, "Congress shall make no law respecting an establishment of religion . . . ."[206] Congress cannot make a law that establishes religion, but neither can it make a law disestablishing religion in the various states.[207] The text of the Establishment Clause prohibits the Congress from making any law respecting establishment at the state or national level, either pro or con.[208] Thus, through the Establishment Clause, the Constitution at ratification left to the states the decision of whether an official state church was appropriate. By the 1830s the few states with established churches moved towards disestablishment, although it was not until the passage of the Fourteenth Amendment in 1867 that it

---

308, 308–14 (Norman Cousins ed., 1958). Madison delivered this speech to the Virginia legislature as it debated whether to authorize religious assessments out of the state treasury.

201 KIRK, *supra* note 196, at 436.

202 *Id.*; *see also* CARTER, *supra* note 7, at 118.

203 KIRK, *supra* note196, at 436.

204 *Id.* at 438.

205 CARTER, *supra* note 7, at 118.

206 U.S. CONST. amend. I.

207 According to Carter, "there is good reason to think that the principal purpose of the Establishment Clause, and maybe the sole one, was to protect the state religious establishments from disestablishment by the federal government." CARTER, *supra* note 7, at 118; *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION 319 (2005) ("Much of the First Amendment . . . simply textualized the Federalist party line in 1787–88 that Congress had no proper authority to censor opposition speech or meddle with religion in the several states."); Kruse, *supra* note 196, at 83–85.

208 *Cf.* Akhil Reed Amar, *The Bill of Rights as a Constitution*, *in* THE BILL OF RIGHTS: GOVERNMENT PROSCRIBED 274, 311 (Ronald Hoffman & Peter J. Albert eds., 1997) ("The establishment clause did more than prohibit Congress from establishing a national church. Its mandate that Congress shall make no law '*respecting* an establishment of religion' also prohibited the national legislature from interfering with, or trying to *dis*establish, churches established by state and local governments.").

became possible to enforce the prohibitions of the Bill of Rights against individual states.[209] By 1940, the Supreme Court found that the First Amendment's Free Exercise Clause was applicable to the states,[210] and the Court has subsequently recognized that the Establishment Clause is as well.[211]

The Establishment Clause did not simply protect federalism. It also functioned, and continues to function, to prevent the federal government from taking action to establish an official religion for the Union: "Congress shall make no law respecting an establishment of religion"[212] does not simply bind the Congress in regards to the states, it is a declarative statement removing from the federal government as a whole the power to establish religion, period.[213] Many of the early settlers of the United States had migrated to America at least in part to escape laws that forced them to support and attend government churches in Europe.[214] Even though many may have come here to escape religious persecution, tolerance in matters of faith was not always a part of the American experience.[215] Many American minority religious groups, like the Catholics, Baptists, and Quakers, were often the targets of persecution by colonial authorities.[216] The religion clauses were ratified to prevent the federal government of the new republic from sliding into the habits of religious establishment and persecution.[217]

---

[209] Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 253 (1963) (Brennan, J., concurring) ("Whatever limitations [the First] Amendment now imposes upon the States derive from the Fourteenth Amendment."). For a discussion on the incorporation of the Establishment Clause to the states through the Fourteenth Amendment, see Snee, *supra* note 197, at 397–407.

[210] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[211] *Schempp*, 374 U.S. at 255–58 (Brennan, J., concurring) (outlining the major arguments in favor of incorporating the Establishment Clause through the Fourteenth Amendment to the states); *see also* Wallace v. Jaffree, 472 U.S. 38, 49 (1985).

[212] U.S. CONST. amend. I.

[213] *See* McGowan v. Maryland, 366 U.S. 420, 441–42 (1961).

[214] Everson v. Bd. of Educ., 330 U.S. 1, 8–11 (1947).

[215] *Id.* at 9–10; *see also* THOMAS JEFFERSON, REPUBLICAN NOTES ON RELIGION AND AN ACT ESTABLISHING RELIGIOUS FREEDOM, PASSED IN THE ASSEMBLY OF VIRGINIA, IN THE YEAR 1786, *reprinted in* 'IN GOD WE TRUST,' *supra* note 200, at 121, 121–25.

[216] *Everson*, 330 U.S. at 10.

[217] *Id.* at 11. As the Court pointed out, it was not only the official persecution of minority religions that caused "shock [to] the freedom-loving colonials" but also "[t]he imposition of taxes to pay ministers' salaries and to build and maintain churches and church property . . . ." *Id.* Amar explains the emphasis in the early Republic on preventing national establishment while leaving local establishments intact as a result of the lack of a common religious culture in the new nation:

> Given the religious diversity of the continent—with Congregationalists dominating New England, Anglicans down south, Quakers in Pennsylvania, Catholics huddling together in Maryland, Baptists seeking refuge in Rhode Island, and so on—a single national religious regime would have been horribly

Thus, the almost universally acknowledged purpose of the religion clauses is to secure religious liberty for the people of the United States as a whole.[218] To ensure this religious liberty, the Establishment Clause prohibits overt fusion or co-mingling of government and religion.[219] When combined with the Free Exercise Clause, which protects the right of citizens to hold whatever religious views they choose, the two clauses coupled with the Fourteenth Amendment prevent the federal government and the states from establishing an official religious body.[220] There can be no established Church of the United States of America. Yet, while the Establishment Clause was meant to prohibit the institutional alliance of religion and the government, there is no evidence that it was designed to prevent religious believers from taking an active role in public life consistent with their religious principles. Laura Underkuffler-Freund's exhaustive exploration of this point establishes quite clearly that an historical approach to the Establishment Clause does not support the exclusion of "religious values, beliefs, or ideals in the workings of government."[221] Far from seeking to place religious motivation in public life outside the scope of constitutional government, the historical focus of the Establishment Clause according to Laura Underkuffler-Freund has been on preventing "the merger of institutional church and state."[222]

Stephen Carter has pointed out that, when enacted, the Establishment Clause was not intended to protect the state from the church, but it was meant to protect the church from the state.[223] The purpose of the Founders, as Carter explains, was to create a situation where religious believers had the maximum amount of religious liberty

---

> oppressive to many men and women of faith; local control, by contrast, would allow dissenters in any place to vote with their feet and find a community with the right religious tone. On a more positive note, allowing state and local establishments to exist would encourage participation and community spirit among ordinary citizens at the grass roots . . . .

AMAR, *supra* note 199, at 45.

[218] CARTER, *supra* note 7, at 105–06; Douglas W. Kmiec, *Preserving Religious Freedom*, *in* CATHOLICS IN THE PUBLIC SQUARE 90, 94–96 (Thomas Patrick Melady ed., 1995).

[219] *See Everson*, 330 U.S. at 15–16; Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[220] McDaniel v. Paty, 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such.").

[221] Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 980–81 (1995).

[222] *Id.* at 981.

[223] CARTER, *supra* note 7, at 105.

possible in an ordered society.[224] The Establishment Clause makes this possible by denying to the government the authority to control religion through establishment and regulation.[225] The independence of the church from the state was never intended, according to Carter, to strip religious believers and religious groups of their ability to influence and shape public policy.[226] Rejecting modern views that see the Establishment Clause as "the shielding of the secular world from too strong a religious influence," Carter states that "the principal task of the separation of church and state is to secure religious liberty."[227] This liberty is not freedom from religious believers who are motivated by their faith in the public square; it is freedom from government influence on religion.[228]

2. The Example of the Founders

While the Founders as a group varied widely in their own personal religious practice and belief, most of them believed that religion had a crucial role to play in public life and appealed to religious principles to support their views on public policy issues.[229] One of the most famous

---

[224] *Id.* at 105–06.

[225] *Id.* at 106.

[226] *Id.*

[227] *Id.* at 107. Carter is not alone, of course, in this view. Justice O'Connor voiced the same conviction when she wrote that "the goal of the [Religion] Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society." McCreary County v. ACLU of Ky., 545 U.S. 844, 882 (2005) (O'Connor, J., concurring).

[228] CARTER, *supra* note 7, at 108–09.

[229] *See generally* 'IN GOD WE TRUST,' *supra* note 200. This anthology includes writings on religion and public life from Benjamin Franklin, George Washington, John Adams, Thomas Jefferson, James Madison, Alexander Hamilton, Samuel Adams, John Jay, and Thomas Paine. For a comprehensive and balanced overview of the Founders' views of religion, see THE FOUNDERS ON RELIGION (James H. Hutson ed., 2005). For more detailed accounts of the views of the Founders on religion and the American Republic, see generally JAMES H. HUTSON, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC (1998); MICHAEL NOVAK, ON TWO WINGS: HUMBLE FAITH AND COMMON SENSE AT THE AMERICAN FOUNDING (2002); RELIGION AND THE NEW REPUBLIC (James H. Hutson ed., 2000). As Novak notes, "a purely secular interpretation of the founding runs aground on massive evidence." Novak, *supra*, at 7. "Far from having a hostility toward religion, the founders counted on religion for the underlying philosophy of the republic, its supporting ethic, and its sole reliable source of rejuvenation." *Id.* at 111. That the appeal to religious principles and beliefs in support of public policy was not limited to the Founders but was spread throughout early American society during the founding period is demonstrated by the massive amount of political sermons surviving from the colonial and revolutionary periods as well as the early American Republic. A two volume set of such sermons, totaling 1,596 pages, has been published by the Liberty Fund. POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805 (Ellis Sandoz ed., 2d ed. 1998); *see also* GERTRUDE HIMMELFARB, ONE NATION, TWO CULTURES 85–91 (Vintage Books 2001) (1991) (briefly

episodes from the early Republic regarding the use of religious argument to influence public policy is provided by Benjamin Franklin, widely considered to be one of the least pious of the Founders, when he delivered a speech to the Constitutional Convention in Philadelphia in 1787.[230] The convention was deadlocked on several critical issues, and was on the verge of adjourning.[231] Franklin appealed to the assembled delegates, reminding them "that God governs in the affairs of men."[232] Without God's help, Franklin told the convention, the new Republic will have no greater success than the disastrous Tower of Babel.[233]

Among the Federalists, there was a great deal of support for religious interaction in political life. Alexander Hamilton believed that religion was necessary to provide order in society, and that without religion, the only force capable of maintaining civic society was "the terrors of despotism."[234] James Wilson, who was a delegate to the Constitutional Convention, a noted Federalist, and a Supreme Court justice until his death in 1798, spent a good deal of his time outlining the relationship between the positive law and the divine law, particularly in his lectures on Law and Obligations, delivered at Harvard College.[235] Wilson argued that there was a universal law, found in "the bosom of God."[236] He also believed God had established laws, "promulgated by reason and the moral sense" (that is, the natural law) and "promulgated by the holy scriptures . . . ."[237] For Wilson, these sources of law, which apply both to human beings and larger national communities, "flow[] from the same divine source: it is the law of God."[238]

George Washington is one Founder often overlooked in regards to his views on the relationship of religion and politics. Washington was an astute thinker who had an enormous impact on the shape of the new nation. As far as the institutional connection between the national government and religion was concerned, Washington opposed any

---

reviewing the relationship between religion, the American founding, and American politics into the more recent past).

[230] *See* Norman Cousins, *Introduction* to *Benjamin Franklin: "I Never Was Without Some Religious Principles," in* 'IN GOD WE TRUST,' *supra* note 200, at 16, 17–18.

[231] *Id.* at 17.

[232] *Id.* at 18.

[233] *Id.*

[234] KIRK, *supra* note 196, at 433 (quoting Alexander Hamilton, *The Stand No. III* (N.Y., Apr. 7, 1798), *reprinted in* 21 THE PAPERS OF ALEXANDER HAMILTON 402, 405 (Harold C. Syrett ed., 1974)).

[235] 1 JAMES WILSON, *Of the General Principle of Law and Obligation, in* THE WORKS OF JAMES WILSON 49 (James DeWitt Andrews ed., 1895).

[236] *Id.* at 49–50.

[237] *Id.* at 92.

[238] *Id.* at 93.

attempt to use tax dollars to support religious institutions.[239] At the same time, he shared Hamilton's view that religion was vitally necessary for the civic well-being of the Republic.[240] In his First Inaugural Address, Washington stated his belief that God guides the affairs of nations.[241] In his Farewell Address on September 19, 1796, Washington told the nation, "Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports."[242] Washington also urged that national policy in regard to foreign affairs be shaped by religious principles, declaring that religion enjoins the United States to "[o]bserve good faith and justice towards all Nations."[243] Washington's belief that religion was vital to the life of the republic included a strong belief in the necessity of religious freedom. In a letter to the United Baptist Churches in Virginia, written soon after his election to the presidency, Washington reiterated his strong commitment to religious liberty.[244] "If I could have entertained the slightest apprehension, that the constitution framed in the convention, where I had the honor to preside, might possibly endanger the religious rights of any ecclesiastical society, certainly I would never have placed my signature to it . . . ."[245]

Washington also reassured the Baptists that he believed in the necessity of "effectual barriers against the horrors of spiritual tyranny, and every species of religious persecution."[246] In a letter to a church in Baltimore, Washington stated that in America everyone has the right to worship God as his or her own conscience requires, and Washington emphasized that the right to be protected by the law and to hold public office would not be taken away because of an individual's religious beliefs.[247]

---

[239] Letter from George Washington to George Mason (Oct. 3, 1785), *in* 'IN GOD WE TRUST,' *supra* note 200, at 64, 64–65. Washington believed that state tax support for religious bodies was "impolitic." *Id.* at 65.

[240] Letter from George Washington to the Clergy of Different Denominations Residing in and Near the City of Philadelphia (Mar. 3, 1797), *in* 'IN GOD WE TRUST,' *supra* note 200, at 63, 63 (stating "that *Religion* and *Morality* are the essential pillars of Civil society").

[241] George Washington, From the First Inaugural Address (Apr. 30, 1789), *in* 'IN GOD WE TRUST,' *supra* note 200, at 66, 66.

[242] George Washington, Farewell Address (Sept. 19, 1796), *in* 'IN GOD WE TRUST,' *supra* note 200, at 69, 69.

[243] *Id.*

[244] Letter from George Washington to the General Committee of the United Baptist Churches in Virginia (May 1789), *in* 'IN GOD WE TRUST,' *supra* note 200, at 58, 58–59.

[245] *Id.* at 58.

[246] *Id.*

[247] Letter from George Washington to the Members of the New Church in Baltimore (Jan. 27, 1793), *in* 'IN GOD WE TRUST,' *supra* note 200, at 62. For a detailed view of George

Perhaps the two Founders who are most often referenced regarding the Establishment Clause are James Madison and Thomas Jefferson. Jefferson, particularly, is often portrayed as having some degree of hostility to the intersection of religion and public life.[248] However, neither Madison nor Jefferson was as hostile to religion and religious involvement in the public square as they are often portrayed. Jefferson himself based his arguments for disestablishment on religious principles.[249] This can be seen by his free use of religious arguments and language in the bill that he introduced in Virginia to support religious freedom.[250] The bill sought to guarantee religious liberty and to prohibit public taxation for the support of religious institutions, and Jefferson often referred to religious beliefs that supported the purpose of religious freedom.[251] He stated that religious freedom was required because "Almighty God hath created the mind free . . . ."[252] Further, the Act stated that state persecution of people because of their religious beliefs constitutes "a departure from the plan of the Holy Author of our

---

Washington's views regarding religion and public life, see TARA ROSS & JOSEPH C. SMITH, JR., UNDER GOD: GEORGE WASHINGTON AND THE QUESTION OF CHURCH AND STATE (2008).

248 AMAR, *supra* note 199, at 34 (noting that Jefferson is "often invoked today as a strong opponent of religious establishment . . .").

249 *See* JEFFERSON, *supra* note 215, at 125–27. While Jefferson was a rigorous opponent of federal religious establishments, he was less opposed to state recognition of religion in public life:

> Although he argued for an absolutist interpretation of the First Amendment—the federal government should have *nothing* to do with religion in the states, control of which was beyond Congress's limited delegated powers—he was more willing to flirt with governmental endorsements of religion at the state level, especially where no state coercion would impinge on dissenters' freedom of conscience. The two ideas were logically connected; it was especially easy to be an absolutist about the federal government's involvement in religion if one understood that the respective states had broad authority over their citizens' education and morals.

AMAR, *supra* note 199, at 34–35; *see also* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 55–59 (2002). As Dreisbach explains, while Jefferson had a strong commitment to the separation of church and state at the national level, he viewed the principle largely as a jurisdictional one:

> The principal importance of his "wall," like the First Amendment it metaphorically represents, is its clear demarcation of the legitimate jurisdictions of federal and state governments on religious matters. In short, the "wall" constructed by Jefferson separated the federal regime on one side and ecclesiastical institutions and state governments on the other. This jurisdictional (or structural) interpretation of the metaphor is rooted in the text, structure, and historic, pre-Fourteenth Amendment understanding of the Bill of Rights, in general, and of the First Amendment, in particular.

Id. at 56.

250 JEFFERSON, *supra* note 215, at 125–27.

251 *Id.*

252 *Id.* at 125.

religion . . . ."[253] To use the authority of the state to compel someone to pay a tax to support a religion that he does not believe is, according to Jefferson's Act, "sinful."[254] Finally, not only do religious requirements for public office deprive people of their civil rights, they also corrupt religion "by bribing, with a monopoly of worldly honors and emoluments, those who will externally profess and confirm to it . . . ."[255]

James Madison also used religious principles as grounds for public policy positions, particularly to oppose a Virginia proposal to support Protestant religion teachers.[256] Madison believed that the state should not tax citizens to support religious institutions or the missionary efforts of religious believers.[257] His defense of the separation of church and state was grounded in his belief that the state was subject to God, and could not require of any person a higher loyalty than that person's loyalty to God.[258] "Before any man can be considered as a member of Civil Society," Madison wrote, "he must be considered as a subject of the Governor of the Universe . . . ."[259] Madison's basis for defending religious liberty was not that the state needed to be protected from the church, or that theological motivation had to be purged from public life; instead, Madison argued for the institutional separation of church and state to protect the church.[260] Madison believed that abuses of religious liberty are not offenses against human beings, but against God Himself.[261] As such, religious violations should only be punished by God.[262] To interject the state into the business of the church by giving government subsidies to teach religion would engage the state in something beyond its competence and endanger the integrity of religion itself.[263] Madison's religious objections to government financial support for religion also included explicitly Christian themes as well. In his sixth objection to the tax, Madison stated that the establishment of religion is "a contradiction to the Christian Religion itself," for it forces believers to depend on the state rather than on God.[264] In objection twelve, Madison stated that the tax will actually burden the Christian faith, preventing the spread of

---

253 *Id.*

254 *Id.* at 126.

255 *Id.*

256 *See* Madison, *supra* note 200, at 308–14.

257 *See id.* at 309–10.

258 *Id.*; *see also* CARTER, *supra* note 7, at 116; KIRK, *supra* note 196, at 436.

259 Madison, *supra* note 200, at 309.

260 *See id.* at 310; *see also* CARTER, *supra* note 7, at 116; KIRK, *supra* note 196, at 436.

261 Madison, *supra* note 200, at 310.

262 *Id.*; *see also* CARTER, *supra* note 7, at 116.

263 Madison, *supra* note 200, at 310.

264 *Id.* at 311.

"the light of Christianity" to those who languish "under the dominion of false Religions . . . ."[265] These uses of religious belief to support his position demonstrates that Madison, *the man who wrote the First Amendment*,[266] did not believe that disestablishment (a principle for which he had fought long and hard) required the exclusion of religious motivation in public life . Madison used religious arguments and principles to foster support for disestablishment, grounding his efforts to find the establishment of religion in Virginia in his religious belief that only God could judge religious offenses.[267]

The compatibility of religious motivation as a basis for public policy with the principle of nonestablishment is also demonstrated by the fact many of those who most strongly opposed establishments of religion in early America did so out of theological motivation. As Leonard W. Levy has pointed out, among the most fervent supports of disestablishment in the early American republic were evangelical Protestants.[268] Presbyterians, Quakers, and Baptists were all in the forefront of seeking disestablishment, and all on religious grounds.[269] These evangelicals believed that God's will demanded the separation of church institutions and the state, and they acted on those beliefs in the public square. They did not put their arguments in secular terms; rather, they demanded the separation of church and state because they believed that God willed it, and the purity of religious truth was supported by it.[270] Their actions were not carried out in a spirit of secularism, but rather, in a spirit of submission to the will of God. It would be tragic if the principle of religious freedom that they fought so hard for is used to deprive modern-day religionists of the same right to have their religious ideas influence their political views.

This fundamentally religious commitment to the principle of nonestablishment is reflected in the work of one of the earliest commentators on the Constitution, St. George Tucker.[271] In his discussion of the Constitution's protection of religious liberty and freedom of conscience, Tucker notes that those rights are "absolute

---

[265] *Id.* at 312–13.

[266] KIRK, *supra* note 196, at 435 (discussing Madison's authorship of the First Amendment).

[267] Madison, *supra* note 200, at 310.

[268] LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 63–64 (2d ed., North Carolina Press 1994) (1986).

[269] *Id.* at 63.

[270] *Id.* at 64–65. Levy recounts that the early opposition to state support for religion was motivated by a fear that official support would corrupt the church with error. He quotes one petition from Cumberland County, dated October 26, 1785, that said, "religious establishment has never been a means of prospering the gospel." *Id.* at 64.

[271] *See generally* ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS (Liberty Fund, Inc., 1999) (1803).

rights which man hath received from the immediate gift of his Creator . . . ."[272] While governments from the beginning have sought to restrain such rights, such attempts are in vain—the "right of personal opinion . . . in all matters relative to religion" and in "speech and of discussion in all speculative matters, whether religious, philosophical, or political" cannot be successfully constrained because they are part and parcel of human nature itself.[273] Our Constitution's guarantee of religious liberty is not simply a grant from the political machinery of the government, it is "interwoven in the nature of man by his Creator . . . ."[274] According to Tucker, the American system was not content with merely with toleration, where an established church permits dissenters to worship while retaining a privileged place for itself within the political system. Rather, the American system sought to follow more closely the true teachings of Jesus Christ by extending true equality and rejecting any establishment of religion.[275] As Tucker wrote:

> Jesus Christ has established a perfect equality among his followers. His command is, that they shall assume no jurisdiction over one another, and acknowledge no master besides himself. It is, therefore, presumption in any of them to claim a right to any superiority or pre-eminence over their brethren. Such a claim is implied, whenever any of them pretend to tolerate the rest. Not only all christians, but all men of all religions, ought to be considered by a state as equally entitled to its protection, as far as they demean themselves honestly and peaceably. Toleration can take place only where there is a civil establishment of a particular mode of religion; that is, where a predominant sect enjoys exclusive advantages, and makes the encouragement of it's [sic] own mode of faith and worship a part of the constitution of the state; but at the same time thinks fit to suffer the exercise of other modes of faith and worship. Thanks be to God, the new American states are at present strangers to such establishments. In this respect, as well as many others, they have shewn in framing their constitutions, a degree of wisdom and liberality which is above all praise.[276]

Tucker lists a parade of horribles associated with religious establishment, noting at the end that "genuine religion is a concern that lies entirely between God and our own souls."[277] Any attempt to use government to aid religion results in religion being "contaminated" by

---

[272] ST. GEORGE TUCKER, *Of the Right of Conscience; and of the Freedom of Speech and of the Press*, *in id.*, at 371, 371.

[273] *Id.* at 372.

[274] *Id.*

[275] *Id.* at 372–73.

[276] *Id.*

[277] *Id.* at 373.

"worldly motives and sanctions . . . ."[278] Instead of seeking to use the power of the government to aid religion, public officials should inculcate by example a "conscientious regard" for religion "in those forms which are most agreeable to their own judgments, and by encouraging their fellow citizens in doing the same."[279] As Tucker puts it, any attempt at using the power of the state to coerce religious belief "has done [religion] an essential injury, and produced some of the worst consequences."[280] By establishing official orthodoxies, establishments also harm efforts at improving human conditions in the world.[281] To prevent such evils, and to foster the rise of a "rational and liberal religion,"[282] Americans are guaranteed the right of liberty of conscience in regard to religion, a right protected, as Tucker notes, by the Constitution and its First Amendment.[283]

One need not agree with Tucker regarding the basis of the Establishment Clause to see that in his work, and in the work of the Founders in general, the idea of nonestablishment was not fostered out of a desire for a public arena desiccated of all religious conviction. The push towards nonestablishment was motivated in large part by a religious motivation—a motivation which sought to purify religion from too great a dependence upon and control by the secular power of the government. Hence, the irony is that the Establishment Clause that some would use to restrict the scope of religious motivation in public life is itself largely a product of religious motivation. Understanding the perspective of the founding period regarding the permissibility of religious motivation in civic life does not entail eliminating the barrier between the institutional power of religion and the state.

It is critically important that any theory of the Establishment Clause also incorporate the wisdom of the American founding in distinguishing the proper sphere of government from the proper sphere of religion. As Fr. John Courtney Murray, S.J., described it,

> the American system made government simply an instrumental function of the body politic for a set of limited purposes. Its competence was confined to the political as such and to the promotion of the public welfare of the community as a political, i.e., lay, community. In particular, its power of censoring or inhibiting utterance was cut to a minimum, and it was forbidden to be the secular arm of any church. In matters spiritual the people were committed to their freedom, and religion was guaranteed full freedom

---

278 *Id.*

279 *Id.*

280 *Id.*

281 *Id.* at 374.

282 *Id.* at 375.

283 *Id.* at 376.

> to achieve its own task of effecting the spiritual liberation of man. To this task the contribution of the state would be simply that of rendering assistance in the creation of those conditions of freedom, peace, and public prosperity in which the spiritual task might go forward.[284]

Part of the genius of the founding was in recognizing that neither religion nor government is aided by a formal alliance between the two. Whenever such alliances occur, government power is extended into areas beyond its competence and religion is degraded into areas below its dignity. Any action by the government to force people to accede to religious beliefs, to conform to particular types or theories of divine worship, to provide direct tangible financial benefits to religious institutions must be held to violate the Establishment Clause.[285] The Establishment Clause means that the government may not erect a state church that is supported by taxes and at the mercy of the secular order for its very existence.[286] To employ a sentiment from St. George Tucker, both the church and the state must be kept free from such corruption.[287] For this reason, no matter what the motivation, there must be a robust institutional separation of religious institutions and the government. Under the American system of constitutional order, the government has no business enacting laws to foster purely religious purposes; the salvation of souls and the strengthening of faith are not the concern of the government because the temporal power is utterly incompetent to deal with such issues. The government should restrict its activities to providing for the secular needs and benefits of the population as a whole in accord with the common good. Such an approach, however, does not mean that a secular constitutional order in line with the Founders' vision must exclude religious values from influencing public laws.[288] Quite to the contrary, the practice and principles of the American founding indicate that religious values and ideals have a key role to play within the public arena.

---

[284] JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS 182 (1960).

[285] As the Supreme Court noted in *Sch. Dist. of Grand Rapids v. Ball*, such activities violate the very core of the Establishment Clause: "The Establishment Clause . . . primarily proscribes 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" 473 U.S. 373, 381 (1985) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

[286] *Id.*; *see also* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

[287] *See* TUCKER, *supra* note 272, at 371–73.

[288] *See* Araujo, *supra* note 7, at 493. The purpose of Araujo's article is to demonstrate that it is both Constitutionally permissible and helpful (and quite possibly essential) to American republican democracy that the church (and individuals holding religious beliefs) (can and ought to) participate in the public discourse involving a wide variety of political and social issues with which our local, state, and national communities are concerned.

Id.

C. Equal Citizenship and Religious Motivation

1. Religion and the Law: Harmonizing and Coinciding

A robust distinction between religious institutions and the government does not mandate the separation of religious values from the public square; rather, the principle of religious liberty guarantees religious believers the right to participate fully in the civic discussion of the American polity. Both of the religion clauses of the First Amendment share a single primary purpose: to ensure that people in the United States enjoy religious liberty.[289] The Establishment Clause should not be used as a tool to limit religious liberty or marginalize religious believers within the body politic—to so use the clause in such a manner is to do violence to its very reason for being. Nothing in the history of the clauses or in the founding of the United States supports the assertion that the purpose of the First Amendment was meant to prohibit people of faith from acting in accord with their religious beliefs, including in their activities as voters and elected officials. Using the Establishment Clause to mandate the constitutional impermissibility of religious motivation in public life would be to misconstrue the singular purpose of both religion clauses.

McGowan v. Maryland most strongly supports the permissibility of religious motivation in public life.[290] In *McGowan*, the appellants challenged a Maryland law that required, with some exceptions, that all commercial activity cease on Sundays.[291] Ms. McGowan and six other employees of a department store were convicted of violating the law and were fined.[292] They appealed their convictions, first to the Maryland Court of Appeals, which upheld the conviction, and then to the Supreme Court of the United States.[293] The appellants argued that the law violated the Establishment Clause because the purpose of the law was to encourage church attendance.[294] The Court disagreed, ruling that Maryland's Sunday closing law was constitutional.[295]

McGowan was a pre-*Lemon* case, but the Court basically employed the secular purpose criteria that comprises the first prong of the *Lemon* test.[296] The Court found that the Establishment Clause does not prohibit the federal or state governments from enacting laws or regulations that

---

289 CARTER, *supra* note 7, at 105–06. Kmiec, *supra* note 218, at 94–95.

290 366 U.S. 420 (1961).

291 *Id.* at 422.

292 *Id.* at 422, 424.

293 *Id.* at 424–25.

294 *Id.* at 431.

295 *Id.* at 452–53.

296 *Id.*; *see also* Lemon v. Kurtzman, 411 U.S. 192 (1973).

coincide with the tenets of a particular religion or religion in general.[297] After a historical survey of Sunday closing laws, the Court acknowledged that the motivation behind the Sunday closing law was originally religious in nature, but this religious motivation did not automatically invalidate the law.[298] Similarly, as the Court pointed out, murder, adultery and polygamy, theft, and fraud are all illegal, and are all prohibited by the "Judeo-Christian religions . . . ."[299] Such religious roots, the Court noted, do not invalidate laws prohibiting such activities under the Establishment Clause, so long as the legislature concludes "that the general welfare of society, *wholly apart* from any religious considerations, demands such regulation."[300] So long as laws serve secular purposes and meet secular needs, they can be harmonious with religious teaching.[301] The Court found in *McGowan* that the Sunday closing law had a constitutionally sufficient secular justification, namely the provision to the general population of a day of rest to recover from the past week and to prepare for the coming one.[302] Since the law had a secular purpose, the religious motivation that may have supported the law did not present a fatal concern under the Establishment Clause. While the purpose of the law must be secular, the motivation of those enacting the law may be formed and shaped by religious values, traditions, histories, and perspectives without fear that any coincidental harmonies between secular law and sacred principles will result in a constitutional violation.[303]

One issue that the Court wrestled with in *McGowan* was the simple fact that many of our laws have their roots in religion or in the ethical teachings proposed by the various religious traditions historically dominant in western civilization.[304] As constitutional law professor Jesse Choper has observed, this creates a problem when attempting to police the boundary between permissible and impermissible religious influence on the law and public policy. As he points out, many of our laws, including our prohibitions against murder and theft, have their origin in religious morality, and "rest to a significant degree on religious understandings of the world, of human beings, and of social relationships."[305] Given this fact, it is no surprise that the question of

---

[297] *Id.* at 442.

[298] *Id.* at 445–49.

[299] *Id.* at 442.

[300] *Id.* (emphasis added).

[301] *Id.*

[302] *Id.* at 450–52.

[303] *Id.* at 442.

[304] *Id.*

[305] CHOPER, *supra* note 11, at 47 (quoting Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1, 7 (1991)).

religious motivation on civic law was not definitively settled by *McGowan*, but reappeared in the post-*Lemon* case, *Harris v. McRae*.[306]

In *McRae*, the Supreme Court ruled on the constitutionality of the Hyde Amendment, a federal law that restricts Medicaid payments for abortion-related medical services.[307] Opponents of the law argued that the law lacked a necessary secular purpose under the *Lemon* test because it was based on the social teaching of the Roman Catholic Church that human life begins at conception and that abortion is a sin.[308] The Court rejected the argument.[309] Quoting *McGowan*, the Court found that while a law must have a secular purpose, that purpose is not jeopardized when it "'happens to coincide or harmonize with the tenets of some or all religions.'"[310] The Court drew an analogy between the moral teaching of the Judeo-Christian tradition regarding the sinfulness of stealing with secular laws prohibiting larceny, reasoning that so long as there was not "more" in the record to indicate an Establishment Clause violation, such a coincidental concord between religious teaching and secular law did not render a law constitutionally void.[311]

While *McGowan* and *McRae* affirm that the mere concordance of public law with religious values is not sufficient to render laws unconstitutional, the rule nevertheless places religious motivation in public life in something of a suspect category.[312] So long as the parallels between religious values and secular law remain at the level of happenstance harmonies, a constitutional problem is avoided, but if there is, in the *McRae* Court's phrasing, "more" to the congruence of law and religious principle than simple coincidence, the Establishment

---

306 448 U.S. 297 (1980); *see also* Lemon v. Kurtzman, 411 U.S. 192 (1973).

307 *Id.* at 300–301.

308 *Id.* at 318–19.

309 *Id.* at 319–20.

310 *Id.* at 319 (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

311 *Id.* at 319–20.

312 *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting) (citing *McGowan*, 366 U.S. at 429–53, to contend that "[t]he legitimacy of secular legislation depends . . . on whether the State can advance some justification for its law beyond its conformity to religious doctrine") *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). *But see* Webster v. Reprod. Health Servs., 492 U.S. 490, 566 (1989) (Stevens, J., concurring in part and dissenting in part) (citing *McGowan*, 366 U.S. at 442, and *McRae*, 448 U.S. at 319–20, to support his position that the unconstitutionality of a state law stating that life begins at conception "does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions or on the fact that the legislators who voted to enact it may have been motivated by religious considerations"); Bd. of Educ. v. Mergens, 496 U.S. 226, 249 (1990) (O'Connor, J., plurality opinion) ("Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.").

Clause could be implicated.[313] Such an approach goes far to at least ensure the preservation of the historical and cultural assumptions built into Anglo-American law over the centuries of its germination within a social, political, and cultural context shaped by the religious background of western civilization; it does little to prevent the First Amendment from being used to cudgel lawmakers and even ordinary citizens who, in the exercise of their roles within our polity, seek to be informed and even guided by their respective religious traditions.

2. The Compartmentalization of the Human Person

Infringing on the activities of religious believers as citizens and participants in our political process is significant. In fact, it strikes at the very heart of what the religion clauses together are supposed to provide: the ability of religious believers to live lives in accord with their faith commitments and to not be excluded from public life because of their religious views. As Circuit Judge Michael W. McConnell has noted, requiring believers to provide a secular rationale for their positions in the public square "degrades religious persons from the status as equal citizens."[314] The consequences of this kind of degradation of citizenship rights requires a person of faith exercising her rights in the public square to commit an act of psychological apartheid: she must rigorously keep separate her religious views from her non-religious views.[315] Even Michael Perry, has acknowledged the negative consequences that such spiritual schizophrenia can cause in the integrity of a religious believer's personhood.[316] To commit such an act, Perry says, "would preclude *her*—the *particular* person *she* is—from engaging in moral discourse with other members of society."[317]

Hence, to force religious believers to deny their religious convictions when entering the political arena is to force them to deny their ability to participate in American civic institutions without doing significant violence to their own personal integrity and wholeness. It places the believer in the position of having to obey her conscience or the requirements of the state, to "bracket" her faith from her own personality—"precisely what," as Jean Bethke Elshtain notes, "a devout

---

[313] *McRae*, 448 U.S. at 319–20.

[314] McConnell, *supra* note 185, at 656.

[315] *Cf.* CARTER, *supra* note 7, at 56 (citing MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 72–73 (1988) (explaining the difficulty of "bracketing" religious convictions from one's personality)).

[316] PERRY, supra note 315, at 72–73.

[317] *Id.* at 73. That assumes, however, that such an act of psychological compartmentalization is even possible, an assumption that is difficult to sustain. *See generally* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 101 (2007).

person cannot do."[318] If the religion clauses were meant to prevent anything, it is such a situation. Any theory of the Establishment Clause that seeks to be true to the overarching purpose of the clause itself—namely, religious liberty—and that seeks to view the Establishment Clause as an ally rather than an enemy of the Free Exercise Clause must make room for religious believers to be believers in the public square.[319]

Strong support for this position is found in Justice Brennan's concurrence in *McDaniel v. Paty*.[320] In *McDaniel*, decided several years after *Lemon v. Kurtzman*, the Court voided a section of the Tennessee constitution that prohibited ordained clergy from holding public office.[321] The Court found that the provision violated the First Amendment's Free Exercise Clause,[322] but Justice Brennan determined that Tennessee's law had also impacted the citizenship rights of religious believers protected by the Establishment Clause.[323] Forcefully, Justice Brennan refused to countenance any limitation on the rights of religious individuals and institutions to participate fully and vigorously in the public square. "The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally."[324] Beyond ensuring that the government is prevented from "supporting or involving itself in religion or from becoming drawn into ecclesiastical disputes,"[325] Justice Brennan contended that the Establishment Clause did not properly function to restrict religionists from the civic arena—and the Court in his view should not go beyond enforcing the basic purpose of the Establishment Clause to prevent such institutional intertwining of church and state.[326]

---

[318] Elshtain, *supra* note 7, at 150.

[319] *See* CHOPER, *supra* note 11, at 162. Choper argues that while it may be necessary in some situations to limit the benefits that can be extended to religion in general, such a necessity can never serve as a justification "to restrict[] the kinds of beliefs that are catalysts for lawmaking." *Id.* While the separation of church and state is very much a part of our constitutional order, "the Establishment Clause permit[s] government officials to be stimulated by ideological values of any kind." *Id.* To forbid religious motivation in the formulation of public policy would not only violate the Free Exercise Clause, it would also probably be futile because it would only encourage lawmakers to conceal their real motivations in an attempt to ensure a law's constitutionality. *Id.* at 163.

[320] 435 U.S. 618 (1978).

[321] *Id.* at 621, 629.

[322] *Id.* at 629.

[323] *Id.* at 630 (Brennan, J., concurring).

[324] *Id.* at 640.

[325] *Id.* at 642.

[326] *Id.* at 641.

> The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities. *Government may not inquire into the religious beliefs and motivations of officeholders—it may not remove them from office merely for making public statements regarding religion, or question whether their legislative actions stem from religious conviction.*
>
> In short, government may not as a goal promote "safe thinking" with respect to religion and fence out from political participation those, such as ministers, whom it regards as overinvolved in religion. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here. It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.[327]

Dealing with concerns that religious believers would seek to influence government policy, Justice Brennan proposed a solution based not on the bracketing of religious motivation in public life, but on the robust political give and take of liberal democracy: "The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls."[328] This solution protects the institutional separation of religion and the government, defends the right of people of faith to participate fully in the political life of the country, and carefully brackets the proper scope of the Court's investigation into the motivation and beliefs of religionists in public life. Such an approach charts a better path than the *McGowan-McRae* approach for the courts to follow in navigating the tricky constitutional waters surrounding the issue of whether religious motivation is constitutionally problematic under the Establishment Clause. It makes better sense of the constitutional history of the Establishment Clause, the early practices of our Founders, and the rights of religious liberty guaranteed by the Constitution.

V. CONCLUSION

The use of extrinsic evidence in religion cases is well-established by Supreme Court precedent, dating from the nineteenth century all the way into the present era. While the use of such extrinsic evidence is well-

---

[327] *Id.* (emphasis added) (citations omitted).

[328] *Id.* at 642.

supported in the case law, the scope of such use needs clarification, particularly in regard to the use of extrinsic evidence of religious motivation by policy makers as a ground for rendering a government action invalid under the Establishment Clause. Religious principles and religious motivation have always formed a crucial component of American civic life. While some voices have been raised both within legal academia and on the Supreme Court that seek to limit the legitimacy of religious motivation in the political arena, there is nothing inherent in the Establishment Clause itself that supports this view. Instead, the history of the Establishment Clause and the practices of the Founders indicate that religion was never meant to be banished from the public square of the American experiment in democracy. While it is absolutely vital to maintain a strong wall of institutional separation between religious organizations and the government, Supreme Court jurisprudence needs to recognize the legitimacy of religious motivation in the public square and its validity under the First Amendment. In order to accomplish this task, the Court should make a distinction between purpose and motivation in regards to the first prong of the *Lemon* test, and it should read the Establishment Clause in accord with its historical purpose to protect religious liberty and maintain the full equality of all American citizens in the public square, whatever their religious convictions.

GUARDING THE THRESHOLD OF BIRTH

Kevin J. Mitchell[*]

I. INTRODUCTION 258
II. PARTIAL-BIRTH ABORTION AND THE ROAD TO *CARHART II* 262
A. Two Dimensions of the Abortion Debate 262
B. D&X: The Procedure and the Politics 265
III. *CARHART I*: JUDICIAL PROTECTION FOR D&X 267
A. Nebraska Ban Found Unconstitutional 268
B. Three Forgotten Interests 269
C. Congressional Response: The PBABA 270
IV. *CARHART II*: REVISITING AND REJECTING THE D&X PROCEDURE 273
A. Surveying Various Abortion Methods 273
B. Contrasting D&E and D&X 274
C. *Why the PBABA Does Not Place an Undue Burden on a Woman's Right to Choose* 276
1. The PBABA Is Not Overbroad 276
2. The Lack of a Health Exception does not Render PBABA Unconstitutional 277
D. Legitimate Aims of the PBABA 280
E. Dissenting Voices in Carhart II 281
V. *CARHART II* IN THE SHADOW OF *ROE* AND *CASEY*: WHY PRECEDENT SUPPORTS THE PBABA'S CONSTITUTIONALITY 282
A. Pre-Viability Applications of the PBABA 284
B. Post-Viability Applications of the PBABA 285
1. Protecting Potential Life 287
2. Safeguarding the Integrity of the Medical Profession 289
(a) Involuntary Medication 290
(b) Assisted Suicide 292
3. Drawing a Clear Line Between Abortion and Infanticide 294
(a) Historical Consensus Favoring Infanticide 295
(b) Peter Singer and the Contemporary Defense of

* J.D. cum laude, Case Western Reserve University School of Law (2007). I would like to thank Professor Jessie Hill for coordinating the Reproductive Rights Seminar, which gave me an opportunity to develop this Article and think critically about these important issues. Thanks also to my wife and best friend, Kim, for her constant support, encouragement, and devotion during the rigors of law school. Lastly, I would like to devote this article to Calla, who gave me the vision and a tremendous sense of purpose for my writing.

Infanticide 297
VI. CONCLUSION: RETHINKING ABORTION RIGHTS IN LIGHT OF *CARHART II* 299

I. INTRODUCTION

In Ocean City, Maryland, detectives discover four fetuses in Christy Freeman's residence.[1] Because one is over twenty-six weeks old, Freeman is charged with first-degree murder under Maryland law.[2] Legislators drafted the law to protect pregnant women and their fetuses, but now a court considers how broadly to read the statute.[3]

In Freehold, New Jersey, authorities discover the remains of a newborn baby in a garbage bin. Melissa Drexler admits to delivering her son in a toilet, strangling him with her bare hands, and then dropping him in the trash before returning to the dance floor at her senior prom. Drexler agrees to a manslaughter plea, receives a fifteen-year sentence,[4] and is released after three years.[5]

In Bloomington, Indiana, a six-day-old baby dies of dehydration and pneumonia. After discovering that their child suffered from Down Syndrome and esophageal atresia, the parents had refused any medical treatment or nourishment for their son.[6] Public officials had taken legal action to compel medical care, but the courts refused to intervene.[7]

---

1 Dan Morse & William Wan, *Mother Charged in Stillborn Death; Fetal and Placental Remains of 4 Are Discovered in Ocean City*, WASH. POST, July 31, 2007, at B01.

2 *Id.* Specifically, Maryland's law applies to a person who "[(1)] intended to cause the death of the viable fetus; [(2)] intended to cause serious physical injury to the viable fetus; or [(3)] wantonly or recklessly disregarded the likelihood that the person's actions would cause the death of or serious physical injury to the viable fetus." MD. CODE ANN., CRIM. LAW § 2-103 (LexisNexis Supp. 2007). For a survey of similar laws across the country, see National Right to Life Committee, *State Homicide Laws that Recognize Unborn Victims*, May 9, 2007, http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html.

3 *Police Finish Searching Home Where Fetuses Found*, CNN.COM, Aug. 1, 2007, http://www.cnn.com/2007/US/08/01/mother.charged.ap/index.html.

4 *'Prom Mom' Admits Killing Newborn*, CNN.COM, Aug. 20, 1998, http://www.cnn.com/US/9808/20/prom.birth.02/.

5 Deroy Murdock, *Wrist-Slapping Baby Killers*, NAT'L REV. ONLINE, Dec. 10, 2001, http://article.nationalreview.com/?q=MTJkMTk3ZDk2MjJhODgyYzM3NmQ5YWVmMDBiY2ZlNjc.

6 The C. Everett Koop Papers: Congenital Birth Defects and the Medical Rights of Children: The "Baby Doe Controversy," http://profiles.nlm.nih.gov/QQ/Views/Exhibit/narrative/babydoe.html (last visited Jan. 28, 2008).

7 *See* PETER SINGER, RETHINKING LIFE & DEATH 106–15 (1994). Responding in part to this case, President Ronald Reagan published an article discussing the difficult issues facing the American people. Ronald Reagan, *Abortion and the Conscience of the Nation*, *in* ABORTION AND THE CONSCIENCE OF THE NATION 37, 57 (New Regency 2000) (1983). He wrote:

These are three children at different stages of life—a viable fetus, a newborn, and a six-day-old—each of whom was terminated by his or her mother. Across the United States, these stories shock the conscience of many, but the reality is that murdering newborns or infants is not a rare phenomenon.[8] In a society that recognizes a woman's right to choose an abortion in the early stages of pregnancy, and to obtain an abortion in later stages where it is necessary to preserve her life or health, each person must consider the significance of these deaths. Few would defend the right of a mother, or any person, to kill a newborn child.[9] Still, some argue that a fetus has *no* independent rights apart from the mother, and the logical conclusion of such a view is that a mother should be able to terminate her pregnancy *at any time* prior to full delivery.[10] Thus, on one day, a mother merely terminates her pregnancy by obtaining an

---

> I know that when the true issue of infanticide is placed before the American people, with all the facts openly aired, we will have no trouble deciding that a mentally or physically handicapped baby has the same intrinsic worth and right to life as the rest of us. As the New Jersey Supreme Court said two decades ago, in a decision upholding the sanctity of human life, "[a] child need not be perfect to have a worthwhile life."

Id. (quoting Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967)); *see also* John A. Robertson, *Legal Aspects of Withholding Medical Treatment from Handicapped Children, in* LEGAL AND ETHICAL ASPECTS OF TREATING CRITICALLY AND TERMINALLY ILL PATIENTS 213, 213 (A. Edward Doudera & J. Douglas Peters eds., 1982) ("Withholding necessary medical care from defective newborns in order to cause their death is a common practice in many medical centers across the United States.").

[8] *Variation in Homicide Risk During Infancy—United States, 1989–1998*, 51 MORBIDITY & MORTALITY WKLY. REP. 187, 187 (Mar. 8, 2002), *available at* http://www.cdc.gov/mmwr/PDF/wk/mm5109.pdf (documenting 3312 infant homicides); *see also* Edward L. Cardenas & George Hunter, *Boy Faces Felony in Baseball Bat Abortion*, DETROIT NEWS, Jan. 5, 2005, http://www.detnews.com/2005/metro/0501/05/A01-50709.htm (charging a teenage male, but not the consenting female, under the Michigan Prenatal Protection Act for the intentional killing of a six-month-old fetus); *Prosecutors Seek Death Penalty in Arnold Case*, WHIOTV.COM, Dec. 7, 2006, http://www.whiotv.com/news/10484126/detail.html?rss=day&psp=news (recounting criminal indictment against mother accused of killing her three-week-old daughter in the microwave).

[9] *But see infra* notes 233–235 and accompanying text (discussing Professor Peter Singer's defense of infanticide).

[10] *See, e.g.*, Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986). Johnsen notes that, historically, fetal rights did not exist independently of the woman; instead, birth was the legally significant moment where a fetus "acquired legal rights as a separate entity." *Id.* at 601. While initially the law did recognize fetal personhood in limited situations, it "did not afford rights to the fetus *qua* fetus." *Id.* at 602. Thus, the initial limited recognition of fetal rights created no conflicts with the interests of pregnant women. This absolutist view—that a fetus has no rights apart from those of the woman—would hold that a mother exercises complete dominion over the fetus until there is a full birth and separation of the fetus from her body. *Id.* at 601–02. A partial-birth, by contrast, falls short of this standard. Therefore, a partially-born fetus would have no "legal rights as a separate entity." *Id.* at 601.

abortion; on the next, she takes a life by killing her child. Immersed in the grey areas between abortion and infanticide, manslaughter and murder, the examples above compel each person to draw legal, ethical, and moral lines.

These lines are tied inextricably to the nature of abortion itself. Following the Supreme Court's controversial, landmark decision in *Roe v. Wade*, women have enjoyed a qualified right to terminate unwanted pregnancies.[11] While most Americans support broad reproductive freedoms at early stages of gestation,[12] the vast majority generally oppose abortion in later stages.[13] "Partial-birth abortion," a procedure developed and often used for terminating late-term pregnancies, forces Americans to examine this uncomfortable tension. Put another way, it forces each person to ask whether one can draw a clear line between abortion and infanticide. Traditionally, a full vaginal delivery separates these two practices from each other, but partial-birth abortion, as the name suggests, occurs at the "threshold of birth."[14] Thus, it can be described as part abortion, part infanticide.

Various attempts to ban the procedure only underscore the volatile nature of these issues. After most of the states passed partial-birth abortion bans in the late-1990s, the Supreme Court struck down Nebraska's ban in *Stenberg v. Carhart* (*Carhart I*).[15] This Article examines the Court's recent, polarizing decision in *Carhart v. Gonzales* (*Carhart II*),[16] to uphold a similar statute Congress passed, the Federal Partial Birth Abortion Ban Act of 2003 (PBABA), and suggests that,

---

[11] 410 U.S. 113, 166 (1973).

[12] Jeffrey Rosen, *Partial Solution*, NEW REPUBLIC, Dec. 11, 2006, at 8, *available at* http://www.tnr.com/columnists/story.html?id=1f9e5e79-3d12-42e7-8504-242e01189b30.

[13] *Id.*

[14] Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 296 (2d Cir. 2006) (Straub, J., dissenting), *vacated by* Nat'l Abortion Fed'n v. Gonzales, 224 Fed. App'x 88 (2d Cir. 2007). This phrase, borrowed from Judge Chester Straub's dissenting opinion in *National Abortion Federation*, is used throughout this Article. *See* 437 F.3d at 296 ("In passing the Partial-Birth Abortion Ban Act of 2003 . . ., Congress sought to prohibit the 'gruesome and inhuman procedure' of delivering a fetus into this world only to destroy it as it reaches the threshold of birth.") (quoting Partial-Birth Abortion Ban Act of 2003 (PBABA), Pub. L. No. 108–105, § 2(1), 117 Stat. 1201, 1201 (2003) (codified as 18 U.S.C. § 1531 (Supp. V 2007)).

[15] 530 U.S. 914, 945–46 (2000).

[16] 127 S. Ct. 1610 (2007). Among many other criticisms, constitutional law professor Geoffrey Stone argued that the *Carhart II* decision was rooted in the majority's Catholicism. Geoffrey Stone, *Our Faith-Based Justices*, U. CHI. L. SCH. FACULTY BLOG, Apr. 20, 2007, http://uchicagolaw.typepad.com/faculty/2007/04/our_faithbased_.html. *But see* Robert Barnes, *Did Justices' Catholicism Play Part in Abortion Ruling?*, WASH. POST, Apr. 30, 2007, at A13 (noting that four of the five Catholic justices voted to uphold three death penalty convictions in a subsequent case, a view which is at odds with the Catholic Church's teaching).

despite some flawed analysis, the majority reached the proper conclusion.

A few items merit special mention at the outset. This Article assumes that the Supreme Court's abortion jurisprudence protects two rights, each distinct from the other in both its purpose and scope.[17] First, the government may not impose an undue burden on a woman's right to terminate a pre-viability pregnancy. Second, a woman has a right of "medical self-defense,"[18] allowing her to terminate a post-viability pregnancy if that pregnancy threatens her life or health.[19] Additionally, beyond the scope of this Article, and *Carhart II,* is the question of whether the PBABA falls within the scope of Congress's Commerce Clause power,[20] as well as the question of the Court's deference to congressional fact-finding.[21]

Part II emphasizes that two dimensions of the abortion debate, the spatial and temporal, should be viewed in conjunction. While the Court historically has focused exclusively on the temporal dimension (the age of the fetus), *Carhart II* signals a dramatic shift by not only its recognition of, but its singular focus on the spatial dimension (where fetal demise occurs). Part III continues by examining the Court's

---

[17] Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1824 (2007) (distinguishing between two distinct abortion rights).

[18] *Id.* at 1824–25 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992); *Roe*, 410 U.S. at 163–64).

[19] Limiting the analysis to these two rights, the question of fetal abnormalities is not discussed. Pre-viability abortions are allowed for any reason, regardless of whether there is an abnormality. Post-viability abortions are allowed only when a pregnancy threatens a woman's health or life. Any fetus, normal or abnormal, could present such a risk.

This does not suggest that fetal abnormalities do not present women and families with very difficult questions. Perhaps the most famous example was that of Sherri Finkbine, whose fetus had been severely deformed from thalidomine treatments in 1962. Because the Court had not recognized a woman's right to choose, Finkbine was forced to travel to Sweden to undergo the abortion procedure. LAWRENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 37 (1990). Similarly, several children born during the 1960s suffered from rubella, causing blindness, deafness, and mental retardation. *Id.* This led twelve states to amend their abortion laws to include an exception where a fetus suffered from a severe abnormality. JAMES RISEN & JUDY L. THOMAS, WRATH OF ANGELS 36 (1998). The American Law Institute advanced in its model legislation a similar exception in the Model Penal Code. *Id.* at 11.

[20] *See Carhart II*, 127 S. Ct. at 1640 (Thomas, J., concurring) (noting that the parties to the proceeding did not raise, and the Court therefore did not address, the constitutionality of the PBABA under the Commerce Clause).

[21] The *Carhart II* majority opinion spends little time on the question of deference to congressional fact-finding, and Justice Kennedy acknowledges errors in the records. *Id.* at 1638 ("Uncritical deference to Congress' factual findings in these cases is inappropriate."); *see also id.* at 1643–44 (Ginsburg, J., dissenting) (discussing potential erroneous statements of facts in the congressional findings accompanying the PBABA).

reasoning in *Carhart I*, and how the majority failed to consider both the spatial and temporal dimensions adequately. This Part also highlights Justice Kennedy's *Carhart I* dissent and the three important government interests that he emphasized.

Part IV analyzes *Carhart II* and the Court's decision to uphold the PBABA, arguing that the opinion is consistent with the controlling standards for abortion regulations as outlined in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[22] Although the majority attempts to circumvent any direct reversal of *Carhart I*, this Part contends that Justice Kennedy's *Carhart II* majority opinion is constitutionally correct for the same reasons that his *Carhart I* dissent was constitutionally correct. Specifically, the PBABA does not create an undue burden on a woman's right to obtain a pre-viability abortion. Further, the unique interests at stake, both spatial and temporal, in post-viability applications of the PBABA justify the Court's decision to not require a health exception.

Part V considers in greater detail the important governmental interests emphasized in Justice Kennedy's *Carhart I* dissent and *Carhart II* majority, which are also highlighted in the PBABA's congressional record. First, government has an important interest in protecting fetal life from the outset of pregnancy. This interest was emphasized in *Roe*, reaffirmed in *Casey*, and its status has been solidified by *Carhart II*. Second, government has an important interest in safeguarding the integrity of the medical profession. This interest has been discussed in various contexts. Two such contexts, assisted suicide and involuntary medical treatment of death row inmates, are discussed as comparisons. Third, and most importantly, government has an interest in drawing a clear line between abortion and infanticide. While abortion is secured as a constitutional right through the Court's jurisprudence, neither the Constitution nor the laws of the United States should ever condone infanticide. By examining the historical consensus favoring infanticide and contemporary support for it, this Part argues that the government has the constitutional authority, as well as the moral and ethical duty, to draw a clear line between the two procedures.

II. PARTIAL-BIRTH ABORTION AND THE ROAD TO *CARHART II*

A. Two Dimensions of the Abortion Debate

The abortion debate is dominated by questions of *when* the act occurs,[23] but too often neglected are questions of *where* it occurs.

---

[22] 505 U.S. 833, 846 (1992).

[23] *See Roe*, 410 U.S. at 163 (noting that the "compelling" point where the State interest is heightened is at viability); *Casey*, 505 U.S. at 846 (affirming *Roe*'s essential

Proponents of a partial-birth abortion ban argue that the "spatial" question (location where fetal demise occurs) is equally important to the "temporal" question (fetal age at the time of the procedure).[24] Thus, any discussion of abortion policy must focus on the circumstances attendant to the killing, including the location at the time of the procedure, and the type of being that is killed, as indicated by fetal age and development.

One might analogize these two dimensions to the death penalty context. The Supreme Court has held that the death penalty is inappropriate for certain classes of people.[25] But even when a person is sentenced to death, the Constitution also limits the type of punishment that can be inflicted.[26] For example, the American criminal justice system has rejected public executions, recognizing that the power to punish offenders must be balanced against inmates' rights to be free from cruel and unusual punishment.[27]

Thus, courts have always considered whether the greater power of administering the death penalty includes the lesser power to use any method of inflicting that penalty. Just as the *type* of person being killed and the *method* by which he is killed has significance in the death penalty context, both the age of the fetus and the location where fetal death occurs have legal, ethical, and moral significance in the abortion debate. Thus, even when a woman has a right to an abortion, countervailing considerations, including the state's interest in preserving and protecting life, must be considered as well. The temporal and spatial elements should be analyzed in conjunction with the woman's interests and the state's interests.

Although the Supreme Court has emphasized the temporal element in its abortion jurisprudence, the spatial dimension is important in discussing partial-birth abortion because it highlights important

---

holding, including "a *confirmation of the State's power to restrict abortions after fetal viability*, if the law contains exceptions for pregnancies which endanger the woman's life or health" (emphasis added)).

[24] United States Solicitor General Paul Clement stated in the *Carhart II* oral arguments, "I don't think anybody thinks that the law is or should be indifferent to whether in that case fetal demise takes place in utero or outside the mother's womb." Transcript of Oral Argument at 16–17, *Carhart II*, 127 S. Ct. 1610 (No. 05–380), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-380.pdf.

[25] Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (minors); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (mentally retarded); Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) (insane).

[26] Trop v. Dulles, 356 U.S. 86, 99 (1958) (plurality opinion) ("[T]he existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.").

[27] Furman v. Georgia, 408 U.S. 238, 297 (1972) (Brennan, J., concurring) ("No longer does our society countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all."); *see also Trop*, 356 U.S. at 99.

distinctions between abortion and infanticide. An abortion is defined as the "termination of a pregnancy before the embryo or fetus can live independently."[28] Infanticide, by contrast, is defined as the murder of a living child outside of the womb.[29] Because partial-birth abortion occurs at the threshold of birth, one must consider the spatial dimension in analyzing the appropriateness of the procedure.

The temporal and spatial elements, viewed in conjunction, distinguish four types of abortions. These are: pre-viability, internal; pre-viability, external; post-viability, internal; and post-viability, external. Although the viability line is difficult to establish with certainty,[30] and some procedures are neither completely internal nor

---

[28] KAREN J. CARLSON ET AL., THE HARVARD GUIDE TO WOMEN'S HEALTH 6 (1996).

[29] *See* STEDMAN'S MEDICAL DICTIONARY 703 (4th Unabridged Lawyer's ed. 1976) (defining infanticide as "[t]he killing of an infant," and defining an infant as "[a] child under the age of 2 years" or "[a] newborn baby"); WEBSTER'S NEW WORLD DICTIONARY 731 (Michael Agnes & David B. Guralnik eds., 4th ed. 1999) (defining infanticide as "the murder of a baby").

[30] *E.g.*, *Roe*, 410 U.S. at 159 ("When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus [on when life begins], the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."). Greater survival rates among pre-term infants born at earlier stages push back the viability line. In October, 2006, Amillia Taylor was born at twenty-one weeks and six days, and has thus far been resilient in the face of minimal odds of survival. This is the youngest fetus to have ever survived delivery, raising new questions about where the viability line should be drawn. Pat Wingert, *The Baby Who's Not Supposed to be Alive*, NEWSWEEK, Mar. 5, 2007, at 59, *available at* http://www.msnbc.msn.com/id/17304274/site/newsweek. Amillia's parents have since taken her home. *Tiny Baby Goes Home From Hospital*, CBSNEWS.COM, Feb. 21, 2007, http://www.cbsnews.com/stories/2007/02/21/health/main2501131.shtml.

Although this Article focuses on the traditional viability line, consistent with the Supreme Court's approach, reasonable arguments have been put forth for dismissing the traditional approach. For example, some have proposed the "vector theory of life" as a substitute. According to this theory, viability is not defined simply as an ability to live outside of the womb, but by forces directed towards *the specific end of human life*. BERNARD NATHANSON, THE HAND OF GOD 135–39 (1996). Dr. Nathanson, co-founder of the National Abortion and Reproductive Rights Action League, but now a prominent pro-life advocate, BERNARD N. NATHANSON AND RICHARD N. OSTLING, *Preface to* ABORTING AMERICA (1st ed. 1979), notes that within the first nineteen days of gestation, fetal growth is most pronounced because of rapid cell division, but by the nineteenth day, cells no longer split and are simply growing. Interestingly, this process of cell growth continues through birth to adolescence to adulthood, whereas cell division has already ended at the earliest stages of gestation. *Id.* at 135–36. *See also* KEITH L. MOORE, THE DEVELOPING HUMAN 81 (2d ed. 1977) ("The transition from embyro to fetus is not abrupt, but *the name change is meaningful because it signifies that the embryo has developed from a single cell, the zygote, into a recognizable human being*. Development during the fetal period is primarily concerned with growth and differentiation of tissues and organs that started to develop during the embryonic period." (emphasis added)).

external,[31] these abortion types are useful for discussing the convergence of the spatial and temporal elements. The PBABA restricts only "partial-birth abortion," also referred to in medical circles as dilation and extraction (D&X),[32] which causes death when the fetus is almost entirely outside of the vagina. Because the PBABA contains no reference to fetal age, it applies with equal force to both pre- and post-viability fetuses.

The PBABA therefore poses two constitutional questions. As applied pre-viability, one must ask whether the statute creates an undue burden on a woman's right to choose.[33] As applied post-viability, one must ask whether the absence of a health exception is fatal to the statute's constitutionality.[34] Section V answers each of these questions in the negative, and the following pages provide factual and legal background information upon which those conclusions are based.

B. D&X: The Procedure and the Politics

Although it is one of the most rarely used abortion procedures, D&X is one of the most controversial. It is a procedure that can be seen in two different ways. To some, it is a grievous assault on human life,[35] and to others, it is merely a practical—and in some cases medically necessary—

---

[31] Admittedly, the spatial element is more accurately described as a continuum and defies classification with mechanical precision. Fetal demise can occur when the fetus is in the uterus, when it is lodged in the cervix, or when it is substantially outside of the vagina.

The vast majority of abortions are performed surgically while the fetus is in the uterus. *See Carhart I*, 530 U.S. at 923 (noting that ninety percent of all abortions are performed in the first trimester, and the predominant method is vacuum aspiration). Vacuum aspiration involves the insertion of a tube into the uterus; suction is then used to remove the fetal contents. *See id.* A second type of abortion that takes place in the uterus is dilation and curettage (D&C), although this method is being employed by physicians less frequently. CARLSON ET AL., *supra* note 28, at 211–12. After administering an anesthetic, the abortionist gradually dilates the cervix and uses a metal tool called a curette to scrape the fetal contents from the uterus. *Id.* The key consideration for both procedures is that fetal demise occurs in the uterus. In a vacuum aspiration, the suction destroys the fetus as it is removed from the woman's body. In a D&C, the curette scrapes the fetus from the uterine wall, which results in fetal death. *Id.* at 212.

Abortions can also occur outside of the uterus. Some are transcervical, meaning that they occur when the fetus is lodged in the cervix. The most common transcervical procedure is dilation and evacuation (D&E), which is discussed further in Section IV.B. *See infra* notes 96–97 and accompanying text. By contrast, dilation and extraction (D&X) ends fetal life when the fetal body is almost entirely outside of the woman's body. D&X is discussed further in Section II.B. *See infra* notes 35–46 and accompanying text.

[32] *Carhart II*, 127 S. Ct. at 1621 (citing Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 440 n.2 (2004)).

[33] *See infra* notes 155–166 and accompanying text.

[34] *See infra* notes 167–242 and accompanying text.

[35] *See* RAMESH PONNURU, THE PARTY OF DEATH 43–53 (2006) (equating D&X with infanticide).

option for terminating unwanted pregnancies.[36] Opponents emphasize that the procedure was developed as a means of terminating viable or late-term fetuses,[37] but proponents emphasize pre-viability uses,[38] as well as instances where it may be medically necessary post-viability.[39]

Developed by Dr. Martin Haskell, a physician in Dayton, Ohio, the D&X procedure first gained notoriety when Dr. Haskell described it at a National Abortion Federation conference in 1992.[40] After dilating the woman's cervix over two full days, the physician removes the fetal legs and torso until the head lodges in the cervical opening. He then uses a pair of Metzenbaum scissors to pierce the skull and create an opening. Next, the scissors are removed and replaced with a suction catheter to evacuate the "skull contents."[41] Having emptied the head, the skull is then collapsed, and the fetus is removed intact.[42]

Those who oppose the partial-birth abortion procedure use different language to describe it. Brenda Pratt Schafer, a nurse who was formerly employed by Dr. Haskell, described the procedure as follows:

> The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.

---

[36] *See Carhart II*, 127 S. Ct. at 1644–45 (Ginsburg, J., dissenting) (listing testimony suggesting health and safety benefits to women in certain cases when D&X is used in favor of D&E).

[37] Martin Haskell, M.D., *Dilation and Extraction for Late Second Trimester Abortion*, *in* SECOND TRIMESTER ABORTION: FROM EVERY ANGLE 27, 33 (1992) (noting that D&X is designed for late-second, and even third, trimester abortions), *available at* http://www.priestsforlife.org/prochoice/haskell1.htm.

[38] *Carhart I*, 530 U.S. at 929 (discussing possible health benefits during second trimester justifying use of D&X procedure).

[39] *Carhart II*, 127 S. Ct. at 1644–45 (Ginsburg, J., dissenting). Opponents of the PBABA also possess a general distrust of congressional medical regulations and edicts, which are too often an outgrowth of political whims. *E.g.*, Jeffrey M. Drazen, M.D., *Government in Medicine*, 356 NEW. ENG. J. MED. 2195, 2195 (2007) ("In 2005, we all saw the disastrous consequences of congressional interference in the case of Terri Schiavo. In that case, the courts wisely decided that Congress should not be practicing medicine. They correctly ruled that wrenching medical decisions should be made by those closest to the details and subtleties of the case at hand. Such decisions must be made on an individual basis, with the best interests of the patient foremost in the practitioner's mind.").

[40] *See* Haskell, *supra* note 37.

[41] *Id.* at 31.

[42] *Id.*

> The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp.[43]

Gruesome depictions of D&X like this cause many people, who otherwise support a woman's right to choose, to oppose the procedure. This is in part because D&X is often a late-term or post-viability procedure,[44] but irrespective of fetal age, many find the gruesome nature of the procedure to be objectionable.[45] As the late Democratic Senator Daniel Patrick Moynihan once stated, D&X "is infanticide, and one would be too many."[46] Consequently, this procedure, more than any other abortion procedure, raises unique spatial concerns, in addition to temporal questions raised by any procedure in the abortion debate.

Not surprisingly, legislatures at both the federal and state levels have made several attempts to ban D&X. In 1996, the United States Congress first passed a partial-birth abortion ban, which was vetoed by President Clinton.[47] With the Senate unable to override the veto, the bill never became law. Similarly, a 1997 ban suffered the same fate.[48] Despite Congress's inability to override the presidential vetoes, by the late 1990s, thirty-one states had passed similar measures banning D&X.[49]

III. *CARHART I*: JUDICIAL PROTECTION FOR D&X

The Supreme Court's decision in *Carhart I* to strike down Nebraska's partial-birth abortion ban severely hampered the states' efforts to regulate the procedure.[50] Under Nebraska's ban, a "partial-birth abortion" occurred when, prior to completing a full delivery, the physician "deliberately and intentionally deliver[ed] into the vagina a living unborn child, or a substantial portion thereof," to perform a procedure that the physician "knows will kill the unborn child and does

---

[43] *Carhart I*, 530 U.S. at 1007 (Thomas, J., dissenting) (quoting *The Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the Comm. on the Judiciary*, 104th Cong. 17 (1995) (statement of Brenda Pratt Shafer)).

[44] Rosen, *supra* note 12 (noting that approximately two-thirds of Americans oppose partial-birth abortion).

[45] *See Carhart II*, 127 S. Ct. at 1623 (quoting Carhart v. Ashcroft, 331 F. Supp. 2d 805, 858 (D. Neb. 2004) (abortion doctor's concession that it is a "difficult situation" for his staff to deal with the D&X procedure)).

[46] PONNURU, *supra* note 35, at 43 n.1.

[47] *Carhart II*, 127 S. Ct. at 1623.

[48] *Id.*

[49] R. Alta Charo, *The Partial Death of Abortion Rights*, 356 NEW ENG. J. MED. 2125, 2126 (2007) (noting that only five bans contained exceptions to preserve the health of the mother).

[50] *Carhart I*, 530 U.S. 914 (1999).

kill the unborn child."[51] The statute made no mention of fetal age, so its focus was primarily on the spatial dimension, where the physician destroyed the fetus in relation to the woman's body. The statute contained no health exception; instead, it only allowed partial-birth abortion when necessary "to save the life of the mother."[52] Performing a partial-birth abortion would result in automatic suspension and revocation of the physician's medical license and was punishable as a Class III felony.[53]

A. Nebraska Ban Found Unconstitutional

In 2000, the Supreme Court, with Justice Stephen Breyer writing for the majority, found that the Nebraska ban was unconstitutional on two grounds. First, the statute was unconstitutional because it contained no health exception, which was required by *Casey*.[54] Although Nebraska claimed that banning partial-birth abortion created no health risk for women, the Court found that in some cases the procedure provided a health benefit to women.[55] "[W]here substantial medical authority supports the proposition that banning a particular abortion procedure *could* endanger women's health," the Court found that such a ban required a health exception.[56]

The majority's second reason for striking down the Nebraska ban was that it placed an "undue burden" on a woman's right to choose an abortion.[57] Justice Breyer could not understand how the term partial-birth abortion could be limited only to D&X, rather than the more commonly used second trimester procedure, dilation and evacuation (D&E).[58] The Nebraska State Attorney General argued that "substantial portion" of the fetus should have been read as a "child up to the head,"[59]

---

[51] NEB. REV. STAT. § 28-326(9) (Supp. 2006).

[52] *Id.* § 28-328(1).

[53] *Id.* § 28-328(2), (4). Under Nebraska Law, a Class III felony is punishable by up to twenty years in prison, and/or a $25,000 fine. *Id.* § 28-105(1) (1995 & Supp. 2006).

[54] *See Carhart I*, 530 U.S. at 938 (quoting *Casey*, 505 U.S. at 879); *see also* Roe v. Wade, 410 U.S. 113, 163–64 (1993) ("If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.").

[55] *Carhart I*, 530 U.S. at 931–33, 936.

[56] *Id.* at 938 (emphasis added).

[57] *Id.* at 930 (quoting *Casey*, 505 U.S. at 874).

[58] *Id.* at 939. *But see id.* at 993 (Thomas, J., dissenting) (noting use of the term, "partial-birth abortion," by a majority of state legislatures, the United States Congress, medical journals, physicians, reporters, and judges in reference to D&X, rather than D&E). For more discussion of the D&E procedure, see *infra* notes 96–97 and accompanying text.

[59] *Carhart I*, 530 U.S. at 940 (quoting Brief of Petitioners at *20, *Carhart I*, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 228615). Noticeably absent from Justice Breyer's opinion is a discussion of how one "delivers" a child, piece-by-piece. *See id.* at 990–91 (Thomas, J., dissenting) ("Without question, one does not 'deliver' a child when one

but Justice Breyer thought that phrase could just as easily encompass a leg or an arm.[60] Accordingly, the Court found that the prospect of future prosecution, conviction, and imprisonment could deter physicians from providing this procedure to women, and this would result in an undue burden on a woman's right to choose.[61]

In a concurring opinion, Justices Stevens and Ginsburg went a step further, arguing that there is no moral difference between various methods of killing the unborn.[62] In contrast, Nebraska, like many other states,[63] saw a moral difference between killing a child at the threshold of birth, with almost the entire body outside of the womb, and killing a fetus inside of the mother's body. Still, comparing the D&E procedure and the D&X procedure, Justice Stevens argued that "the notion that either of these two equally gruesome procedures performed at this late stage of gestation is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, *is simply irrational*."[64]

B. Three Forgotten Interests

In stark contrast to the majority's indifference, Justice Kennedy's dissenting opinion emphasized the role of states in "defining their interests in the abortion debate."[65] In particular, he noted three important interests put forth by Nebraska: (1) concern for the life of the unborn and partially born; (2) preserving the integrity of the medical profession; and (3) erecting a barrier to infanticide.[66]

The key issue, in Justice Kennedy's view, was not whether the Court sees a moral difference between partial-birth abortion and other abortion methods, but whether legislatures, as agents of the people, see a difference. Noting that "[t]he differentiation between the procedures is

---

removes the child from the uterus piece by piece, as in a D&E. . . . The majority has pointed to no source in which 'delivery' is used to refer to removal of first a fetal arm, then a leg, then the torso, etc.").

[60] *Id.* at 938–39 ("We do not understand how one could distinguish, using this language, between D&E (where a foot or arm is drawn through the cervix) and D&X (where the body up to the head is drawn through the cervix).").

[61] *Id.* at 945–46.

[62] *Id.* at 946–47 (Stevens, J., concurring); *Id.* at 951–52 (Ginsburg, J., concurring).

[63] *Id.* at 995 & n.13 (Thomas, J., dissenting) (discussing partial-birth abortion bans that were virtually identical to Nebraska's in twenty-eight different tates).

[64] *Id.* at 946–47 (Stevens, J., concurring) (emphasis added); *see also id.* 951–52 (Ginsburg, J., concurring) ("[T]his law does not save any fetus from destruction, for it targets only 'a *method* of performing abortion.'" (quoting *id.* at 930) (majority opinion)).

[65] *Id.* at 961 (Kennedy, J., dissenting) (discussing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

[66] *Id.* (citing Brief of Petitioners, *supra* note 59, at *48–49).

itself a moral statement, serving to promote respect for human life,"[67] and that the difference for a mother's health was, at best, marginal, Justice Kennedy believed legislatures should be allowed to consider "the grave moral issues" presented by D&X.[68] Accordingly, the abortion debate should not be limited to the temporal question of fetal age and development; rather, the people, speaking through their representatives, have a legitimate and important role in distinguishing between various abortion methods in light of spatial considerations. Justice Kennedy recognized that questions of *when* the fetus is killed are not the only important questions in the debate. Equally important are questions of *where* the fetus is destroyed.

C. Congressional Response: The PBABA

Although Justice Kennedy was unable to convince a majority of the *Carhart I* Court to uphold Nebraska's partial-birth abortion ban, Congress was successful in passing a similar ban five years later. President Bush signed the PBABA into law on November 5, 2003.[69] The PBABA defines a partial-birth abortion as a procedure in which the physician:

> (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
> (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus . . . .[70]

Any physician who knowingly performs a partial-birth abortion is subject to fines and/or a maximum jail term of two years.[71] Like the Nebraska statute from *Carhart I*, the PBABA contains no health exception, but it expressly carves out an exception for a D&X that is necessary to save the life of the mother.[72]

The PBABA also contains a section detailing congressional findings pertaining to partial-birth abortion.[73] Congress discussed the serious

---

[67] *Id.* at 964.

[68] *Id.* at 967.

[69] *Carhart II*, 127 S. Ct. at 1623–24.

[70] 18 U.S.C. § 1531(b)(1)(A)–(B) (Supp. V 2007).

[71] *Id.* § 1531(a).

[72] *See id.*

[73] In light of testimony heard during legislative hearings held during the 104th, 105th, 107th, and 108th Congresses, Congress made the following findings in the PBABA:

> (A) Partial-birth abortion poses serious risks to the health of a woman undergoing the procedure. . . .

(B) There is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures. . . .

(C) A prominent medical association has concluded that partial-birth abortion is "not an accepted medical practice," that it has "never been subject to even a minimal amount of the normal medical practice development," that "the relative advantages and disadvantages of the procedure in specific circumstances remain unknown," and that "there is no consensus among obstetricians about its use". . . .

(D) Neither the plaintiff in [*Carhart I*], nor the experts who testified on his behalf, have identified a single circumstance during which a partial-birth abortion was necessary to preserve the health of a woman.

(E) The physician credited with developing the partial-birth abortion procedure has testified that he has never encountered a situation where a partial-birth abortion was medically necessary to achieve the desired outcome and, thus, is never medically necessary to preserve the health of a woman.

(F) A ban on the partial-birth abortion procedure will therefore advance the health interests of pregnant women seeking to terminate a pregnancy.

(G) . . . In addition to promoting maternal health, such a prohibition will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life.

(H) . . . A child that is completely born is a full, legal person entitled to constitutional protections afforded a "person" under the United States Constitution. Partial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a "person." Thus, the government has a heightened interest in protecting the life of the partially-born child.

(I) . . . [A] prominent medical association has recognized that partial-birth abortions are "ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside the womb. . . ."

(J) Partial-birth abortion also confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life. . . .

(K) . . . [P]artial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world, in order to destroy a partially-born child.

(L) The gruesome and inhumane nature of a partial-birth abortion procedure and its disturbing similarity to the killing of a newborn infant promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure.

(M) . . . [D]uring a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain. . . .

(N) Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life. . . .

(O) For these reasons, Congress finds that partial-birth abortion is never medically indicated [i.e. necessary] to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical

health risks associated with the partial-birth abortion procedure, including risks of future cervical incompetence; "uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus" caused by the breech conversion; and risks of "lacerations and secondary hemorrhaging" attendant to puncturing the fetal skull while it is lodged in the birth canal.[74] Additionally, the findings emphasize the absence of any circumstance where D&X would be medically necessary to preserve a woman's health or life.[75]

Noting the moral, medical, and ethical consensus that D&X is "a gruesome and inhumane procedure that is never medically necessary,"[76] Congress affirmed three interests that justified banning the procedure. Just as in *Carhart I*, in which Justice Kennedy focused on protecting potential life, safeguarding the integrity of the medical profession, and drawing a clear line between abortion and infanticide, Congress argued that D&X directly undermines each of these. First, D&X promotes a "complete disregard for infant human life."[77] Second, it perverts the delivery process and manipulates the obstetrician's techniques to destroy life, rather than to bring life into the world.[78] Furthermore, this morally confusing process undermines public perception of the medical profession.[79] Third, D&X blurs the line between abortion, the killing of an unborn child, and infanticide, the killing of a child after birth.[80]

Although there are differences between the PBABA and the Nebraska statute struck down in *Carhart I*,[81] opponents of the PBABA quickly filed suit to bar its enforcement. After obtaining injunctive relief barring enforcement at the trial level, three federal circuits held that the PBABA was unconstitutional.[82] Two circuits wrote unanimous opinions. The Eighth Circuit held that the PBABA was unconstitutional because it

---

> community; poses additional health risks to the mother; blurs the line between abortion and infanticide in the killing of a partially-born child just inches away from birth; and confuses the role of the physician in childbirth and should, therefore, be banned.

Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14), 117 Stat. 1201, 1204–06 (2003) (codified as 18 U.S.C. § 1531 (Supp. V 2007)).

74 *Id.* § 2(14)(A).

75 *Id.* § 2(14)(D).

76 *Id.* § 2(1).

77 *Id.* § 2(14)(L).

78 *Id.* § 2(14)(J).

79 *Id.* § 2(14)(K).

80 *Id.* § 2(14)(O).

81 *Compare supra* note 70 and accompanying text, *with supra* notes 51–53 and accompanying text.

82 Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 290 (2d Cir. 2006), *vacated by* 224 Fed. App'x. 88 (2d Cir. 2007); Carhart v. Gonzales, 413 F.3d 791, 803 (8th Cir. 2005), *rev'd*, 127 S. Ct. 1610 (2007); Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1180–81 (9th Cir. 2006), *rev'd*, 127 S. Ct. 1610 (2007).

contained no health exception.[83] Likewise, the Ninth Circuit held that the PBABA was unconstitutional because it contained no health exception, it was void for vagueness, and it placed an undue burden on a woman's right to choose an abortion.[84]

The Second Circuit's opinion in *National Abortion Federation* was fractured in a 2-1 decision to strike down the PBABA. Though Chief Judge Walker believed the PBABA to be a clear violation of *Carhart I*, he voiced his strong opposition to that opinion.[85] Conversely, Judge Straub argued in his dissent that the PBABA and the Nebraska statute could be distinguished.[86] In early 2006, the Supreme Court granted certiorari on the Eighth and Ninth Circuit cases.[87]

IV. *CARHART II*: REVISITING AND REJECTING THE D&X PROCEDURE

Almost ten years after writing an impassioned dissent in *Carhart I*, Justice Kennedy penned the Supreme Court's majority opinion in *Carhart II*. From the outset, he distinguished the PBABA from other restrictions on abortion because it focuses on "a particular manner of ending fetal life . . . ."[88] Thus, the *Carhart II* opinion focuses on spatial questions of where and how the abortion occurs, rather than temporal questions of fetal age and viability.

A. Surveying Various Abortion Methods

In order to put the D&X procedure in a larger context, Justice Kennedy began by surveying various methods used to terminate a pregnancy. Eighty-five to ninety percent of abortions are performed during the first trimester, and the primary method used is vacuum

---

[83] *Carhart*, 413 F.3d at 803.

[84] *Planned Parenthood Fed'n of Am., Inc.*, 435 F.3d at 1180–81.

[85] *Nat'l Abortion Fed'n*, 437 F.3d at 290 (Walker, C.J., concurring) ("[I]t is my duty to follow [*Carhart I*] no matter how personally distasteful the fulfillment of that duty may be."); *id.* at 296 ("In today's case, we are compelled by [*Carhart I*] to invalidate a statute that bans a morally repugnant practice, not because it poses a significant health risk, but because its application might deny some unproven number of women a marginal health benefit.").

[86] *Id.* at 298 (Straub, J., dissenting) ("Because I do not believe that a woman's right to terminate her pregnancy under [*Roe*] or [*Casey*] extends to the destruction of a child that is substantially outside of her body, and that the State has a compelling interest in drawing a bright line between abortion and infanticide, I am of the opinion that [*Carhart I*] is not dispositive of this case.") (citations omitted); *id.* at 312 ("I find the current expansion of the right to terminate a pregnancy to cover a child in the process of being born morally, ethically, and legally unacceptable.").

[87] Gonzales v. Carhart, 546 U.S. 1169 (2006); Gonzales v. Planned Parenthood Fed'n of Am., Inc., 126 S. Ct. 2901 (2006).

[88] *Carhart II*, 127 S. Ct. at 1620.

aspiration, also referred to as suction curettage.[89] This procedure involves the insertion of a flexible tube through the cervix and into the uterus. Suction is then used to remove the fetal contents.[90] Additionally, some physicians prescribe the drug mifepristone, or RU-486, to terminate a first trimester pregnancy.[91]

Approximately ten to fifteen percent of abortions take place during the second trimester,[92] and the predominate method employed by physicians is dilation and evacuation (D&E). The D&E procedure, which is discussed in greater detail in the next Section, can be performed with a digoxin or potassium chloride injection to end fetal life prior to removing the fetus.[93] Rarely used techniques include induction abortions,[94] hysterotomy, or hysterectomy.[95]

B. Contrasting D&E and D&X

After describing some of the various procedures employed throughout the term of a woman's pregnancy, Justice Kennedy's opinion highlights important distinctions between the most common procedure employed during the second trimester, D&E, and the D&X procedure, which is barred by the PBABA. The D&E procedure involves dilation of the cervix over an extended period of time, placing the woman under general anesthesia or conscious sedation, and then grabbing the fetus with forceps and pulling it through the cervix. When the fetus becomes lodged in the cervical walls, the physician rips out the fetal tissue, piece-by-piece, with as many as ten to fifteen passes.[96] After removing the bulk

---

[89] Some physicians also use a method called dilation and curettage (D&C), although this method is being employed by abortionists less frequently. CARLSON ET AL., *supra* note 28, at 211–211. After administering an anesthetic, the physician gradually dilates the cervix and uses a metal tool called a curette to scrape the fetal contents from the uterus. *Id.* at 212.

[90] *Carhart I*, 530 U.S. at 923 (citations omitted).

[91] *Carhart II*, 127 S. Ct. at 1620 (citing Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 464 n.20 (S.D.N.Y. 2004)).

[92] *Id.* A small number (less than one percent) of abortions are performed during the third trimester. Because such abortions are rare, there is very little data available; however, the D&X procedure has been performed into the third trimester. Haskell, *supra* note 37, at 33.

[93] *Carhart II*, 127 S. Ct. at 1620–21 (citing Carhart v. Ashcroft, 331 F. Supp. 2d 805, 907–12 (D. Neb. 2004); *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 474–75).

[94] *Id.* at 1623 (citing *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 467; Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 962–63 (N.D. Cal. 2004)) (noting that approximately five percent of pre-twenty week abortions are inductions).

[95] *Id.*

[96] *Id.* at 1621. The dismemberment causes severe bleeding in the fetus and subsequently, death. As Justice Kennedy noted in *Carhart I*, "[t]he fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb."

of the tissue, suction is used to remove any placenta or remaining material in the uterus.[97]

By contrast, D&X, which is also referred to as "intact D&E,"[98] begins with a more substantial dilation process than ordinary D&E.[99] Upon reaching the appropriate level of dilation, the physician uses forceps to remove the entire fetal body until the head lodges in the cervix. The physician then inserts scissors into the base of the skull, uses suction to remove the fetal brain, collapses the head, and removes the intact fetus from the cervix.[100]

In addition to describing the original D&X method developed by Dr. Haskell,[101] Justice Kennedy explains the procedure's evolution in the years following *Carhart I*. For example, one physician testified that he squeezes the skull after piercing it to empty the cranial contents, rather than using suction, and then removes it. Another preferred crushing the skull with forceps instead of the scissors and suction method. Still another would simply pull on the body until the head was "disarticulat[ed]," or decapitated, from the body. The head was then crushed with forceps in the uterus and removed.[102]

Most importantly, Justice Kennedy describes various self-imposed boundaries that physicians use when performing the D&X procedure. One physician would remove the entire fetus without collapsing the head, but limited this practice to fetuses less than twenty-four weeks gestation.[103] Another physician testified that if he had over-dilated the woman's cervix, he would purposefully hold the fetal head inside body, so that he could terminate the life before it was outside the woman's body.[104] And another physician acknowledged that it is a "'difficult situation'" for "staff to have to deal with a fetus that has 'some viability

---

530 U.S. at 958–59 (Kennedy, J., dissenting). When the procedure is over, the abortionist is left with "'a tray full of pieces.'" *Id.* at 959 (quoting testimony of Dr. Leroy Carhart).

[97] *Carhart II*, 127 S. Ct. at 1621.

[98] *Carhart I*, 530 U.S. at 927. Technically, there are two types of D&E: non-intact and intact. Intact D&E is rarely used, and it is virtually identical to D&X. *See id.* at 927–28. Although Justice Kennedy used intact D&E in his *Carhart II* opinion, D&X is used herein for purposes of clarity. Many courts have taken this approach when discussing the issue. *See Id.* at 928 ("Despite the technical differences . . . intact D&E and D&X are sufficiently similar for us to use the terms interchangeably.").

[99] *Carhart II*, 127 S. Ct. at 1621 (describing "'serial' dilation," which lasts up to two full days and can involve up to twenty-five osmotic dilators) (quoting Carhart v. Ashcroft, 331 F. Supp. 2d. 805, 870 (D. Neb. 2004); *Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 965).

[100] *Carhart II*, 127 S. Ct. at 1622 (quoting H.R. REP. NO. 108-58, at 3 (2003)).

[101] *See* Haskell, *supra* note 37, at 27–33.

[102] *Carhart II*, 127 S. Ct. at 1623 (citing *Carhart*, 331 F. Supp. 2d at 858, 864, 878).

[103] *Id.* (citing *Carhart II*, 127 S. Ct. 1610, J.A. at 408–09 (2007) (No. 05-1382), 2006 WL 2285650).

[104] *Id.* (citing *Carhart II*, 127 S. Ct. 1610 J.A. at 409).

to it, some movement of limbs . . . .'"[105] Thus, it would seem that even proponents of the procedure recognize a difference between D&X and other procedures, even if they have no qualms about terminating the pregnancy by other means. Justice Kennedy's evidence suggests that the spatial dimension has independent moral significance, regardless of fetal age.

C. Why the PBABA Does Not Place an Undue Burden on a Woman's Right to Choose

After highlighting the various abortion methods above, Justice Kennedy's legal analysis begins with *Roe*'s "essential holding," as it was interpreted in *Casey*.[106] First, a woman has a right to choose abortion before viability without undue interference from the state. Second, the state has power to regulate post-viability abortions, provided that there are exceptions to preserve the life and health of the mother. Third, the state has a legitimate interest from the outset of the pregnancy in protecting a woman's health and the life of the fetus that may become a child. Justice Kennedy contends that, despite *Casey*'s attempt to reconcile the potentially competing interests of the woman and the state, one of the plurality opinion's "central premises" is that the state has an important interest in preserving and promoting fetal life.[107] This interest would be repudiated were the Court to strike down the PBABA.

1. The PBABA Is Not Overbroad

Justice Kennedy spends significant time examining the language of the PBABA in order to distinguish between the procedure that the statute covers, D&X, and the procedure that it does not cover, D&E.[108] D&X involves the delivery of a fetus, while D&E involves the extraction of fetal parts.[109] Further, the PBABA expressly requires that the physician commit an "overt act" to kill the fetus after removing it beyond a specified anatomical landmark.[110] Unlike D&E, which involves destruction of fetal life inside the woman's body, the PBABA covers only the D&X procedure which involves the partial delivery of a fetus, and a subsequent deliberate, intentional, and overt act.

---

[105] *Id.* (quoting *Carhart II*, 127 S. Ct. 1610, J.A. at 94 (2007) (No. 05-380), 2006 WL 1440830).

[106] *Id.* at 1626 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. at 846).

[107] *Id.* at 1633 (quoting *Casey*, 505 U.S. at 873).

[108] *See supra* notes 96–97 and accompanying text.

[109] *Carhart II*, 127 S. Ct. at 1630 ("D & E does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix.").

[110] 18 U.S.C. § 1531(b)(1)(A)–(B) (Supp. V 2007).

Justice Kennedy notes the Court's longstanding, "'elementary rule . . . that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"[111] Conversely, where a statute is not susceptible to more than one construction, the Court may not rewrite the language to avoid an undesirable result.[112] The Nebraska statute was facially broad enough to cover D&E, so the Court had to strike it down; however, the "most reasonable reading" of the PBABA, according to Justice Kennedy, does not encompass D&E.[113]

2. The Lack of a Health Exception does not Render PBABA Unconstitutional

After concluding that the PBABA is not overbroad, Justice Kennedy addressed the absence of a health exception, which had previously been considered a constitutional mandate under *Roe* and *Casey*.[114] In fact, those cases seemed to establish a per se constitutional rule that, absent life or health exceptions, no abortion regulation would be valid. Even in

---

[111] *Carhart II*, 127 S. Ct. at 1631 (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)). The Court explained that where statutory text is susceptible to two separate meanings, courts traditionally read such legislation so as to avoid any constitutional conflicts, or where there is a conflict, to uphold statutes that can be saved through a narrowing construction. *Id.* The Court also held that the PBABA is not void for vagueness. *Id.* at 1628–29. The void for vagueness doctrine generally requires that a criminal statute define an offense with sufficient particularity both to inform an ordinary person what is prohibited and to prevent arbitrary enforcement by law enforcement officials. *Id.* at 1628 (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)). Because the PBABA contains a scienter requirement and specific anatomical landmarks past which the fetus must be delivered, Justice Kennedy found that it was not void for vagueness. In contrast, the Nebraska Statute struck down in *Carhart I* did not contain a specific anatomical landmark but used the language of delivering a "substantial portion" of the fetus, which is susceptible to various definitions. *Id.* (quoting *Carhart I*, 530 U.S. at 922). Furthermore, although the Nebraska Statute contained the same scienter requirement, the PBABA requires that the physician "'deliberately and intentionally'" deliver the fetus past the specified anatomical landmark, *id.* (quoting 18 U.S.C. § 1531(b)(1)(A) (Supp. V 2007)), which ultimately alleviates the vagueness concerns. *Id.* (citing Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 526 (1994)). Thus, the PBABA's specific requirements not only give clear notice of what is prohibited, but also prevent arbitrary enforcement by law enforcement officials. *Id.* at 1629.

[112] *See id.* at 1631 (quoting Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998)).

[113] *Id.* Justice Thomas argued in *Carhart I* to the contrary, suggesting that the Nebraska statute *could* be read to only include D&X, rather than D&E. To the extent that "partial birth abortion" could be read to apply to both D&X and D&E, the Court easily could have read the statute to apply only to D&X. This would have been consistent with a common sense interpretation of "partial-birth abortion" as a term-of-art. *See Carhart I*, 530 U.S. at 999 (Thomas, J., dissenting) ("There is, of course, no requirement that a legislature use terminology accepted by the medical community. A legislature could, no doubt, draft a statute using the term 'heart attack' even if the medical community preferred 'myocardial infarction.'").

[114] *Casey*, 505 U.S. at 846; Roe v. Wade, 410 U.S. 113, 163–64 (1973).

Ayotte v. Planned Parenthood of Northern New England, where a unanimous Court supported the appropriateness of reading an implicit health exception in a statute that lacked one, the Court did not suggest that a health exception might not be required in some cases.[115]

Nonetheless, Justice Kennedy begins with the threshold question whether the lack of a health exception exposes a woman to significant health risks. Because this was a contested factual question in the lower courts,[116] Justice Kennedy concludes that medical uncertainty exists; and, where medical uncertainty exists, the PBABA is safe from a facial challenge.[117] Medical uncertainty does not foreclose legislative regulation in the abortion context any more than in any other context.[118] Even

---

[115] 546 U.S. 320, 331 (2006). *Ayotte* dealt with a facial challenge to New Hampshire's parental notification law. Like the PBABA, it contained a life exception, but no health exception. The Court held that an injunction "prohibiting unconstitutional applications" of the law could save the statute as a whole. *Id.* at 332. Such an injunction would, in essence, read the statute as implicitly including a health exception. *Id.* at 331. In this way, *Ayotte* dealt with the proper measure of remedies in the abortion context, rather than any suggestion that a health exception might not be required.

[116] *Carhart II*, 127 S. Ct. at 1635 ("[W]hether the Act creates significant health risks for women has been a contested factual question. The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position.").

[117] *Id.* at 1636 (citing Kansas v. Hendricks, 521 U.S. 346, 360 n.3 (1997)). Justice Kennedy explicitly notes that an as-applied challenge could render the PBABA unconstitutional for lacking a health exception. This would require specific examples of how the procedure poses a significant health risk; short of that, no health exception is required. *Id.* at 1638–39.

[118] *Id.* at 1636 ("The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community."). Abortion has never been considered, as Justice Kennedy seems to suggest, just another medical procedure. Indeed, the substantive due process cases that preceded and laid the groundwork for *Roe* and its progeny further underscore the high level of scrutiny that the Court has applied in abortion cases. In *Griswold v. Connecticut*, the Supreme Court struck down a statute prohibiting the use of contraceptives, as applied to a married couple. 381 U.S. 479, 485 (1965). The Court discussed important First Amendment principles that opposed the Connecticut statute. Specifically, the Court noted that freedom of association, though not explicitly mentioned in the First Amendment, "is necessary in making the express guarantees fully meaningful." *Id.* at 483. Without certain "peripheral rights," the specific and most fundamental constitutional rights would be less secure. *Id.* at 482–83.

Famously, the Court went on to state that these examples suggest that the specific guarantees in the Bill of Rights "have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. Certain "zones of privacy" can be deduced from specific guarantees in the First, Third, Fourth and Fifth Amendments, not the least of which is privacy surrounding the marital bed. Because Connecticut's law swept too broadly into this constitutionally-protected area, the Court ultimately struck it down. *Id.* at 484–85.

Less than seven years later, the Court extended *Griswold*'s protection to non-married persons in *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972). *Griswold* focused on the sanctity of the marriage relationship. *Griswold*, 381 U.S. at 486 ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school

where "'substantial medical authority'" supports the proposition that banning D&X "could" endanger a woman's health, legislatures may ban the procedure when it pursues rational and legitimate ends, such as protecting the fetus that may become a child.[119]

The mere fact that D&X could be *safer* than D&E in isolated cases does not show that D&E is no longer *safe*.[120] In fact, the *safest* method in some cases might be to simply remove the entire fetus and kill it outside of the woman's body, but that does not mean that each person has a constitutional right to such a procedure.[121] By accepting the congressional determination that D&X is "never medically necessary,"[122] Justice Kennedy avoided expressly overruling *Carhart I*.

---

system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."); *id.* at 499 (Goldberg, J., concurring) ("I believe that the right of privacy in the marital relation is fundamental and basic . . . ."). Despite *Griswold*'s focus on marriage, the Court in *Eisenstadt* applied the substantive Due Process right of marital privacy to unmarried persons via the Equal Protection Clause. *Eisenstadt*, 405 U.S. at 453–55. "If the right of privacy means anything," it is the right of any person, married or unmarried, "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision *whether to bear or beget a child.*" *Id.* at 453 (emphasis added) (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969)). Justice O'Connor's opinion in *Casey* would further solidify these rights. 505 U.S. at 896 (recognizing the interests of two distinct individuals in the marriage relationship). Abortion has always been considered an extension of these fundamental rights; Justice Kennedy's language seems to marginalize the conncetion of abortion to fundamental rights by comparing abortion to medical procedures in a general sense.

[119] *Carhart II*, 127 S. Ct. at 1638 (quoting *Carhart I*, 530 U.S. at 938).

[120] Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 291 (2d Cir. 2006) (Walker, C.J., concurring). The *Carhart I* Court

> never identified why a statute that altogether forbids D & X creates a significant health risk; it simply noted that, while other methods of abortion are "*safe*," some doctors believe that "the D & X method [is] significantly *safer* in certain circumstances." Of course, this only establishes that a statute that altogether forbids D & X would deny some women a potential health *benefit* over an objectively "safe" baseline; it does not establish that such a statute would pose a constitutionally significant health *risk*.

Id. (citation omitted) (quoting *Carhart I*, 530 U.S. at 934).

[121] There are reported cases when the cervix is overly dilated such that the fetus could be removed without piercing the fetal skull and sucking out the brain. *See Carhart I*, 530 U.S. at 988 (Thomas, J., dissenting); Roger Byron, Comment, *Children of a Lesser Law: The Failure of the Born-Alive Infants Protection Act and a Plan for Its Redemption*, 19 REGENT U. L. REV. 275, 275–76 (2006) (citing multiple examples of delivered fetuses who survived delivery only to be killed by medical professionals). Going through with the D&X procedure in those cases inevitably poses a greater risk to the woman, but that does not mean infanticide is a better alternative.

[122] Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105 § 2(14)(E), 117 Stat. 1201, 1205 (2003) (codified as 18 U.S.C. § 1531 (Supp. V 2007)).

D. Legitimate Aims of the PBABA

While much of Justice Kennedy's opinion focuses on why the PBABA does not violate constitutional mandates under *Roe* and its progeny, he also emphasizes three important governmental objectives. These objectives were, in his view, ignored in *Carhart I*,[123] but duly noted by Congress and embodied in the PBABA's fact-finding.

First, "[t]he Act expresses respect for the dignity of human life,"[124] which is consistent with the state's important interest in protecting fetal life from the outset of the pregnancy.[125] Allowing "a brutal and inhumane procedure" like D&X would coarsen society to the value and humanity of life, beginning at its earliest stages and beyond.[126] Consistent with *Casey*, the state "may use its voice and its regulatory authority to show its profound respect for the life within the woman."[127] This interest is served not only by protecting a small number of fetuses from the brutality of the D&X procedure, but also by the dialogue that better informs all of the citizenry of the procedure and the value of fetal life.[128]

Second, government has an important interest in safeguarding the integrity of the medical profession.[129] D&X "confuses the medical, legal, and ethical duties of physicians to preserve and promote life . . . ."[130] The physician begins the D&X procedure wearing the hat, so to speak, of an obstetrician, but manipulates the procedure to accomplish the ends of an abortionist.[131] Interestingly, the same could be said of many other methods, including the induction procedure upheld in *Planned*

---

[123] *See Carhart I*, 530 U.S. at 961–64 (Kennedy, J., dissenting).

[124] *Carhart II*, 127 S. Ct. at 1633.

[125] *But cf. Carhart I*, 530 U.S. at 951 (Ginsburg, J., concurring) ("[T]his law does not save any fetus from destruction, for it targets only 'a *method* of performing abortion.'" (quoting *id.* at 930)).

[126] *Carhart II*, 127 S. Ct. at 1633 (quoting Partial-Birth Abortion Ban Act § 2(14)(N)).

[127] *Id.* (citing *Casey*, 505 U.S. at 877 (plurality opinion)).

[128] *See id.* at 1634.

> It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. *The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.*

Id. (emphasis added).

[129] *Id.* at 1633 (quoting Washington v. Glucksberg, 521 U.S. 702, 731 (1997)).

[130] *Id.* (quoting Partial-Birth Abortion Ban Act § 2(14)(J)).

[131] *Id.*

Parenthood of Central Missouri v. Danforth.[132] Nonetheless, the gruesome nature of the D&X procedure is qualitatively different from other methods of abortion, thus justifying the distinction.[133]

Third, government has an important interest in drawing a clear line between abortion and infanticide. The PBABA, Justice Kennedy contends, draws such a line.[134] The Court has drawn similar lines in the past, and these lines can be a valid attempt by the government to prevent a moral descent from that which is legal, but controversial to that which is clearly condemned.[135] Considering these three factors, Justice Kennedy concludes that when the government has a "rational basis" to take action and it imposes no undue burden, "the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn."[136]

E. Dissenting Voices in Carhart II

Joined by Justices Stevens, Souter, and Breyer, Justice Ginsburg criticizes the "flimsy and transparent"[137] justifications for upholding the validity of the PBABA. First, she argues that the PBABA does not further a state interest in protecting fetal life. Because the statute targets a method of abortion, rather than a particular fetal age, women are free to obtain and physicians are free to perform other procedures in lieu of D&X. Thus, the PBABA "saves not a single fetus from destruction . . . ."[138]

---

[132] 428 U.S. 52, 79 (1976).

[133] Justice Kennedy is not the only pro-choice person to see something inherently different in the D&X procedure. Dr. George Tiller, a well-known abortion doctor in Kansas, refused to perform partial-birth abortions on ethical grounds. RISEN & THOMAS, *supra* note 19, at 323. Dr. Tiller gained national recognition for his efforts to protect a woman's right to choose when he refused to be intimidated by the radical anti-abortion group, Operation Rescue, whose members eventually firebombed Dr. Tiller's offices. *Id.* at 321.

[134] *Carhart II*, 127 S. Ct. at 1633–34 (quoting Partial-Birth Abortion Ban Act § 2(14)(G)).

[135] *Id.* at 1634 (quoting *Glucksberg*, 521 U.S. at 732 (upholding state bans on assisted suicide based on the "fear that permitting assisted suicide will start [a state] down the path to voluntary and perhaps even involuntary euthanasia")).

[136] *Id.* at 1633.

[137] *Id.* at 1646 (Ginsburg, J., dissenting).

[138] *Id.* at 1647. Similar arguments have been put forth by pro-life advocates, albeit for different reasons. For example, when conservative, evangelical leader Dr. James Dobson suggested that *Carhart II* signaled a victory in the abortion debate for the pro-life movement, he faced stiff criticism from other prominent leaders in the pro-life movement who argued the PBABA does virtually nothing to save the millions of fetuses who are killed annually by abortion procedures. *See* Open Letter to Dr. James Dobson, Colorado Right to Life, http://www.coloradorighttolife.org/openletter (last visited Mar. 1, 2008). In response to

Second, Justice Ginsburg criticizes the PBABA as being motivated chiefly by "'moral concerns.'"[139] But these same concerns, she notes, could also be marshaled in opposition to *all* abortion procedures, the remainder of which are not affected by the statute. The majority, Justice Ginsburg argues, provides no justification for overriding fundamental rights in appeasing "moral concerns" in this case, but refraining from doing so in other cases.[140]

Justice Ginsburg is also critical of Justice Kennedy's failure to adequately address the viability line with regards to the PBABA. She notes that the Supreme Court has long considered viability to be an important line because when a woman carries a fetus beyond the age of viability, she implicitly consents to greater state intrusion into her reproductive choices.[141] Thus, the Court has "identified viability as a critical consideration."[142] While Justice Kennedy, like Congress, is concerned with blurring the line between abortion and infanticide,[143] the dissenting Justices are equally concerned with blurring the line between pre- and post-viability abortions.[144] Essentially, Justice Ginsburg questions the constitutionality of a statute that focuses solely on spatial considerations, or "where a fetus is anatomically located,"[145] rather than the more important temporal question of viability.

V. *CARHART II* IN THE SHADOW OF *ROE* AND *CASEY*: WHY PRECEDENT SUPPORTS THE PBABA'S CONSTITUTIONALITY

Though the *Carhart II* opinion probably says more about the Supreme Court Justices' differences than it says about their commonalities, the majority's opinion is consistent with the principles underlying precedent. Justices Thomas and Scalia reluctantly joined the majority opinion, while noting the constitutional right to abortion

---

these arguments, Justice Kennedy does claim that, even when physicians are able to use different procedures to conform to the PBABA, the interest in protecting life is furthered by the debate and dialogue surrounding the procedure. *Carhart II*, 127 S. Ct. at 1617.

[139] *Id.*, 127 S. Ct. at 1647 (Ginsburg, J., dissenting) (quoting *id.* at 1633 (majority opinion)).

[140] *Id.*

[141] *Id.* at 1650 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869–70 (1992) ("In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.")).

[142] *Id.* at 1649 (citing *Casey*, 505 U.S. at 869–70).

[143] *Id.* at 1633–34 (majority opinion) (citing Partial-Birth Abortion Ban Act of 2003 § 2(14)(G)).

[144] *Id.* at 1650 (Ginsburg, J., dissenting) (quoting *id.* at 1627 (majority opinion)).

[145] *Id.*

established in *Roe* and *Casey* "has no basis in the Constitution."[146] They joined because it "accurately applies current [abortion] jurisprudence."[147] Since the four dissenting Justices clearly would have struck down the PBABA, that leaves only three Justices—Chief Justice Roberts, Justice Kennedy, and Justice Alito—whose views are consistent with the central holding of *Carhart II*: that abortion is a constitutionally protected right, and the PBABA is consistent with the contours of that right.[148]

Assuming, consistent with *Roe* and *Casey*, that abortion is a fundamental right under the Constitution, as seven of the Justices at least implicitly concede, this Section suggests that the PBABA is consistent with that fundamental right. Although Justice Kennedy's opinion does not adequately distinguish between pre- and post-viability applications of the PBABA, his conclusion is nonetheless correct. The PBABA does not place an undue burden on a woman's right to choose a pre-viability abortion;[149] and, while it contains no health exception, the nature of the procedure—including its convergence of spatial and temporal components—justifies this omission.[150]

The Supreme Court has long held that a woman "has a right to choose to terminate her pregnancy" pre-viability.[151] On the other hand, post-viability, states can place substantial restrictions, even prohibitions, on abortion so long as there are exceptions to preserve the life and health of the mother.[152] Put another way, the pre-viability right is one of "reproductive choice," while the post-viability right is one of "medical self-defense."[153]

This distinction provides the basic lens through which abortion rights must be viewed. The greatest flaw in Justice Kennedy's *Carhart II* opinion is that it never adequately recognizes the important temporal distinctions posed by the PBABA. While it is important that the Court

---

[146] *Id.* at 1639 (Thomas, J., concurring) (citing *Casey*, 505 U.S. at 979 (Scalia, J., concurring in the judgment in part and dissenting in part)); *Carhart I*, 530 U.S. at 980–83 (Thomas, J., dissenting).

[147] *Carhart II*, 127 S. Ct. at 1639 (Thomas, J., concurring).

[148] Perhaps Chief Justice Roberts and Justice Alito would join Justices Thomas and Scalia in a future opinion to strike down *Roe*, but that is pure speculation.

[149] *See infra* notes 155–166 and accompanying text.

[150] *See infra* notes 167–242 and accompanying text.

[151] *Carhart I*, 530 U.S. at 921 (quoting *Casey*, 505 U.S. at 870 (plurality opinion)).

[152] *Casey*, 505 U.S. at 846 (1992); Roe v. Wade, 410 U.S. 113, 163–64 (1973).

[153] Volokh, *supra* note 17, at 1824–28. This distinction has not always been clear. The 1959 revision to the Model Penal Code by the American Law Institute included three exceptions to the general ban on abortions when restricting abortion "would gravely impair the physical or mental health of the mother"; when a child would likely be born with "grave physical or mental defects"; or where the pregnancy resulted from rape or incest. TRIBE, *supra* note 19, at 36 (quoting MODEL PENAL CODE § 207.11(2)(a) (Tenative Draft No. 9, 1959)).

consider the spatial dimension of where fetal death occurs, it must do so in conjunction with the temporal dimensions. Failure to adequately address both the spatial and temporal dimension and an inability to reconcile them only enhances the cynical view, held by many, that abortion jurisprudence is simply an extension of Justices' political whims or religious beliefs.[154] Below, both pre-viability and post-viability applications of the PBABA are discussed in turn.

A. Pre-Viability Applications of the PBABA

As applied to pre-viability cases, the PBABA addresses spatial concerns of where the abortion takes place, but temporal concerns related to fetal age are not in issue. Announcing the proper standard for pre-viability abortion restrictions and dismissing *Roe*'s strict scrutiny approach, the *Casey* plurality stated that government could not place an "undue burden" on a woman's right to choose. The plurality defined an undue burden as any restriction having "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[155] In *Carhart I*, the Court officially recognized the "undue burden" test as controlling its analysis of pre-viability abortion restrictions.[156]

Like many judicially created tests, the "undue burden" standard defies precise explanation and demarcation. The Court has stated that twenty-four hour waiting periods do not place an undue burden on a woman's right to choose.[157] Similarly, the Court has held that requiring a higher informed consent standard for abortion procedures, relative to other medical procedures, does not create an undue burden.[158] One could argue that the key distinction between these restrictions and a complete D&X ban provided in the PBABA is that the former only affected abortion rights through ancillary requirements. While burdensome in some ways, these did not amount to a complete ban on any procedure.

In fact, some would argue that the PBABA is more like the complete ban on saline amniocentisis that was struck down by the Court in

---

[154] *See, e.g.*, Stone, *supra* note 16.

[155] *Casey*, 505 U.S. at 876–77 (plurality opinion).

[156] 530 U.S. at 921 (citing *Casey*, 505 U.S. at 877).

[157] *Casey*, 505 U.S. at 885–86. *But cf.* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 452 (1983) (striking down a twenty-four-hour waiting period under a strict scrutiny analysis).

[158] *Casey*, 505 U.S. at 882, 884, 887 (upholding government requirement that abortion providers give "truthful, nonmisleading information about the nature of the [abortion] procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus"). *But cf.* Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 762–63 (1986) (striking down a similar law under strict scrutiny analysis).

Danforth.[159] Although the State of Missouri claimed that the procedure endangered women's health,[160] the Court held that the ban was an "unreasonable or arbitrary regulation . . . ."[161] This was because, at the time of the decision, saline amniocentisis was one of the most commonly used procedures. A restriction on it would have inhibited the "'vast majority of abortions'" after twelve weeks.[162] In contrast, pre-viability application of the PBABA leads to a very different result from that of *Danforth*. Banning an oft-used procedure like D&E today would be akin to the saline amniocentisis ban in *Danforth*, but the isolated use of D&X pre-viability severely undercuts any argument that the PBABA poses an undue burden on a woman's right to choose.

Banning pre-viability D&X, at worst, prevents access to a slightly safer procedure than the other safe procedures that are already available.[163] As Justice Kennedy notes, in the absence of clear medical evidence to the contrary,[164] Congress can legislate and the Court can affirm regulations on the abortion procedure to the same extent as regulations on any other procedure.[165] This is particularly true in pre-viability applications of the PBABA, when safe alternatives exist. Neither *Roe* nor *Casey* has ever required the advancement of marginal safety benefits without any deference to competing interests at stake.[166]

B. Post-Viability Applications of the PBABA

Perhaps the more difficult question is the post-viability application of the PBABA. Although the pre-viability application raises some questions, the undue burden test is sufficiently pliable to uphold the PBABA.[167] But the PBABA provides no exception to protect the woman's

---

159 Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 79 (1976).

160 *Id.* at app. at 86–87 (quoting H.C.S.H.B. 1211 § 9, 77th Leg. (Mo. 1974)).

161 *Id.* at 79.

162 *Carhart II*, 127 S. Ct. at 1637 (quoting *Danforth*, 428 U.S. at 79).

163 *See* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 291 (2d Cir. 2006) (Walker, C.J., concurring), *vacated on other grounds by* Nat'l Abortion Fed'n v. Gonzales, 224 Fed. App'x 88 (2d Cir. 2007).

164 Justice Ginsburg emphasized plaintiffs' expert testimony and trial court findings contradicting Justice Kennedy's view. *Carhart II*, 127 S. Ct. at 1644–45 (Ginsburg, J., dissenting) ("According to the expert testimony plaintiffs introduced, the safety advantages of [D&X] are marked for women with certain medical conditions, for example, uterine scarring, bleeding disorders, heart disease, . . . compromised immune systems [or] . . . certain pregnancy-related conditions, such as placenta previa and accreta . . . .").

165 *Id.* at 1636 (majority opinion) ("The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community.").

166 *See Nat'l Abortion Fed'n*, 437 F.3d at 291 (Walker, C.J., concurring).

167 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 798–800 (2d ed. 2002) (questioning substance of the undue burden standard).

health, which appears to be a clear violation of the *Roe-Casey* mandate requiring such an exception.

The corollary of *Casey*'s undue burden test for pre-viability restrictions on a woman's right to choose is the grant of broad powers to regulate, even proscribe, post-viability abortion, so long as exceptions are made to protect the life and health of the mother.[168] Prior to *Carhart II*, the Court never upheld a statute that purposefully excluded a health exception. In *Ayotte v. Planned Parenthood of Northern New England*, the Court implied a health exception when the statute was silent,[169] but *Carhart II* takes a significant step beyond *Ayotte*. Though Congress purposefully excluded a health exception to the PBABA because D&X is "never medically necessary"[170]—thus negating the possibility of an implied health exception as in *Ayotte*—Justice Kennedy's majority opinion in *Carhart II* affirmed the constitutionality of the statute. Thus, at first blush, the PBABA appears irreconcilable with *Casey*'s requirement that every post-viability restriction contain an exception to preserve the life or health of the mother. Despite this apparently fatal flaw, if one steps back to consider the "essential holding" of *Roe*, as was reaffirmed in *Casey*, *Carhart II* proves to be consistent with the underlying constitutional principles and public policies. Though Justice Kennedy's opinion lacks sufficient explanation and is flawed in some ways, the end result is correct: the PBABA does not violate the post-viability right to an abortion, as outlined in *Casey*.

Abortion jurisprudence has developed by the Court's balancing of competing interests. Beginning in *Roe*, the Court balanced the woman's interest in reproductive autonomy, the state's interest in protecting health, and the state's interest in protecting fetal life. *Casey* reinforced this delicate balance, emphasizing the latter. Though the *Carhart I* Court failed to recognize the validity of a state D&X ban, the *Carhart II* majority finally recognized both the temporal and spatial concerns justifying the PBABA.[171] In the end, the post-viability application of the

---

[168] *See Casey*, 505 U.S. at 846.

[169] 546 U.S. 320 (2006). In *Ayotte*, the Supreme Court reviewed New Hampshire's parental notification law, which prohibited a physician from performing an abortion until at least forty-eight hours after notice is delivered to a minor's parent or guardian. *See* Parental Notification Prior to Abortion Act, N.H. REV. STAT. ANN. §§ 132:24–132:28 (LexisNexis 2006). The law contained no exception allowing a physician to perform the procedure in a medical emergency, unless the minor's life was in peril. Thus, it contained no explicit health exception.

[170] *Carhart II*, 127 S. Ct. at 1624 (quoting Partial-Birth Abortion Ban Act of 2003 § 2(1)).

[171] *See Nat'l Abortion Fed'n*, 437 F.3d at 311–12 (Straub, J., dissenting) ("At birth, we are . . . confronted with a unique circumstance where we must weigh the relative strength of the mother's privacy right, specifically her right to terminate her pregnancy in

PBABA comes down to a balance: three legitimate and important state interests against an exception to allow D&X when necessary to preserve a woman's health. Considering the grave governmental interests—and by extension, social interests—at stake, as well as the unsubstantiated need for a health exception,[172] the *Carhart II* Court was right in upholding the constitutionality of the PBABA. The following pages consider in greater detail the three important government interests that were dismissed in *Carhart I* and affirmed in *Carhart II*: protecting potential life; safeguarding the integrity of the medical profession; and drawing a clear line between abortion and infanticide.

1. Protecting Potential Life

Since 1973, the Court has affirmed the important government interest in protecting potential life.[173] In fact, Justice Blackmun's *Roe* opinion flatly rejected the contention that a woman may terminate her pregnancy at any time, in any manner, and for any reason.[174] The State's important interests of regulating medical procedures and protecting potential life dictate that the abortion right is a qualified right, and that this individual interest must be balanced against important government interests.[175]

While the *Roe* Court emphasized the State of Texas's interest in protecting potential life, it also refrained from answering "the difficult question of when life begins."[176] Instead, Justice Blackmun attempted to balance the competing interests through the trimester system:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the

---

a manner that preserves her own health, against the emerging right of the fetus to live and the State's interest in protecting life.").

[172] *See id.* at 306–07. The American Medical Association could not identify a single circumstance where D&X would be medically necessary. *Id.* at 306 (citation omitted). Likewise, the American College of Obstetricians and Gynecologists could identify no such circumstance, although they did suggest the procedure "may be the best or most appropriate procedure' in an unspecified 'particular circumstance." *Id.* (citation omitted).

[173] *Roe*, 410 U.S. at 150 ("In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.").

[174] *Id.* at 153.

[175] *Id.* at 154.

[176] *Id.* at 159. Although this statement is not entirely true, the purpose of this Article is not to question the validity of *Roe*; countless others have accomplished this task. *See, e.g.*, Richard A. Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (1973).

> mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[177]

The "'compelling' point," according to Justice Blackmun, is at viability because a viable fetus is capable of "meaningful life outside the mother's womb."[178] Accordingly, the trimester system recognized the state's interest in potential life, an interest which became more and more compelling as the day of birth approached.

Nearly twenty years later, the Supreme Court reaffirmed and retained *Roe*'s "essential holding" in *Casey*.[179] The Court discussed three key principles that remained from Justice Blackmun's opinion. First, a woman has a right to pre-viability abortion without "undue interference from the State."[180] Second, the Court confirmed the State of Pennsylvania's ability to regulate post-viability abortions, if such regulations contain exceptions "for pregnancies which endanger the woman's life or health."[181] Third, and most importantly for the purposes of this Article, legislatures have an interest in not only protecting the woman's health during pregnancy, but also in protecting "the life of the fetus that may become a child."[182]

In *Casey*, Justice O'Connor's chief criticism with the *Roe* decision was that the trimester framework was too rigid and that it failed to "fulfill [its] own promise that the State has an interest in protecting fetal life or potential life."[183] *Roe* held that any governmental attempt to influence a woman's abortion decision pre-viability was unwarranted; however, this view is incompatible with the *Roe* Court's recognition of the "substantial state interest in potential life *throughout pregnancy*."[184] Although *Casey* is often cited for the undue burden standard, the

---

[177] *Roe*, 410 U.S. at 164–65.

[178] *Id.* at 163.

[179] 505 U.S. 833, 846 (1992).

[180] *Id.* at 846.

[181] *Id.*

[182] *Id.*

[183] *Id.* at 876 (plurality opinion) (citing *Roe*, 410 U.S. at 162). *See also* Webster v. Reprod. Health Servs., 492 U.S. 490, 519 (1989) (plurality opinion) ("'[T]he State's interest [in protecting fetal life], if compelling after viability, is equally compelling before viability.'" (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 795 (1986) (White, J., dissenting))).

[184] *Casey*, 505 U.S. at 876 (plurality opinion) (emphasis added) (comparing *Webster*, 492 U.S. at 519 (plurality opinion) with City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 460–61 (1983) (O'Connor, J., dissenting)).

plurality left *Roe*'s post-viability framework where it found it. Under *Casey*, a state could still regulate, or even proscribe abortion altogether, provided that exceptions were made where abortion would be necessary to preserve the life or health of the mother.[185]

As applied post-viability, the PBABA furthers the important interest in protecting potential life in two ways. First, it ensures that D&X is only used, if at all, to protect the life of the mother. Thus, no person may rely on an overly broad reading of the health exception to justify this gruesome procedure.[186] Second, the ban also has symbolic value because it fosters dialogue on the nature of abortion itself.[187] By forcing individuals to grapple with both the spatial and temporal elements, it forces each person to consider the nature of life, when it begins, and how to reconcile abortion rights with that developing life.

2. Safeguarding the Integrity of the Medical Profession

In addition to protecting potential life, government also has an important interest in safeguarding the integrity of the medical profession. Today, commentators debate this issue in contexts ranging from prisoner abuse in the war on terror,[188] to capital punishment,[189] to euthanasia.[190] When a physician performs a gruesome procedure like D&X to destroy fetuses that are both viable and partially born, similar policy concerns can be raised.

---

[185] *Casey*, 505 U.S. at 879 (plurality opinion) (citing *Roe*, 410 U.S. at 164–65).

[186] For a critical discussion of the health exception, see Brian D. Wassom, Comment, *The Exception that Swallowed the Rule?* Women's Medical Professional Corporation v. Voinovich *and the Mental Health Exception to Post-Viability Abortion Bans*, 49 CASE W. RES. L. REV. 799 (1999).

[187] *Carhart II*, 127 S. Ct. at 1634.

[188] *E.g.*, Peter A. Clark, *Medical Ethics at Guantanamo Bay and Abu Ghraib: The Problem of Dual Loyalty*, 34 J.L. MED. & ETHICS 570, 576 (2005) ("For prisoners and detainees to see their primary care physicians also in the role of assisting those who tortured and abused them, or to see them remain silent in the face of such human rights violations, undermines the credibility of the medical profession and is irreconcilable with the physician's role as healer.").

[189] *E.g.*, Christopher J. Levy, Note, *Conflict of Duty: Capital Punishment Regulations and AMA Medical Ethics*, 26 J. LEGAL MED. 261, 274 (2005) ("The Hippocratic Oath binds the medical community to the healing of society, regardless of the historical and humane natures of capital punishment. Under current law, there is a direct conflict between requiring physicians to assist in capital punishment and the sworn oath of medicine. Furthermore, there is great conflict between laws criminalizing one form of physician-assisted death, euthanasia, and laws requiring medical professional to execute for the state.").

[190] *E.g.*, Kelly Green, Note, *Physician-Assisted Suicide and Euthanasia: Safeguarding Against the "Slippery Slope"—The Netherlands Versus the United States*, 13 IND. INT'L & COMP. L. REV. 639, 650 (2003) ("If physicians are obligated by law to provide their patients with a lethal prescription or injection upon request, physicians will no longer be viewed as healers but those who take life.").

In order to provide a more robust understanding of these policy concerns, this Section looks at two other examples where similar arguments have been raised: (a) involuntary medication of death row inmates and (b) assisted suicide. If the integrity of the medical profession is implicated through assisting in the death of murderers, and if it is also implicated through alleviating the suffering of consenting adults, one must ask whether those same interests are implicated in the case of a partially born, viable fetus that is neither guilty of any wrongdoing nor capable of giving consent. When considering these types of policy questions, one must also consider the interplay between law and ethics, and the degree to which each informs the other.[191]

(a) Involuntary Medication

The Supreme Court's decision in *Washington v. Harper* established the standard for involuntary medication of a prison inmate.[192] In *Harper*, the Court balanced the inmate's liberty interest guaranteed, though diminished in some ways, under the Fourteenth Amendment against traditional state interests in prison safety and security. In light of these considerations, the Court held that involuntary medication is permissible when "the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."[193] Thus, the constitutionality of involuntary medication hinges on the question of "medical appropriateness."[194]

Because the Eighth Amendment prohibits the execution of the insane,[195] the *Harper* involuntary medication framework created a potential loophole whereby prisons could medicate mentally incompetent inmates for the express or implied purpose of carrying out a death sentence.[196] In *Singleton v. Norris*, a death row inmate—whose death

---

[191] One of America's most controversial physicians describes this aptly: "Before [*Roe*], abortion was illegal and therefore unethical. That decision suddenly made it legal and, of course, ethical; and doctors began doing abortions on a grand scale." JACK KEVORKIAN, PRESCRIPTION: MEDICIDE 163 (1991). This line of thinking suggests that, were the Court to overturn *Roe*, abortion would become unethical again. *See id.* at 164.

[192] 494 U.S. 210 (1990).

[193] *Id.* at 227.

[194] Riggins v. Nevada, 504 U.S. 127, 135 (1992) (citing *Harper*, 494 U.S. at 227).

[195] Ford v. Wainwright, 477 U.S. 399, 401 (1986).

[196] At least two state courts have recognized that the *Harper* involuntary medication framework is problematic in the context of the death penalty. State v. Perry, 610 So. 2d 746, 747 (La. 1992); Singleton v. State, 437 S.E.2d 53 (S.C. 1993). These courts argue that so-called "medicate-to-execute" regimes run afoul of the Hippocratic Oath, which states:

> "I swear by Apollo the physician, by Aesculapius, Hygeia, and Panacea, and I take to witness all the gods, all the goddesses, to keep according to my ability and my judgment the following Oath: . . . I will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to

sentence had been stayed due to insanity—received medically appropriate antipsychotic medication for his mental condition.[197] This treatment had a secondary effect of rendering him competent for execution, thus reinstating his death sentence. The Eighth Circuit ultimately held that this treatment was consistent with Due Process requirements espoused in *Harper*.[198]

Despite the majority's reasoning, commentators have been critical of the *Norris* decision in part because of a failure to adequately consider how it would affect the integrity of the medical profession.[199] Judge

---

> anyone. To please no one will I prescribe a deadly drug, nor give advice which may cause his death. . . . I will preserve the purity of my life and my art. . . . In every house where I come I will enter only for the good of my patients, keeping myself far from all intentional ill-doing . . . ."

Perry, 610 So. 2d at 752 (quoting Hippocratic Oath, *reprinted in* STEDMAN'S MEDICAL DICTIONARY 647 (4th Unabridged Lawyer's ed. 1976)); *see also Singleton*, 437 S.E.2d at 61 (same).

In *Perry*, the Louisiana Supreme Court held that involuntary medication that restores an inmate's competency for execution violates the Louisiana Constitution, 610 So. 2d at 747 (citing LA. CONST. art. I, §§ 5, 20), but the court focused much of its attention on federal precedent. *Id.* at 761–71 (discussing Eighth Amendment case law). The *Perry* court noted that "blurring the distinction between healing and punishing denigrates the 'deep-seated social interest in preserving medical care, in actuality and in perception, as an unambiguously beneficent healing art.'" *Id.* at 753 (quoting David L. Katz, Note, Perry v. Louisiana*: Medical Ethics on Death Row—Is Judicial Intervention Warranted?*, 4 GEO. J. LEG. ETHICS 707, 724 (1991)).

In *Singleton*, the South Carolina Supreme Court followed *Perry*, holding that involuntary medication that restored an inmate's competency for execution violated the State's Constitution. Like the Louisiana Supreme Court in *Perry*, the South Carolina Supreme Court in *Singleton* rested on independent state grounds; nonetheless, the court discussed the same concern of safeguarding the integrity of the medical profession. Citing published opinions by the American Medical Association and the American Psychiatric Association, the court discussed the "causal relationship between administering a drug which allows the inmate to be executed, and the execution itself." *Singleton*, 437 S.E.2d at 61. Emphasizing the deference that the United States Supreme Court has shown to medical professionals in other cases, *id.* (citing Addington v. Texas, 441 U.S. 418 (1979) (discussing clear and convincing standards for involuntary commitment proceedings); Vitek v. Jones, 445 U.S. 480 (1980) (discussing transfer of inmate to medical hospital)), the court in *Singleton* found that psychotic drugs could not be prescribed solely to facilitate execution. 437 S.E.2d at 61.

[197] 319 F.3d 1018 (8th Cir. 2003).

[198] *Id.* at 1026 ("[T]he mandatory medication regime, valid under the pendency of a stay of execution, does not become unconstitutional under *Harper* when an execution date is set.").

[199] *See* Thompson v. Bell, No. 1:04-CV-177, 2006 WL 1195892, at *32 n.18 (E.D. Tenn. May 4, 2006) (citing Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169 (2005)); Jeremy P. Burnette, Note, *The Supreme Court "Sells" Charles Singleton Short: Why the Court Should Have Granted Certiorari to* Singleton v. Norris *After Reversing* United States v. Sell, 21 GA. ST. U. L. REV. 541 (2004); Lisa N. Jones, Note, Singleton v. Norris: *The Eighth Circuit Maneuvered Around the Constitution by Forcibly Medicating Insane Prisoners to Create an Artificial Competence for Purposes of Execution*, 37 CREIGHTON L. REV. 431 (2004).

Heaney, one of the five dissenting judges, criticized the majority opinion because medicate-to-execute regimes violate important ethical standards of the medical profession.[200] He noted that this was not merely a policy concern, and that "courts have long recognized the integrity of the medical profession as an appropriate consideration in its decision-making process."[201] In the context of involuntary medication for execution, Judge Heaney wrote that "the medical community has spoken with a singular voice, opposing its members' assistance in executions."[202] Consequently, he argued that the majority's decision to uphold the death sentence, rather than to defer to the medical community's view, was erroneous.

This reasoning provides a useful analogy for the partial-birth abortion context. Death row inmates have diminished constitutional rights in many important respects, but that does not release physicians from their ethical duty to do no harm. Although a fetus is not a "person" within the constitutional definition, the partially born, viable fetus—being on the threshold of birth, having violated no laws, and having taken no lives—deserves heightened protections.[203] Where the medical community has spoken with a "singular voice"[204] in opposition to D&X,[205] the *Carhart II* Court correctly deferred to the medical community in affirming the importance of this interest.

(b) Assisted Suicide

A second and equally instructive context where courts have discussed government's important interest in safeguarding the medical profession is in assisted suicide cases. The Supreme Court has held that the "right to die" is not a fundamental right.[206] While each person has a

---

[200] *Norris*, 319 F.3d at 1036 (Heaney, J., dissenting).

[201] *Id.* at 1037 (citing Washington v. Glucksberg, 521 U.S. 702 (1997)).

[202] *Id.*

[203] *See Carhart I*, 530 U.S. at 962–63 (Kennedy, J., dissenting) ("We are referred to substantial medical authority that D&X perverts the natural birth process to a greater degree than D&E, commandeering the live birth process until the skull is pierced. American Medical Association (AMA) publications describe the D&X abortion method as 'ethically wrong.'"); *id.* at 995 n.13 (Thomas, J., dissenting).

[204] *Norris*, 319 F.3d at 1037 (Heaney, J., dissenting).

[205] *Carhart I*, 530 U.S. at 963 (Kennedy, J., dissenting) (quoting publications from the American Medical Association ["AMA"] stating that D&X is "ethically wrong"). In part because of reservations against governmental interference in medicine, the AMA has softened its stance. *See H-5.982 Late-Term Pregnancy Termination Techniques*, AMERICAN MEDICAL ASSOCIATION, http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/H-5.982.HTM (last visited Mar. 5, 2008) (stating that "ethical concerns have been raised about intact D&X" instead of determining the procedure to be ethically wrong).

[206] *Glucksberg*, 521 U.S. at 728.

fundamental right to refuse unwanted medical care,[207] it does not follow that one has a right to actively receive treatment that will cause his or her death.[208]

In 1997, the Supreme Court decided companion cases on the question of assisted suicide, *Washington v. Glucksberg*[209] and *Vacco v. Quill*.[210] While *Glucksberg* was a substantive due process challenge and *Vacco* was an equal protection challenge, each stands for the proposition that a state may draw a line between a patient's constitutional right to refuse unwanted medical care and a patient's interest in obtaining physician assistance to end his or her life.[211] The *Glucksberg* opinion is particularly instructive because the Court analyzes the state's interest in "protecting the integrity and ethics of the medical profession."[212] Using similar language to that employed in the *Norris* dissent, the Court noted that "'[p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer.'"[213]

Glucksberg and *Vacco* show the significance of drawing lines. One could certainly argue that assisted suicide, at least in some cases, constitutes the ultimate sort of pain relief with which physicians could be involved.[214] Indeed, the line between pain relief and assisted suicide is not always clear; sometimes very aggressive, "palliative care" aims at soothing pain, but ultimately can hasten death.[215] Nonetheless, legislatures have an important interest in distinguishing between medical treatment that aims at healing and medical treatment that aims at ending life, despite any imperfections in such a distinction.

In the end, the *Glucksberg* Court recognized the important policy implications that underlie these types of ethical or moral lines. The State

---

[207] *Id.* at 720 (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990)).

[208] While the right to die is not a fundamental right, a state may pass legislation recognizing such a right. *See* Gonzales v. Oregon, 546 U.S. 243 (2006) (upholding the Oregon Death With Dignity Act).

[209] 521 U.S. 702 (1997).

[210] 521 U.S. 793 (1997).

[211] *See id.* at 808–09; *Glucksberg*, 521 U.S. at 735.

[212] *Glucksberg*, 521 U.S. at 731; *see also Vacco*, 521 U.S. at 808–09 (referencing *Glucksberg*'s discussion on this issue).

[213] *Glucksberg*, 521 U.S. at 731 (quoting American Medical Association, CODE OF ETHICS § 2.211 (1994), *reprinted in* CODES OF PROFESSIONAL RESPONSIBILITY 291 (Rena A. Gorlin ed., 3d ed. 1994)).

[214] *See* Marya Mannes, *Euthanasia vs. the Right to Life*, 27 BAYLOR L. REV. 68, 69 (1975) (quoting FRANCIS BACON, THE ADVANCEMENT OF LEARNING (1605), *reprinted in* 2 THE WORKS OF FRANCIS BACON 165 (Basil Montagu ed., 1825) ("I esteem it the office of a physician not only to restore health, but to mitigate pain and dolours; and not only when such mitigation may conduce to recovery, but when it may serve to make a fair and easy passage . . . .")).

[215] *Vacco*, 521 U.S. at 802.

of Washington argued that, were the Court to strike down the state's ban on physician-assisted suicide, such a ruling would start the state "down the path to voluntary and perhaps even involuntary euthanasia."[216] The Court looked to the example of the Netherlands, where this prophecy has been fulfilled:

> [D]espite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering. . . . [R]egulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia.[217]

The two examples discussed in this Section, medicate-to-execute regimes and physician-assisted suicide, highlight the government's important interest in safeguarding the integrity of the medical profession. Traditionally, the role of the physician has been that of a healer and preserver of life, and thus, the state has an interest in prohibiting practices that undermine this view. By condoning a procedure in which a physician manipulates an obstetrician's delivery techniques to ultimately destroy a fetus when it is only inches from a full birth,[218] the *Carhart I* Court failed to recognize the importance of this interest. In *Carhart II*, the Court corrected this error.

3. Drawing a Clear Line Between Abortion and Infanticide

The third important government interest at issue is the need to draw a clear line between abortion and infanticide.[219] This interest is

---

[216] *Glucksberg*, 521 U.S. at 732.

[217] *Id.* at 734 (citing CHARLES T. CANADY, 104TH CONG., REPORT ON PHYSICIAN-ASSISTED SUICIDE AND EUTHANASIA IN THE NETHERLANDS 10-12 (U.S. Gov. Print 1996)).

[218] *See Carhart II*, 127 S. Ct. at 1633 (citing Partial-Birth Abortion Ban Act of 2003 § 2(14)(J)).

[219] In discussing the intentional killing of a child, scholars typically refer to three definitional categories. LITA LINZER SCHWARTZ & NATALIE K. ISSER, ENDANGERED CHILDREN: NEONATICIDE, INFANTICIDE, AND FILICIDE 1 (2000). Neonaticide refers to "the killing of an infant at or within hours of his birth . . . ." *Id.* Infanticide is "the murder of a child up to 1 year of age," and filicide is "the murder of a [child] older than 1 year." *Id.* The key distinction between these definitional concepts is largely based on the psychological causes. Explanations for neonaticide include (1) shame; (2) denial of pregnancy; (3) mental disorders; and (4) reaction or revenge. *Id.* at 44–53. The causes of infanticide or filicide, by contrast, include immaturity or stress, and in some cases, desire for financial gain. *Id.* at 53–55.

For the purposes of this Article, the differences between neonaticide, infanticide, and filicide will not be considered. Infanticide, as used herein, will refer to the killing of a newborn child. Though scholars technically would refer to this as neonaticide, both laypersons and those in the legal community would consider this to be infanticide. *See, e.g.*, *supra* note 29; *Carhart I*, 530 U.S. at 982 (Thomas, J., dissenting) (recognizing even in a legal context that partial-birth abortion is "a method of abortion that millions find hard to distinguish from infanticide"). Thus, while abortion involves the taking of a fetus's life

related to the previous interests of protecting potential life and safeguarding the integrity of the medical profession. Because even potential life has some value, government may take measures to protect such life. Further, it may take steps to ensure that physicians are regarded as healers, rather than killers. Clearly distinguishing abortion from infanticide serves both of these ends because it protects the dignity of potential human life, ensuring that viable fetuses are not killed at the threshold of birth, and safeguards the medical profession by distinguishing between abortion, which is generally accepted, and infanticide, which is not accepted.

(a) Historical Consensus Favoring Infanticide

In the ancient world, infanticide was a norm in many cultures. Records from ancient Babylonian and Chaldean civilizations, dating back as far as 4000 to 2000 B.C., reference the common practice of infanticide.[220] The Spartan ritual of exposing children to the hillsides is a notable example for many,[221] but few recognize that this was the common practice for all of ancient Greece and Rome.[222] Some scholars have noted the disparate sex ratios between males and females as evidence that infanticide was used as post-birth gender selection favoring males.[223] The ancient world viewed its children as expendable, and when they became a burden, they could simply be discarded.[224]

The emergence of Christianity in the Roman Empire during the late-third and early-fourth centuries helped to eradicate the practice of infanticide,[225] a moral trend that has had long-term implications for

---

prior to full vaginal delivery, infanticide would involve the taking of that fetus's life immediately after delivery.

[220] *See* Michelle Oberman, *A Brief History of Infanticide and the Law*, *in* INFANTICIDE: PSYCHOSOCIAL AND LEGAL PERSPECTIVES ON MOTHERS WHO KILL 3, 4 (Margaret G. Spinelli ed., 2003).

[221] In Sparta, children would be left alone, subjected to the elements. As Glanville Williams notes, "[t]he practice of exposing the baby meant that death was the most merciful fate that might befall it; often the child might be picked up by someone, and reared for slavery or prostitution." GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 14–15 (1974).

[222] PETER SINGER, PRACTICAL ETHICS 173 (2d ed. 1993) (discussing approval of infanticide by Greek philosophers Plato and Aristotle, as well as the Roman philosopher Seneca). Plato suggested that children "begotten by inferior parents" should be killed. SCHWARTZ & ISSER, *supra* note 219, at 4 (citation omitted). In Rome, the father was given complete discretion to kill his children, while the mother could do the same with his authorization. *Id.*

[223] *Id.*

[224] *See* WILLIAMS, *supra* note 221, at 14.

[225] Oberman, *supra* note 220, at 6 ("In 318 A.D., when the Roman Empire converted to Christianity, Constantine declared an end to *patria potens*, the absolute right of the

subsequent Western cultures. In fact, the Judaic tradition stands in sharp contrast with many other ancient cultures in that child sacrifice and child exposure were condemned in the Scriptures.[226] To the extent that the partial-birth abortion debate is framed as a merely theological (and thus, legally irrelevant) debate,[227] the Judeo-Christian influence on eradicating the practice of infanticide is worth noting.[228]

Still, a cultural aversion to infanticide historically was, and in some cases still is, the exception, rather than the norm.[229] For example,

---

father over his children, and infanticide was declared to be a crime."). For a complete discussion, see generally MICHAEL J. GORMAN, ABORTION AND THE EARLY CHURCH (1982).

[226] SCHWARTZ & ISSER, *supra* note 219, at 5. For example, in *Leviticus* 18:21 (NKJV), God gives the nation of Israel the following command: "And you shall not let any of your descendants pass through the fire of Molech . . . ." Further, *Leviticus* 20:1 *(NKJV)* states that "whoever of the children of Israel, or of the strangers who dwell in Israel, who gives any of his descendants to Molech, he shall surely be put to death."

[227] *See, e.g.*, Francis J. Beckwith, *Gimme That Ol' Time Separation: A Review Essay*, 8 CHAP. L. REV. 309, 322–23 (2005) (noting that pro-life arguments are often dismissed as attempts to establish religion).

[228] The entire abortion debate can be framed as a theological question of when life begins, which would have a direct bearing on when such a being is given rights. One could attempt to reject the difficult question of when life begins, but the legal question of when society will recognize certain rights does not go away. They are thus intertwined in some respects. To label the PBABA as imposing "moral" values that are not legally relevant assumes that the partially-born fetus has no rights. Such a determination is both moral and legal, in the same way that the ancient Roman practice of infanticide was both a moral and legal determination. In other contexts, such as the civil rights movement, "moral" values unquestionably have served the common good. *See, e.g.*, Martin Luther King, Jr., Letter from a Birmingham Jail, (Apr. 16, 1963), *available at* http://www.historicaltextarchive.com/sections.php?op=viewarticle&artid=40; *see also* THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. 351 (Clayborne Carson ed., 1998) ("The great tragedy is that Christianity failed to see that it had the revolutionary edge. You don't have to go to Karl Marx to learn how to be a revolutionary. I didn't get my inspiration from Karl Marx; I got it from a man named Jesus, a Galilean saint who said he was anointed to heal the broken-hearted. He was anointed to deal with the problems of the poor. And that is where we get our inspiration. And we go out in a day when we have a message for the world, and we can change this world and we can change this nation."). Even those who generally oppose pro-life causes recognize the need for religion and moral conviction in public debates. *E.g.*, MADELEINE ALBRIGHT, THE MIGHTY AND THE ALMIGHTY 87–88 (2006) ("I do not . . . fault members of the Christian right for expressing and fighting for a moral view, since many others engaged in public policy—including me—do the same. Articulating moral principles is what movements to establish international norms are in business to do. That is precisely how military aggression, slavery, piracy, torture, religious persecution, and racial discrimination have come to be outlawed. It is also how abuses against women, including domestic violence, 'dowry murders,' 'honor crimes,' trafficking, and female infanticide may one day be further reduced. This is a question not of imposing our views on others, but of convincing enough people in enough places that we are right. That is persuasion, not imposition.").

[229] Oberman, *supra* note 220, at 4–6 (recognizing a present and persistent custom of female infanticide in China); SINGER, *supra* note 222, at 172 ("Infanticide has been practised [sic] in societies ranging geographically from Tahiti to Greenland and varying in culture from the nomadic Australian aborigines to the sophisticated urban communities of

families in India and China use sex-selective infanticide to avoid financial burdens associated with having a daughter.[230] Across the Atlantic Ocean, the Netherlands has in place an administrative mechanism allowing for disposing of unwanted, handicapped children.[231] And even America is not exempt: many newborns and infants have been left to die by those charged to protect them.[232]

(b) Peter Singer and the Contemporary Defense of Infanticide

For years, philosophers and ethicists like Peter Singer have advocated for infanticide, arguing against the idea that full personhood, including concomitant legal, ethical, and moral significance associated with humanity, is acquired at birth.[233] Singer argues that the fetus lacks intrinsic value because it does not possess those things that make a person fully human: rationality, self-consciousness, awareness, and capacity to feel.[234] Like many animals, the fetus is a sub-human form,

---

ancient Greece or mandarin China. In some of these societies infanticide was not merely permitted but, in certain circumstances, deemed morally obligatory."); *see also* SINGER, *supra* note 7, at 129–30 ("[I]t is worth knowing that from a cross-cultural perspective it is *our* tradition . . . that is unusual in its official morality about infanticide.").

[230] Oberman, *supra* note 220, at 5 (discussing cultural dowry obligations that burden some families in India); *id.* at 5–6 (discussing China's one child policy); *see also* Qu Jian Ding & Therese Hesketh, *Family size, fertility preferences, and sex ratio in China in the era of the one child family policy: results from national family planning and reproductive health survey*, 333 BMJ (BRIT. MED. J.) 371, 373 (2006), *available at* http://www.bmj.com/cgi/reprint/333/7564/371 ("Since the start of the one child family policy, the total birth rate and the preferred family size have decreased, but a gross imbalance in the sex ratio has also emerged.").

[231] *See generally* A. A. E. Verhagen & Pieter J.J. Sauer, *End-of-Life Decisions in Newborns: An Approach From the Netherlands*, 116 PEDIATRICS 736 (2005), *available at* http://www.pediatrics.org/cgi/content/full/116/3/736. In the Netherlands, the practice of infanticide has been embraced by the medical community and by the populace as a whole. *Id.* at 738 (highlighting two infanticide cases which established the standard of care in Dutch medicine, one involving a child with an extreme form of spina bifida, the other involving a child with trisomy 13 (Down syndrome)). The "Groningen Protocol" has become recognized as the standard of care in newborn end-of-life decisions. Eduard Verhagen & Pieter J.J. Sauer, *The Groningen Protocol—Euthanasia in Severely Ill Newborns*, 352 NEW ENGL. J. MED. 959, 959 (2005) [hereinafter Verhagen & Sauer, *Groningen Protocol*]. The Groningen Protocol requires:

> [1] The diagnosis and prognosis must be certain [2] Hopeless and unbearable suffering must be present [3] The diagnosis, prognosis, and unbearable suffering must be confirmed by at least one independent doctor [4] Both parents must give informed consent [5] The procedure must be performed in accordance with the accepted medical standard.

Id. at 961 tbl.2.

[232] *See* SINGER, *supra* note 7, at 106–15; Byron, *supra* note 121.

[233] *See generally* SINGER, *supra* note 222, at 95–109; *see also* PONNURU, *supra* note 35, at 179–82 (discussing others who advocate similar concepts as Singer).

[234] SINGER, *supra* note 222, at 169.

and it is expendable. By extension, Singer contends that "these arguments apply to the newborn baby as much as to the fetus."[235]

If one adopts the view that fetal rights cannot exist independently of the mother,[236] one should not dismiss Singer's logic too easily.[237] Full delivery significantly alters the mother-child relationship, but it does not fundamentally change the fetus. Essentially, the change is semantic: the fetus is no longer called a fetus, but a child. If a viable fetus may be aborted only inches from a full delivery, then one must ask—as Singer does ask—why a newborn infant could not be killed as well.[238]

This is the moral quandary presented by partial-birth abortion. Devised as a method of killing late-term fetuses at the threshold of birth,[239] it has the appearance of infanticide, and it is an affront to human dignity. The process of delivering a fetus within inches of a full birth only to puncture her skull and suck out her brain, too closely resembles infanticide; therefore, the government, legislating as the voice of the people, has an important interest in eradicating the procedure.

The clear danger from Singer's logic is that abortion, once conceived as a decision between a woman and her physician based on her physician's medical judgment,[240] devolves into the ancient brutality of infanticide. In a world where scholars argue the moral equivalence of abortion and infanticide, it is entirely feasible that segments of the population would follow suit. Indeed, the Netherlands has resurrected the practice of infanticide based on this type of logic.[241] Legislatures therefore have an important interest in drawing clear moral lines. Where philosophical argumentation and speculation has so blurred these lines that they become virtually undetectable, legislatures must erect fixed, firm barriers between prohibited and permitted acts. In this way, the PBABA is a valid attempt to provide a clear boundary between abortion and infanticide.[242]

---

[235] *Id.*

[236] *See* Johnsen, *supra* note 10, at 601–02.

[237] SINGER, *supra* note 7, at 130 ("Birth is a significant point because the mother has a relationship to her baby that is different from the relationship she had with her fetus; and others can now relate to the baby too, in a way that they could not earlier. But it is not for that reason a point at which the fetus suddenly moves from having no right to life to having the same right to life as every other human being.").

[238] *See* PONNURU, *supra* note 35, at 127 ("Pro-choicers who find Peter Singer's advocacy of infanticide repulsive cannot come up with a persuasive argument for why he is wrong. He differs from them only in his willingness to embrace the logical consequences of the premises he joins them in affirming.").

[239] Haskell, *supra* note 37.

[240] *See* Roe v. Wade, 410 U.S. 113, 164 (1973).

[241] *See* Verhagen & Sauer, *Groningen Protocol*, *supra* note 231, at 959.

[242] *See* Partial-Birth Abortion Ban of 2003 § 2(14)(O).

VI. CONCLUSION: RETHINKING ABORTION RIGHTS IN LIGHT OF *CARHART II*

Partial-birth abortion forces Americans to ask some of the most fundamental questions that one can ask about when life begins and when a fetus obtains intrinsic value in the eyes of the law. More than other abortion procedures, however, D&X forces each person to consider the spatial question of where a fetus gains independent moral status apart from his or her mother. At the threshold of birth, the law must draw a clear line between abortion and infanticide.

Justice Kennedy's opinion in *Carhart II* draws this line by affirming the constitutionality of the PBABA. Where other safe abortion alternatives exist pre-viability, the PBABA prohibits the unnecessary brutality of the D&X procedure. And absent any evidence that D&X is ever medically necessary, the PBABA ensures that an overly broad reading of the health exception is not used to justify pulling a child almost entirely outside of the mother's body in order to ends its life.

Ultimately, *Carhart II* succeeds where *Carhart I* failed because it recognizes the three important governmental interests at stake. The PBABA promotes and protects life by limiting the unnecessary use of D&X and fostering dialogue about the nature of and substantive limits on reproductive rights. It also safeguards the integrity of the medical profession by barring physicians from manipulating obstetricians' delivery techniques to complete an ethically and morally offensive procedure. Most importantly, the PBABA draws a clear line between abortion, a right of reproductive choice and medical self-defense, and infanticide, an abhorrent practice that no society should ever condone.

RELIGIOUS LIBERTIES: THE ROLE OF RELIGION IN PUBLIC DEBATE†

*Diane S. Sykes**

Good afternoon, everyone. I am Diane Sykes from the Seventh Circuit Court of Appeals in Chicago, and it is my great privilege to welcome you here today to the Federalist Society Religious Liberties Practice Group panel discussion at the annual convention.

Our topic today is the role of religion in public debate. University of Chicago Law Professor Geoffrey Stone recently argued[1] that the Supreme Court's decision in *Gonzales v. Carhart*,[2] the partial-birth abortion case, and the President's veto of legislation expanding federal funding for embryonic stem cell research[3] represent the interjection of sectarian religious belief into matters of public policy. This sparked renewed debate over the role of religion in public discourse.

Our panel this afternoon will discuss the place of religious language and ideas in public debate, including whether there are legitimate constitutional or philosophical limits to religious discourse in public debate; whether religious participants in public debate should be required to translate their views into publicly available reasoning; and whether there are non-theological, publicly available arguments in opposition to, for example, such matters as abortion, same-sex marriage, or embryonic stem cell research.

---

† This panel discussion was presented as part of the Federalist Society for Law & Public Policy Studies 2007 National Lawyers Convention, November 15, 2007. The panelists included: the Honorable Michael W. McConnell, United States Court of Appeals for the Tenth Circuit; Professor Robert Audi, University of Notre Dame; Professor Kent Greenawalt, Columbia Law School; Dr. James W. Skillen, President, The Center for Public Justice; moderated by the Honorable Diane S. Sykes, United States Court of Appeals for the Seventh Circuit.

* Circuit Judge, United States Court of Appeals for the Seventh Circuit; J.D., Marquette University Law School, B.S., Northwestern University.

1 Posting of Geoffrey Stone to The Faculty Blog (The University of Chicago Law School), *Our Faith-Based Justices*, http://uchicagolaw.typepad.com/faculty/2007/04/our_faithbased_.html (Apr. 20, 2007, 15:01 EST).

2 127 S. Ct. 1610 (2007).

3 President's Message to the House of Representatives Returning Without Approval the "Stem Cell Research Enhancement Act of 2005," 42 WEEKLY COMP. PRES. DOC. 1365 (July 19, 2006), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2006_presidential_documents&docid=pd24jy06_txt-24.pdf; President's Message to the Senate Returning Without Approval the "Stem Cell Research Enhancement Act of 2007," 43 WEEKLY COMP. PRES. DOC. 833–34 (June 20, 2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2007_presidential_documents&docid=pd25jn07_txt-13.pdf.

To discuss this important topic this afternoon, we are privileged to be joined by four distinguished scholars in law and philosophy. Starting on the far right—your far left—Dr. James Skillen became Executive Director of The Center for Public Justice in 1981 and in 2000 became its President. The Center for Public Justice is a non-partisan organization engaged in public policy development and civic education.[4] Its work centers on doing justice from a Christian-Democratic perspective by recognizing different religions and points of view and keeping the public square open to people of all or no faiths. The Center is concerned with the subject of what should constitute a just political community. It explores the full scope of responsibility that belongs to citizens and all branches of government. Dr. Skillen received his B.A. in philosophy from Wheaton College, a divinity degree from Westminster Theological Seminary, and an M.A. and Ph.D. in political science from Duke University.

Next to him, Professor Robert Audi is the David E. Gallo Professor of Business Ethics, Professor of Management, and Professor of Philosophy at the University of Notre Dame. He is the author of many books and articles on ethics, epistemology, the theory of human action, and related areas. His most recent works include *Moral Value and Human Diversity*,[5] an introductory treatment to normative ethics and the theory of value, with applications to business, education, government and the media, and *Religious Commitment and Secular Reason*,[6] which offers a theory of the ethical basis of church-state separation and a theory of the relation between religion and politics. He has served as president of the American Philosophical Association, Central Division, Editor-in-Chief of *The Cambridge Dictionary of Philosophy*,[7] and Editor of the *Journal of Philosophical Research*.[8] He received his B.A. from Colgate University and his M.A. and Ph.D. from the University of Michigan.

On my left is the Honorable Michael McConnell, known to many in this audience. He was appointed by President George W. Bush to the United States Court of Appeals for the Tenth Circuit in 2002. Judge McConnell brought to the bench seventeen years of scholarship and teaching in the field of constitutional law and related subjects at the University of Chicago Law School and later at the University of Utah. In addition to serving our nation as a Circuit Judge, Judge McConnell

---

4 The Center for Public Justice, About the Center, http://www.cpjustice.org/about.html (last visited Feb. 14, 2008).

5 ROBERT AUDI, MORAL VALUE AND HUMAN DIVERSITY (2007).

6 ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON (2000).

7 THE CAMBRIDGE DICTIONARY OF PHILOSOPHY (Robert Audi ed., 2d ed. 1999); THE CAMBRIDGE DICTIONARY OF PHILOSOPHY (Robert Audi ed., 1995).

8 JOURNAL OF PHILOSOPHICAL RESEARCH 1992 (Robert Audi ed. 1993).

continues to teach part-time as Presidential Professor at the S.J. Quinney College of Law at the University of Utah and is a visiting professor at Harvard and Stanford Law Schools. Judge McConnell has written widely on the subject of freedom of religion and constitutional history and theory. He is co-author of *Religion and the Constitution*[9] and co-editor of *Christian Perspectives on Legal Thought*.[10] Judge McConnell received his B.A. from Michigan State University and his J.D. from the University of Chicago Law School. He served as a law clerk to Chief Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit and for Associate Justice William J. Brennan of the United States Supreme Court. He has also served as an Assistant General Counsel in the Office of Management and Budget and as an Assistant to the Solicitor General of the United States.

And finally, Professor Kent Greenawalt is University Professor at Columbia Law School, where he teaches constitutional law and jurisprudence. He has taught at Princeton University and has been a visiting fellow at Cambridge and Oxford. His scholarship focuses on the areas of church and state, freedom of speech, civil disobedience, and criminal responsibility. He is the author of *Religion and the Constitution: Free Exercise and Fairness*;[11] *Does God Belong in Public Schools?*;[12] *Private Consciences and Public Reasons*;[13] and *Religious Convictions and Political Choice*.[14] Professor Greenawalt received his B.A. from Swarthmore, a bachelor's degree in philosophy from Oxford, and an LL.B. from Columbia Law School. He served as law clerk to Associate Justice John Marshall Harlan of the United States Supreme Court and as Deputy Solicitor General of the United States.

Welcome to all of our panel members.

---

9 MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION (2d ed. 2006).

10 CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell et al. eds., 2001).

11 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006).

12 KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? (2005).

13 KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995).

14 KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

RELIGIONS AS WAYS OF LIFE†

*James W. Skillen**

Thank you, Judge Sykes. It is an honor to be part of this panel with our fellow panelists, and to be with you addressing this important topic.

The focus that I would like to offer in these opening remarks is on the distinction between what I would call—when we talk about religion—*ways of worship*, which usually suggest prayer, theology, ecclesiastical institutions, mosques, temples, etc., on the one hand, and *ways of life*, on the other hand. Certainly, Judaism, Christianity, and Islam are the latter kind of religion. They have to do not only with the way people worship but with the way they conduct their whole life. They have to do with the way they raise their children, the way they serve neighbors and the poor, and the way they engage in public life more generally. Religions as ways of life entail every institution of life and cannot be reduced to only one part or aspect of life.

So, to talk about religion only as an isolatable element or only as a way of worship, which then needs to be connected to politics, education, leisure, or something else, starts with the assumption that religion is only an institutional variable and misses the deeper, broader meaning of religion.

Now, the constitutional protection of the free exercise of religion in the First Amendment[1] neither defines religion nor gives the government the authority to do so. Consequently, we may not read into the amendment that it protects only private worship and not the ways of life that religious people are conscience-bound to live. That is to say, the First Amendment does not state that if you do this or that, or if you behave like this or that, then you are religious. And if you are not religious in the way just prescribed, then you do not have First Amendment protection. Free exercise, it seems to me, is a reference to a freedom people should enjoy in order to give allegiance to their God.

---

† This Address was presented as part of a panel discussion, "Religious Liberties: the Role of Religion in Public Debate," at the Federalist Society for Law & Public Policy Studies 2007 National Lawyers Convention, November 15, 2007. The panelists included: the Honorable Michael W. McConnell, United States Court of Appeals for the Tenth Circuit; Professor Robert Audi, University of Notre Dame; Professor Kent Greenawalt, Columbia Law School; Dr. James W. Skillen, President, The Center for Public Justice; moderated by the Honorable Diane S. Sykes, United States Court of Appeals for the Seventh Circuit.

* President, The Center for Public Justice; B.A., Wheaton College; B.D., Westminster Theological Seminary; M.A., Duke University; Ph.D., Duke University.

1 U.S. CONST. amend. I.

Thus, religious freedom may really have to do with all areas of life, including education, welfare, and any number of other contexts in which our deepest convictions direct the way we ought to live before the face of God. Or for those who do not acknowledge God, it means freedom to live without reference to God. It is at that level that questions of how we should shape science policy and stem cell research, of how we should consider the unborn, or of how we should educate our children are deeply religious questions. Language arising from these deepest convictions must not be excised from public debate and cannot be expressed in a common, secular language. At the level of deepest convictions, we are bringing to the fore our basic views of life, our worldviews, our understanding of who humans are, and are not simply talking about worship.

Obviously, if we are engaged in political or legal debate, our language should be about public policy and legal matters. Therefore, there are all kinds of extraneous arguments that would not be relevant to a particular debate about public issues. But I do not think anyone should be excluded from the debate or from political participation because they are using language that others believe is too religious.

Now, Western Christianity has itself been partly responsible for the ambiguity in the use of the words "religion" and "secular." *Saeculum*, the Latin word from which we derive *secular*, really means "of or pertaining to this world," and in the High Middle Ages there was a distinction between a religious vocation, or what came to be referred to as "religious" in the narrower sense of that term, and vocations that were not ecclesiastical but "secular." But, *saeculum* did not mean by any stretch "unrelated to God" or not of faith or not Christian. In fact, in the medieval view, everything was related to God and was mediated through the Church to God.

At the point when the Church lost its preeminent position and everything outside the church became disconnected from it the *saeculum* gradually came to be seen as something unrelated to God because it was no longer related to the Church. I think that is the root of the way we tend to talk rather easily about the "secular" as something not religious, when in fact for many people—many Christians, Jews, and Muslims—all that pertains to life in this world is related God.

The big question we face, therefore, in constitutional adjudication and in political argumentation more broadly is how to understand government's relation to religious ways of life among citizens. This certainly includes the question of how government should be related to churches and similar organizations. But it also has to do with how government should be related to schooling, social welfare organizations, various kinds of public media, and politics itself. It is at this point that we need to make the distinction between government and other

institutions and organizations, any of which may be quite religious. If there are those whose ways of life in the service of God lead them not only to worship God but also to educate their children, serve their neighbors, and join in political debate in distinctive ways, it is wrong to discriminate against them on the grounds that they are illegitimately carrying religion into so-called secular life.

The main impetus of the Enlightenment/post-Enlightenment period has been to say that if something is not identifiably religious in the sense of being connected with a church, synagogue, temple, or mosque, then it is secular and nonreligious. And religious freedom is to be protected and enjoyed only in private life. It seems to me that the direction in which we need to move, by contrast, is to say that religions in the broader sense of ways of life should be free to work their way out in the education of children, in social welfare, and so forth. And the way government should relate to the variety of religions in society is by making room for them by making room for a diversity of school systems, a diversity of social welfare services, and so forth, all of which should enjoy equal treatment under the law.

The key purpose of the Establishment Clause, then, is to guard against any faith or non-faith gaining a monopoly in the public square. The worry that religion will become dominant, that it will become overwhelming, that one religion will throw others out, indeed has to be guarded against so that there is equal treatment for all—genuine pluralism in public life as well as in private life. Religious freedom and non-establishment thus come together in a unitary purpose.

Thank you.

RELIGIOUS CONVICTION AND POLITICAL PARTICIPATION†

*Michael W. McConnell**

Thank you to the organizers for including me in this event. It is wonderful to see so many old friends and meet new ones, and I include all the members of the panel here. All of us have had conversations on this general subject for going on a decade or two now.

I would like to begin by clarifying the question before us. We have all heard the complaint, on various issues, that "religion" is being improperly interjected into political discussion. This is an old charge, and it has cropped up in very different contexts. Now, the charge is often made with respect to such charged social issues as same-sex marriage or stem cell research. Not long ago it was made by opponents of civil rights in the South when the Rev. Dr. Martin Luther King, Jr. called on ministers to be more religiously aware and engaged on that issue.[1] Over 150 years ago, Southern supporters of slavery were indignant that Northern abolitionists would bring religious arguments to bear against the practice of slavery.[2] You may recall that William Lloyd Garrison's newspaper, *The Liberator*, featured a cross and a biblical quotation on the top of the front page.[3]

People say that to present a religious argument in support of a public policy position is inappropriate—that there is something wrong with citizens advocating or legislators enacting laws that are based upon religious rationales, premises, or arguments. This comes both in a constitutional law version and in a political theory version. The constitutional law version is that it violates the Constitution, and

---

† This Address was presented as part of the Federalist Society for Law & Public Policy Studies 2007 National Lawyers Convention, November 15, 2007. The panelists included: the Honorable Michael W. McConnell, United States Court of Appeals for the Tenth Circuit; Professor Robert Audi, University of Notre Dame; Professor Kent Greenawalt, Columbia Law School; Dr. James W. Skillen, President, The Center for Public Justice; moderated by the Honorable Diane S. Sykes, United States Court of Appeals for the Seventh Circuit.

* Circuit Judge, United States Court of Appeals for the Tenth Circuit, and Presidential Professor, S.J. Quinney College of Law, University of Utah; B.A., Michigan State University; J.D., The University of Chicago Law School.

1 *See generally* Dr. Martin Luther King, Jr., Letter from Birmingham City Jail (Apr. 16, 1963), *in* THE WORLD TREASURY OF MODERN RELIGIOUS THOUGHT 606, 606–21 (Jaroslav Pelikan ed., 1990).

2 *See generally*, WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY (1998).

3 *See* The Liberator Files, http://www.theliberatorfiles.com (last visited Jul. 10, 2008).

specifically the Establishment Clause of the First Amendment,[4] for laws to be passed if their primary rationale is based upon a religious premise, such as the existence of God or divine commands or theological considerations, including interpretations of sacred texts and the pronouncements of religious authorities.

The political theory version, which I take it is Professor Audi's position, is that as a matter of democratic theory, such arguments and such laws are inconsistent with good democratic practice, and that good democratic citizens would refrain from making such arguments. Now, Professor Audi graciously qualifies his position with what he calls an "excusability clause," which means that a person who offers a religious argument for a public policy position may not necessarily be a bad citizen. But I think it is clear that, excuses aside, he maintains that argumentation of this sort is bad for the republic and contrary to good democratic citizenship.

It is important to note that we are bracketing the question of laws that are actual infringements upon anyone's religious liberty in the sense of being classic establishments, such as taxes for the support of religion or requiring school prayer for the support of religion. The issue today concerns laws that would otherwise be legitimate exercises of political power in service of the public good, such as laws regarding spending public funds on stem cell research, laws about slavery, or environmental legislation. The question is whether it is democratically illegitimate to support or oppose such laws on the basis of religious premises.

Now, Professor Audi's argument is very complicated, and he says it is often misunderstood. I fear I am often in this camp of misunderstanding. There are a lot of qualifications and curlicues and so forth in the argument. My position, I think, is simpler and perhaps less subject to being misunderstood. My position is that as a matter both of constitutional law and of democratic theory, all citizens have an equal right to offer whatever arguments they consider persuasive in support of the public good, and the rest of us have an equal right to hear those arguments and to accept or reject them according to whether we find them persuasive. Thus, there are no epistemological, theological, or philosophical pre-screening devices for democracy. None. Now, why do I say this? I would like to offer two arguments here today, one based upon history and one based upon democratic theory.

The history is important because, although Professor Audi does not stress this, Professor John Rawls, whose argument this is, argues that this idea of an exclusion of religious and other comprehensive ideologies

---

[4] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

as a basis for public policy is based upon an uncontroversial, widely shared premise of American public life.[5] It seems to me that that is patently false as a matter of history. In fact, expressly religious arguments in matters of politics have been with us all along. It would be impossible to tell the story of American political life without reference to religiously engaged, motivated advocates.

This is from the very beginning: the American Revolution was defended by ministers and other religious people in religious terms.[6] King George III, when asked what was the cause of the American Revolution, blamed it on the "black regiment," by which he did not mean the African-American soldiers who fought on the American side. He was referring to the Congregationalist, Puritan ministers in their black robes who were among the principal apologists for liberty in America.

The greatest irony is that the First Amendment religion clauses themselves were advocated by religious people, especially Baptist ministers, but others as well, for expressly religious purposes and on religious rationales while the defenders of establishment of religion in America tended to offer secular arguments.[7] Even Thomas Jefferson—not, I think, the most religious of our founders—begins his bill for the establishment of religious freedom in Virginia with an express theological proposition: "Whereas Almighty God hath created the mind free."[8] Then he goes on to argue that establishment is contrary to the "plan of the Holy author of our religion," referring evidently to Jesus Christ.[9] So, if it were true that offering religious arguments in favor of public policy somehow delegitimizes the policy, the very First Amendment in the American Constitution would be delegitimized. And all through American history this continues.

The anti-slavery movement was almost exclusively a movement of religious people. The opposition to polygamy, the Catholic Social Labor Movement, Prohibition, most of the anti-war movements in American history, the civil rights movement, you name it; it is hard to find a major social movement, whether you agree with it or not, that does not involve religious advocacy. So, to suggest that secularization of our public discourse is a shared premise or an uncontroversial shared point for

---

[5] *See* JOHN RAWLS, THE LAW OF PEOPLES 149 (1999) [hereinafter RAWLS, LAW OF PEOPLES]; JOHN RAWLS, POLITICAL LIBERALISM, *passim* (1993) [hereinafter RAWLS, POLITICAL LIBERALISM].

[6] ALICE M. BALDWIN, THE NEW ENGLAND CLERGY AND THE AMERICAN REVOLUTION 98, 154–67 (1965).

[7] *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev 2105, 2206 (2003).

[8] A Bill For Establishing Religious Freedom (1786), *reprinted in* MICHAEL W. MCCONNELL, ET AL., RELIGION AND THE CONSTITUTION 69 (2002).

[9] *Id.*

American public life is simply a historical falsehood.

Let us turn, then, to theory. For theory, I begin in the same place that John Rawls begins, with what he calls the fact of reasonable pluralism.[10] This means it is a fact of life in the United States and in other modern pluralistic democracies that there exist a wide number of differing reasonable worldviews. We do not all share the same premises, and these disagreements are ineradicable. Even in principle, if we could talk forever and produce the best possible evidence for our positions, we would still disagree. We would still have people who are fundamentally of different orientations. We would still have libertarians. We would still have statists. We would still have environmentalists. We would still have feminists. We would still have people who believe in critical legal studies. We would have traditionalists. We would have any number of points of view. That is a fact of life. So, that is the first point.

The second point is that it is hopelessly utopian to think that public policy—including public policy with respect to coercion, such things as preventing people from owning slaves or taxing them more for support of social welfare programs—can be based upon shared premises. There might be a conglomeration of premises that add up to a majority, but you are never going to have unanimity. We will always have differences of opinion. And not only is it utopian, but it is downright silly to think that democratic theory, which is, after all, all about how to resolve differences, would presuppose any sort of unanimity.

How do we proceed as a democratic, pluralistic society in the face of ineradicable reasonable differences of opinion? I would submit that there is only one possible basis that is consistent with the equality of all citizens, and that is that everyone has an equal right to advocate for the public good according to the premises that they find persuasive. Some of those people are going to offer premises that others of us may find to be completely implausible, maybe even crazy, but they can put them forward. We can listen to them. It is our right to disagree, but it is not our right, and it is not the right of judges wearing robes, and it is not the right of political scientists in seminar rooms, to serve as gatekeepers for what arguments can be made.

And so, when Professor Audi concludes by saying that he is talking about using the appropriate civic voice—I am not going to stand here and defend inappropriate civic voices. I will respond that in a democracy it is the citizens who are the proper judges of what civic voices we find appropriate. There are no theological, philosophical, ideological, or epistemic limitations that are properly imposed in advance.

Thank you.

---

[10] RAWLS, POLITICAL LIBERALISM, *supra* note 5, at 36–37, 63–65; *see also* RAWLS, LAW OF PEOPLES, *supra* note 5, at 11–12.

THE ROLE OF RELIGIOUS CONSIDERATIONS IN THE PUBLIC DISCOURSE OF PLURALISTIC DEMOCRACIES†

*Robert Audi**

I will begin first with background assumptions. I assume that an appropriate church-state separation is a protection of religious liberty and governmental autonomy. Three principles I defend are a liberty principle that requires the government to protect religious liberty, an equality principle requiring its equal treatment of different religions, and a neutrality principle requiring its neutrality toward religion.[1] The equality principle implies non-establishment. The neutrality principle is not entailed by the other two nor, so far as I can tell, clearly required by the Constitution. In political philosophy, it is also more controversial.[2] I also assume that there is a moral right to maximal freedom of expression in public discourse and that here, as in other realms of conduct, liberty is the default position in free democracies.

Secondly, I would like to comment regarding standards for freedom of expression versus standards for advocacy of laws and public policies. Free expression may have many purposes other than advocacy. Those engaging in it need not even aim at persuasion. By contrast, advocacy of laws or public policies normally is intended to persuade and most of those are also coercive. For coercion, as opposed to free expression, there are higher standards, both moral and legal. We are free to persuade others to do things we ought not to coerce them to do. Related to this, in the moral realm it is essential to distinguish *rights* from *oughts*. There are things many of us ought to do, such as give to charity, which we nonetheless have a moral right not to do. No one may coerce charitable contributions.

---

† This Address was presented as part of a panel discussion, "Religious Liberties: the Role of Religion in Public Debate," at the Federalist Society for Law & Public Policy Studies 2007 National Lawyers Convention, November 15, 2007. The panelists included: the Honorable Michael W. McConnell, United States Court of Appeals for the Tenth Circuit; Professor Robert Audi, University of Notre Dame; Professor Kent Greenawalt, Columbia Law School; Dr. James W. Skillen, President, The Center for Public Justice; moderated by the Honorable Diane S. Sykes, United States Court of Appeals for the Seventh Circuit.

* David E. Gallo Professor of Business Ethics and Professor of Philosophy, University of Notre Dame; B.A., Colgate University; Ph.D., University of Michigan.

1 *See* ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE 3–8 (1997); Robert Audi, *Moral Foundations of Liberal Democracy, Secular Reasons, and Liberal Neutrality Toward the Good*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 197 (2005).

2 *See* AUDI & WOLTERSTORFF, *supra* note 1, at 6–8 (discussing the kind of religious neutrality appropriate to liberal democracy).

Given our moral rights, free expression and advocacy should be legally limited only by a harm principle, roughly a principle to the effect that the liberty of competent adults should be restricted only to prevent harm to other people, animals, or the environment. Ethically, however, both free expression and advocacy should meet higher standards than this very permissible one.

Third, there are some major principles governing advocacy of laws and public policies. Regarding good citizenship, I have defended a standard I call the principle of *secular rationale*.[3] This principle is that citizens in a free democracy have a prima facie obligation not to advocate or support any law or public policy that restricts human conduct unless they have and are willing to offer adequate secular reason for this advocacy or support; for instance, for a vote.[4] This principle has been widely misunderstood. Here are a few of the needed qualifications and an indication of its basis:

One, a prima facie obligation is defeasible and may be overridden. Suppose appeal to religious considerations is necessary to enact laws that will prevent a Nazi from coming to power. Then one should appeal to them.

Two, the prima facie obligation here, like many other such obligations, is compatible with a right to do otherwise. The secular rationale standard is for good citizenship, not for merely permissible socio-political functioning.

Three, a secular reason for an action is roughly one whose status as a potential justifier of action does not evidentially depend on, but also does not deny, the existence of God, nor does it depend on theological considerations or the pronouncements of a person or institution as a religious authority. But secular reasons, say considerations of public safety, will typically accord with reasons that are supported by at least some major religions.

Four, an adequate reason is one that, in rough terms, evidentially justifies the belief, act or other element it supports. The notion is objective but complex and non-quantitative. In many applications it is controversial, but no plausible legal or political philosophy can do without it.

Five, excusability. A person who does not live up to the principle of *secular rationale* is not *ipso facto* a bad citizen. Like other failures, this one may be fully excusable.

---

[3] Audi, *supra* note 1, at 216.

[4] *Id.*; *see also* Robert Audi, *Religiously Grounded Morality and the Integration of Religious and Political Conduct*, 36 WAKE FOREST L. REV. 251, 268 (2001); Robert Audi, *Religious Values, Political Action, and Civic Discourse*, 75 IND. L.J. 273, 276–80 (2000).

Six, the principle of *secular rationale* is non-exclusive. A) It does not rule out having religious reasons for legal coercion or imply that such reasons cannot justify it. B) It does not even rule out having only religious reasons for lifting oppression or expanding liberty. It concerns coercion. C) It does not imply that religious reasons should be privatized. Indeed, one might quite properly indicate publicly that one supports, say, illegalizing assisted suicide not from a religious ground, such as reverence for God's gift of life, but for secular reasons such as protection of vulnerable patients.

Seven, as to the basis of the principle, here I will suggest only that A) it supports free democracy and religious liberty; B) it helps to prevent religious strife; and C) it is needed to observe the "do unto others" principle[5] since clearly rational citizens may properly resent coercion based on someone else's religious convictions.

I should add that I could have called it the principle of *natural reason*. This would highlight both its central stress on our natural rational endowment and its continuity with elements in the natural law tradition as expressed by Aquinas.[6] Note that we can take our natural endowment as God-given even if we regard the knowledge it makes possible, notably including moral knowledge, as attainable even without appeal to theology or religion.

This is a good place to stress a principle I have more recently introduced as a complement to the secular rationale principle. It is the principle of *religious rationale*.[7] It says that religious citizens in liberal democracy have a prima facie obligation not to advocate or support any law or public policy that restricts human conduct unless they have, and are willing to offer, an adequate religiously acceptable reason for this advocacy or support. The underlying idea is that the ethics of good citizenship calls on religious citizens to constrain their coercion of fellow citizens by seeking a rationale from their own religious perspective.[8]

This perspective would be hypocritical or worse to ignore in such a weighty matter. Given the common coincidence between, on the one hand religious reasons for basic legal constraints on freedom and, on the other hand, natural reasons, which are secular for the same constraints, the principle of religious rationale is an important complement to its secular counterpart for the wider question of the place of religious considerations in public discourse.

---

[5] *Matthew* 7:12 (NIV) ("So in everything, do to others what you would have them do to you, for this sums up the Law and the Prophets.").

[6] *See* 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II Q. 94, art. 1–6 (Fathers of the English Dominican Province trans., Christian Classics rev. ed. 1981) (1911).

[7] Audi, *supra* note 1, at 217.

[8] *Id.*

Let me conclude with some comments on some of the standards for religious expression, whether argumentative or simply expressive, in public discourse. These are, in effect, standards for non-privatization. The uses of religious language are unlimited. Think not just of advocacy and persuasion but of self-expression, self-description, and information. I may need to tell you my religious position to say in any depth who I am. I may want to persuade an audience of physicians or attorneys not to violate our relation to God by facilitating assisted suicide, even though I have voted to legalize it for natural reasons based on respect for the liberty of others with different religions, or none.

What are some of the standards of good citizenship for the socio-political use of religious discourse? One is simply judiciousness. Will what we say be illuminating or alienating, unifying or divisive, clarifying or obfuscating? There are myriad considerations here, both of ethical sensitivity and of prudence. A second consideration is the spirit of reciprocity based partly on the sense of universal standards available to all rational, minimally educated adult citizens. An appeal to a biblical narrative, for instance, can be clarifying with regard to such secular questions as whether prosperous nations are obligated to give more than they do to poor ones. Consider, also, the "do unto others" rule.[9] The wording is biblical. The content is a call for reciprocity, even universalizability.

I see no conflict between being religious, indeed expressively so in public, and adhering to both the principle of secular rationale and that of religious rationale. This integration is most likely to be well reasoned and stable if it is supported by a theo-ethical equilibrium. This is roughly a rational integration between religious deliverances and insights concerning moral matters and, on the other hand, secular ethical considerations. There are theological reasons, at least from the point of view of natural theology, for thinking that a high degree of theo-ethical integration is possible at least for those who conceive God as omniscient, omnipotent, and omni-benevolent. Religious citizens who achieve the theo-ethical equilibrium will typically have both natural and religious reasons for their standards governing freedom and coercion.

I close with a suggestion that public discourse in a free democracy is best served by citizens having and, in a wide range of important matters, using an appropriate *civic voice*. Such a voice is a matter of intonation and manifest respect for others' points of view and convictions. It may reflect religious elements, but in citizens adhering to the principle of natural reason, it will also indicate a respect for standards that simply, as rational persons, we do or can have in common and should take as a basis for setting proper limits on our, may I say, sacred liberty.

---

[9] *See Matthew* 7:12.

BRIEF COMMENTS ON AN INTERMEDIATE POSITION†

*Kent Greenawalt**

I am going to start with some clarifications about how I see this topic. Some of what I say may be a bit repetitive, but I think it can be helpful. I do not see this subject as mainly about the force of the Establishment Clause.[1] With Judge McConnell, I think there is a big difference between promoting a religious position, let's say, which I think teaching creationism is, and deciding some moral or political issue based on a religious judgment, such as whether there should be restrictive abortion law. And I do not think this is a question of whether anyone should be *restricting* advocacy in religious terms. The question is whether people should ideally restrain themselves in some way.

It is not a question of whether religion should be a private matter. Religious perspectives could be used to critique cultural values, urged as a basis for personal lives, even if those perspectives are not used to advocate political positions in the way that is in controversy. It is not a question, as Professor Audi has explained, as to whether one could explain one's religious views as they bear on a topic, like welfare, same-sex marriage, or abortion; and among co-believers this kind of discussion might be the main discussion, even though in advocacy in the public realm there would be an attempt to rely on public reasons. It is not a question of whether religion is going to influence people's judgments and advocacies; of course it is. Nobody could completely divorce themselves from their religious views. It is a question of how people should try to decide things and of how they should advocate. And it is also not a question of whether it is sometimes prudent or strategically helpful to make nonreligious arguments. The answer to that is yes. The issue is whether there is some principle of restraint about making religious arguments—some principle that applies to this public sphere—suggesting that it would always be inappropriate, or at least prima facie inappropriate, to make such arguments.

---

† This Address was presented as part of the Federalist Society for Law & Public Policy Studies 2007 National Lawyers Convention, November 15, 2007. The panelists included: Dr. James W. Skillen, President, The Center for Public Justice; Professor Robert Audi, University of Notre Dame; the Honorable Michael W. McConnell, United States Court of Appeals for the Tenth Circuit; Professor Kent Greenawalt, Columbia Law School; moderated by the Honorable Diane S. Sykes, United States Court of Appeals for the Seventh Circuit.

* University Professor, Columbia University School of Law; B.A., Swarthmore College; B. Phil., Oxford University; LL.B., Columbia University School of Law.

1 U.S. CONST. amend. I.

Now, one could approach this topic from one's own religious perspectives or from what one might call detached political philosophy that does not rely on any particular religious view. Most discussions of the topic are in this latter category. We might think that there are some principles that are applicable to all liberal democracies. I think that is Rawls's view.[2] I think it is Professor Audi's view, as well. Or, one might think that it matters what the historical time and place is. The typical discussions of this topic are either about all liberal democracies or are arguments that bring in the Establishment Clause in a strong way.

The forms of advocacy that people talk about are typically tied to the bases of decision, and the idea is if you should not advocate to other people on a certain ground, if you are a legislator or a voter, you also should not be deciding on that same ground. So, typically the bases for decision are linked to forms of advocacy in the positions that people take. And, typically, it is assumed that the appropriate limits are the same for officials and for citizens who are advocating in the public realm.

It is commonly assumed, and this has not been touched on yet, that if religious grounds should not be the basis for advocacy, then neither should some other grounds—non-rational grounds, controversial ideas of the good, or, most influentially, other comprehensive views. So, according to Rawls, if you cannot rely on a religious argument, you should not rely on Benthamite utilitarianism either.[3] Now, just in passing, the Benthamite utilitarian would need to give up a lot less of what he would be advocating about a particular position than would many religious believers if both of them restrain themselves from relying on their comprehensive views.

Now, it is often said that there is a line between issues that warrant this kind of self-restriction and those that do not. Rawls talks about constitutional essentials and basic issues of justice as being the ones that call for the restraint.[4] And, we have heard Professor Audi talk about coercive measures as being the sort of crucial category.

My own position is an intermediate one. I think there are reasons of fairness and political stability to rely on grounds, to seek grounds that have force or should have force for everyone in the society. But, I also think there are reasons of liberty and fairness to let people rely upon and advocate the reasons that they think are most persuasive. So, I think this is a genuine dilemma with substantial arguments on each side. I do

---

[2] *See* JOHN RAWLS, POLITICAL LIBERALISM 212–54 (1993).

[3] *Id.*; *see also* JOHN RAWLS, A THEORY OF JUSTICE 23–33 (Harvard Univ. Press 2005) (1971) (discussing Benthamite utilitarianism).

[4] *See* RAWLS, *supra* note 2, at 62 ("There is no reason, then, why any citizen, or association of citizens, should have the right to use the state's police power to decide constitutional essentials or basic questions of justice as that person's, or that association's, comprehensive doctrine directs.").

not think either side has a knockdown argument that just sort of destroys the other side.

I doubt if there is one set of principles for all liberal democracies. I think time, place, and cultural heritage are important, so what I am speaking to is here and now in the United States. I think there should be more restraint for officials than for ordinary citizens. There are a lot more citizens than officials, so the liberty interest in freedom is much more substantial when one thinks of citizens. Officials are much more used to saying less than they fully believe when giving reasons that fit political conditions. Asking officials not to publicly advocate political measures in religious terms is, I think, a pretty modest restraint.

The idea that the same restraint should be placed on advocacy and for decisions is also one that I disagree with. What we are talking about here is reciprocal self-restraint. I restrain myself, but in return you do the same thing. Now, it is very hard to know how anybody else is actually reaching a decision, but it is not hard to know what they are saying. Therefore, if we did accept some kind of reciprocal restraint, and for me it is only for officials, on religious discourse, it would be fairly easy to know whether somebody is complying with it or not, and I think it is a solid basis for some kind of reciprocal understanding. Whereas, I see making the decisions as quite different.

I also think there are significant differences among officials. I believe judges are under more restraints than legislators, for instance. And, I am wondering whether Judge McConnell thinks that it would be appropriate for himself as a judge to rely on an explicitly theological argument based on his conception of God to reach a judicial decision now in the society. I think that would be pretty clearly inappropriate, but I see the restraint as being significantly less for legislators.

Now, insofar as religious grounds should not be the basis for advocacy, I think the same should be true about other comprehensive views. But, I am very troubled by how one draws the line between when reliance is on a comprehensive view and when it is not, whether reliance is on religious views or not. And, I think natural law provides a good example of something that is right on the borderline. I could go into that in more detail, but I will not right now.

I am skeptical about the line between coercive laws and other political decisions and between constitutional essentials and basic issues of justice and other issues. The status of the fertilized embryo is crucial for both the issue of abortion and for funding for stem cell research. A restrictive abortion law does involve coercion. Not funding stem cell research does not involve coercion. I think it would be very puzzling to think that the grounds and the advocacy as to one of those issues should be significantly different than the grounds that we think are appropriate for the other of the two issues.

I do not think the government as such should be promoting religion. And, on clear Establishment Clause issues, I tend to be on the disestablishment or separationist side. But, I see reliance on religious grounds where the object is not to promote religion or endorse religion as quite different. So, I do not follow those who advocate this fairly strict reliance on very public reasons, but I arrive at my kind of mixed intermediate position.

Thank you.

PANEL DISCUSSION AND COMMENTARY*

Judge Sykes: We will now have a few moments for response from each of the panelists, and then we will have a question period.

Dr. Skillen, you can take the podium or speak from where you are.

Dr. Skillen: Just a few comments. I am anxious to hear questions.

I am quite in agreement with Mike McConnell and the general statement that he laid out. It seems to me that to prejudge how someone may speak is itself a judgment about who may participate as a citizen and who may not. But everyone who is a citizen should be free to participate in public debate without qualification. Also, I would say, if at many points where Professor Audi uses the terms "secular," "secular reasoning," or "secular reasons," he would instead speak of public-legal reasons or political reasoning, I would be quite sympathetic. That is to say, anyone who is speaking to matters of political or legal life should offer public-legal arguments from their religious or nonreligious point of view. It will not be very helpful in political discussions for someone to say simply that God told them something, or that science has lately shown, or that their best friend thinks this or that. A speaker needs to argue, for example, that Congress or the courts should do something, and then, of course, what should follow is an argument for why that "something" will be just or sound for the common good. And that, of course, raises the question: what is it that we think government ought to do? What is the nature and the task of government in its relationship to other institutions? I would dare say that it is precisely with such basic questions that we arrive at the most fundamental considerations and beliefs. Where do we get our notions of a diversified society, limited government, the dignity of human beings, and constitutional freedoms and restrictions? I think that in every case those convictions are grounded in some kind of comprehensive point of view.

So in this regard, we bring to public debate our political philosophies. We bring our views of life, and that is why I would say I think Judge McConnell is right. Everyone should be free to make his or her arguments, and in the end we might well disagree with one another because of where we started, but we may find—through majority

---

* This panel discussion was presented as part of the Federalist Society for Law & Public Policy Studies 2007 National Lawyers Convention, November 15, 2007. The panelists included: the Honorable Michael W. McConnell, United States Court of Appeals for the Tenth Circuit; Professor Robert Audi, University of Notre Dame; Professor Kent Greenawalt, Columbia Law School; Dr. James W. Skillen, President, The Center for Public Justice; moderated by the Honorable Diane S. Sykes, United States Court of Appeals for the Seventh Circuit.

decisions and good constitutional reasoning—that we can continue cooperating and agree to uphold the law.

I do not know of any religious language in the United States that can lead to justified coercion unless, of course, it becomes law—public law that governments impose. That is why I believe a constitutional protection must be enforced that guarantees the right of all citizens to speak, to associate, to organize, to live, regardless of their religious convictions. Even a majority of ninety percent should not be allowed to deny to the minority a right to speak and live from out of a different viewpoint.

Where the difficulties arise are when someone is restricted (or inequitably funded or otherwise impeded) in the exercise of their right to speak or associate because they are judged to be too religious and not secular enough.

Judge Sykes: Thank you. Professor Audi?

Professor Audi: I will be as brief as I can and so will speak only to two things Judge McConnell said, which I suspect interest the audience most. He cited my excusability clause in connection with freedom of expression, but I want to stress once again that I do not have any principle for restricting free expression, which (as speech) I support to the hilt. Prudence operates there, of course. I think in another place he associated me more closely with Rawls than he should have. I think I am much more an accommodationist than Rawls, particularly in comparison with his work before his introduction to the paperback edition of *Political Liberalism*.[1]

Now, related to this, he referred to an epistemological pre-screening device, so let me remind you that I said that for coercion, one should have adequate secular reason, something that is available to us as rational, informed citizens. One can also have religious reasons, and they can be evidentially sound. It is just that if I am going to illegalize assisted suicide, I should not do it just on a basis that involves my interpretation of scripture, let's say, when lots of people who are equally devoted to scripture read it differently; and then there are those who are not religious at all who would like the freedom to have assisted suicide.

It is really a requirement that we have an appropriate kind of reason for coercion. It is not a requirement that one's speech be limited or that one cannot act for religious as well as other kinds of reasons, even with coercion. And, I might add, when it comes to liberalization, given that liberty is the default position in a free democracy, religious reasons are just fine. So, I applaud their use in lifting oppression.

---

[1] *See* JOHN RAWLS, POLITICAL LIBERALISM, at xiii (1993).

I also want to say that in no way would I want to de-legitimize religious argument. It is a question of what role it ought to play and whether you want it to play the role all on its own, unsupported by the kinds of reasons one can have when one is in a theo-ethical equilibrium where natural reason cooperates with theological and religious insight to produce an integrated view.

There is a larger thing I want to mention that I think has not surfaced, except perhaps in Kent's initial remarks. It is that a morality that concentrates just on rights is too narrow. I gave the example of a right not to give to charity. It seems to me that you can have wrongs within rights. Not every exercise of a right is something we should approve of. There are times when you have a right to punish a child or criticize a colleague, and on balance you ought not to do it. But no one should coerce you to prevent you from doing it.

I am interested in an ethics of citizenship that calls for our meeting a higher standard than simply living within our rights. Sure, there is a right to vote on your religious convictions, but would you want a majority Islamic population that wanted all women to wear burkas, to impose that for religious reasons only? There might be reasons for wearing burkas that have another basis, so I do not rule that out *a priori*. But, the point is, we very much dislike being coerced at all, especially by religious reasons from another person's religious point of view.

So, maybe at that point I would just say, one question for Judge McConnell (if you would like to address it), is whether he has an interesting restriction in the idea that everyone has a right to advocate for the public good. Is there an objective notion of the public good that creates a constraint on the appropriate sort of normative reason one can give for laws and public policy? Maybe so, but I did not hear that in the position overall.

Judge Sykes: Judge McConnell?

Judge McConnell: Well, I think it would be good to get to the audience, so I will just address the two particular questions that have been put to me. Kent Greenawalt asks, in my capacity as a judge would I rely upon explicitly theological premises? The answer to that is: no. Nor would I rely upon any other personal philosophical premises, whether secular or non-secular. I believe a judge is a constrained decision-maker whose obligation is to rely upon the law and nothing else but the law. My theological principles do not appear in the United States Code and, therefore, they will not appear in my opinions either. But, it is not because they are theological. It is because my personal opinions about

matters are not an appropriate basis for legal or judicial decision-making.

Professor Audi asks a hard question, and I really quite like his question. He asks whether there is any interesting restriction implied when I talked about citizens making arguments based upon the common good. I do not know how interesting they are, but I do think that there is a sense in which purely self-interested arguments are a brand of a bad citizen. But, I also think that the common good or the public good is something that only the citizens are able to decide.

So, I think that we should not try in advance to label some arguments as based on the common good, or not. Agricultural price supports would be my favorite example of a public policy that is virtually impossible to defend on only a genuine public good basis. But, I say, let people defend them, and let the rest of the public decide. I do think that it is a problem of our politics that so much of our political practice seems to be cobbling together a whole bunch of people's self-interests. It is as if, when we get enough earmarks in the bill, then everybody benefits. I do not like that aspect of our politics. But, it does not lead me to think that we need a complicated theory. I just think that a healthy democracy will be skeptical of so much self-interested argument. But, I really like that question. It makes me think.

Judge Sykes: Thank you. Professor Greenawalt?

Professor Greenawalt: I just have two fairly brief points. The first is that both Judge McConnell and Dr. Skillen talked about no pre-screening devices and so on—that kind of language. Now, I would think that there are some bases for arguments that are really contrary to liberal democratic premises such as racism. And, I would think that we would say, if somebody makes an explicitly racist argument, "You are free to do that, but that really is contrary to the way we think about things in this society."

So, I am skeptical that what one would really want to defend is no pre-screening if it includes that. Then the question is, if one does think that kind of pre-screening is appropriate for that kind of argument, how do religious arguments relate to those? So, again, I do think there is a huge difference between the religious arguments and these other arguments, but I do not think one can just sort of toss the religious arguments off on the basis that, "Well, there is no pre-screening of arguments."

My second point is one I did not mention when I first posed this issue about how the judge compares to the legislator in respect to relying on theological arguments. Judge McConnell and I were at a conference at Catholic University about seven or eight years ago, in which we

engaged in this exchange, and those papers have finally seen the light of day, thanks to Bill Wagner, about seven years later.[2] These have just come out. But anyway, I think that Judge McConnell oversimplified to a considerable degree here. That is, I think judges are often in the position of deciding when the law is not clear about something or how to interpret a law that considers questions of public welfare and justice, and views that are not drawn explicitly from the law do bear on their opinions.

Just to take one example of that, how about—of course Judge McConnell is not in this position—the judge who has got to decide what is in the best interests of a child in a custody dispute. That is the standard. The judge has to decide what is in the best interests of the child. The law does not tell the judge everything that is relevant to the best interests of the child. A judge could rely on various things. Would it be appropriate for a judge to say, "Well, I know from the Bible that this is in the better interests of the child, from God's point of view, from the true religious point of view, than the alternative." I still think that is inappropriate.

So, I do think there is a difference for the judge between relying on explicit theological premises and relying on some other premises that are not directly drawn from the law itself.

Judge Sykes: All right. We will now take your questions for the panel, and there is a microphone in the center of the room if you would like to step forward if you have a question.

If you have a question for a specific member of the panel, that is fine, or for the panel as a whole.

Question 1: I have a question for anyone on the panel. Would there be any cases where, within our current political discussion, there are particular issues where an important viewpoint could not be justified except on what some of you have labeled "explicitly religious grounds"? Are there arguments that would be shut out entirely, either viewpoints or entire topics, if we did not allow people to make their points based on their individually held religious beliefs?

Judge Sykes: Dr. Skillen or anyone? Who would like to field that question? Okay, Professor Greenawalt.

Professor Greenawalt: I think it would be a rare issue where you could not find some non-theological argument. So, in that sense I think nothing would be excluded. But if we were going to be honest with

---

[2] Symposium, *Idea of Public Reason: Achievement or Failure?*, 1 J.L. PHIL. & CULTURE 13–197 (Spring 2007).

ourselves, we would have to think sometimes the nonreligious reasons might not be enough to carry the day, whereas the religious reasons we would find strong enough to carry the day. And then it would make a difference whether you are relying on them and advocating them. Same-sex marriage might be an example of that; maybe abortion for some people might be an example of that, and so on. I do not think we should think of this as whether there is ever going to be an issue that does not involve anything other than theological arguments but whether the tipping point could be altered by the use of a religious basis.

Judge McConnell: I do not think there are very many; there are some having to do with Native American beliefs about particular locations they regard as sacred. For example, there was a case that involves Rainbow Bridge, an arch down by Lake Powell, which is sacred to the Navajos. The National Park Service has attempted to restrain boaters from going and cavorting on this particular arch.[3] And, there is no evident secular objection to such behavior—I mean they can cavort on every other arch. The only reason Rainbow Bridge is different is because some of our fellow citizens think that it is sacred. So, that is an example of an argument that I guess would be excluded if we excluded expressly religious arguments.

Professor Greenawalt: I would just like to add that I would not actually call that a religious argument. It is an argument from respect for religion, and it is not obvious to me that other sufficiently deeply held views might not generate the same kind of judicial action.

Judge McConnell: It may not be a religious argument for us, but it is a religious argument for the Navajos who think it is sacred. They are saying that this is sacred ground.

Professor Greenawalt: Well, if we relativize to what is religious for a speaker, practically anything could be religious.

Judge Sykes: Dr. Skillen?

Dr. Skillen: No. Thank you.

Judge Sykes: All right, next question.

---

[3] Natural Arch & Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207, 1209–11 (D. Utah 2002).

Question 2: I have a three-sided question, and I hope the panel will, from one end to the other, respond. The strongest argument that seems to be made thus far for religious speech in the public square is an equality argument. And it seems to me that some of Judge McConnell's writings make it an even stronger argument. I wonder if he has reconsidered that? That is, that the First Amendment is more than, religious speech is more than just equal, that there is some sense of a preference or at least a special place for that kind of speech in our political system that may be different than others. So I wonder if we cannot make a stronger argument than, let all the flowers bloom, including the religious ones.

Second, I noticed that none of the panelists made a religious argument for the proposition. They have all presented their positions in non-religious, rational terms, and I wonder what that tells us. I mean, certainly nobody is going to throw stones at you for making a religious argument in this setting, and yet it does not come out. What does that tell us about our society? Have we become so secularized? Is it because there is no common religious value that we can speak to in terms of, you know, it is not just? I can make a Baptist argument or a Catholic argument or a Mormon argument, but are there no common religious arguments that we can make that are persuasive in a public setting anymore? There were times when you would have grace before you had a meal in a public setting. I do not even think that occurred here. I was in another room though when things began. I may be wrong.

Question 2: The third point is American exceptionalism, the theme of this conference, and it seems to me that we have a mission not just to bring democracy or liberty to the world but to set an example for the world. That is what American exceptionalism has meant, to set an example of how this "city upon a hill,"[4] the shining city, governs with a moral mission. I wonder if we are not seeing in events like Abu Ghraib[5] the effect of a generation of sanitizing moral and religious speech from the public square. We are seeing a generation of young people coming of age with citizenship responsibilities and guns in their hands that are doing things that their fathers would never have done, that we did not see happen in World War II despite the horrors that soldiers faced then.

So those three sides I would love to have an answer. Is not there a stronger argument for religious speech?

---

[4] John Winthrop, *A Modell of Christian Charity* (1630), *in* POLITICAL THOUGHT IN AMERICA: AN ANTHOLOGY 7, 12 (Michael B. Levy ed., Waveland Press, Inc. 2d ed. 1988).

[5] *See* Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge: Abu Ghraib Detainees' Statements Describe Sexual Humiliation and Savage Beatings*, WASH. POST, May 21, 2004, at A1.

Judge Sykes: All right, who would like to start? Dr. Skillen?

Dr. Skillen: Two brief comments. I do not read the First Amendment as giving a special protection for religious speech. There is freedom of speech, and there is freedom of religious practice. Religious practice includes speech, of course, but I do not read the amendment as having a special place for religious speech compared with nonreligious speech.

This panel was to discuss the role of religion and public argument. I would be more than willing, if there was more time, to make an argument from out of my deepest convictions that humans have been created in the image of God, that we are not created by the state, that states are not the authors of religious freedom, and that there are Christian grounds for an open society with a constitutionally limited state, and that people of all faiths and nonfaiths should be free to live from out of their deepest beliefs in public as well as in private life.

Judge Sykes: Professor Audi?

Professor Audi: Very briefly, it seems to me that religion is very deep in people who are genuinely religious and that a free democracy as a system of government of, by, and for the people will protect religious liberty as much as possible. Now, whether religious liberty is even more precious than any other kind is an interesting question, but you may remember that I said that the principle that governments should treat different religions equally does not entail that it should be neutral toward religion, so for instance, treat the religious and the nonreligious equally. So it is an interesting question on which I defer to others, whether the Constitution might allow protecting religious liberty even more zealously than certain other liberties.

Judge Sykes: Judge McConnell?

Judge McConnell: The specific references to religion have to do with exercise and establishment, not speech. I do think that the Constitution contemplates special protections for religious exercise, but I do not think that it gives religious speakers any preference over anyone else. I think the Free Speech Clause is fundamentally one of the equality of all citizens, and I think the religious Free Exercise Clause gives all citizens the right to practice their religion in accordance with conscience to the greatest extent consistent with important governmental purposes.

We have not used any religious arguments? I do not know. I thought some of the things we said were pretty religious. I do think that there is

one reason why we do not worry about some of the pragmatic arguments against the use of religious arguments in a pluralistic society like America—the pressures are all the other way. That is, I think in a pluralistic world, in a democracy, when you are advocating for policy there are good, prudent political reasons why even religious people will be moved to couch their arguments in terms that are going to be broadly acceptable. And, I think, without having any pre-screening devices at all, a society like this will tend to have much less sectarian argumentation because of the greater diversity, because sectarian argumentation does not work, is ineffective, and so forth.

I am very hesitant to attribute Abu Ghraib or any other moral failings of our day to the decline in religious speech. I do not know, but the Calvinist in me is tempted to say that "all have sinned and fall short of the glory of God,"[6] and there is no one righteous, no, not one.[7] But of course that is a religious premise.

Judge Sykes: Professor Greenawalt?

Professor Greenawalt: I agree with a lot of what Judge McConnell just said. I agree with him, first of all, that the Supreme Court's position on the Free Exercise Clause is not nearly as generous as it should be. Well, I do not know whether he still believes that, but he has certainly written that in the past.

Judge McConnell: Well, I cannot believe anything anymore.

Professor Greenawalt: Yes, right.

Judge McConnell: I just call the balls and strikes.

Professor Greenawalt: I think protecting religious speech is different from the acceptance of theological premises as true by the people that are making the decisions. I think these are separate issues.

I want to say I agree completely with what Judge McConnell said about bad things that are going on now; and just as a reminder, if we think the Nineteenth Century was great, that was the century for slavery, of terrible persecution of blacks after slavery ended, inequality for women, and so on. There are various things where if we said, "Was that a morally great century?" I think the answer would be "no," and where I think we actually have made some considerable progress over time.

---

6 *Romans* 3:23 (NIV).

7 *Romans* 3:10 (NIV).

My final point is that given the change in immigration law in the 1960s—previously there was tremendous favoritism for people that were coming from Europe, and now, most of our immigrants are coming from Asia—we are going to see increasing religious diversity over the years unless those laws are significantly changed back. And, we have to think about a society in which we have this great religious diversity.

Judge Sykes: All right, next question.

Question 3: With the premise that we are in an experiment of self-government, that is, in America, and that free discussion among the people of that government, of these policies, is a necessary component of self-government, I do not see what is advanced by essentially saying that certain arguments that motivate citizens or public officials cannot be raised because what you are doing then is forcing them to not give their true motivation or justification, but a pretense.

I mean, they are motivated by *X*, and if I understand the argument, if it is a religiously based argument, it is at least unethical. So that person is required not to give—if he wants to be ethical—not to give the true reason, but a pretense. And I do not see how our discussion is advanced by having people not state their true arguments to be evaluated and discussed, and I think there are costs to that. The continuation of this experiment is dependent in part upon people believing that it is legitimate and that their concerns can be raised and discussed. If religious people cannot discuss public policy in religious terms, you are threatening their belief in the legitimacy of the government and of the process.

And finally . . .

Judge Sykes: All right.

Question 3: Just one more quick one on public officials. What is advanced by a pretense, a pretextual argument by a public official? What is advanced by that? I mean, would not those who do not want public officials to make decisions based upon religious justifications want to know it so that they can vote them out of office, as opposed to them pretending that there is some other reason than the true one?

Judge Sykes: Right. This sounds like a challenge put to Professor Audi.

Professor Audi: I think it is. I would like to remind you of comments made by other panelists to the effect that in public policy matters, there normally are reasons of a kind that do not depend on a

particular religious point of view. Then I want to remind you also that I have no objection to people's giving religious arguments. I would, however, be very puzzled if someone had only religious reasons for wanting to pass a coercive law or public policy and could not think of any other reasons. But, if those are the only reasons the person has, then I agree with you, it would be honest to give those reasons in public advocacy. Doing so might tend to invite others who have religious reasons on the other side to present those, and as I have said before, we have to be careful about a situation in which we have, in effect, a clash of gods. It is like a meeting of an irresistible force with an immovable object.

Judge Sykes: Go ahead, Professor Greenawalt.

Professor Greenawalt: I think actually this is more an attack on me than Professor Audi, because my position is the one that draws a distinction between advocacy and decision. He says there should be more limits on the basis of decisions, as well, and I think that is the strongest argument against my position. I guess my answer to it is—take someone like Jimmy Carter, a very religious person, who I think rarely, if ever, made a religious argument for laws when he was president.

It is a degree of lack of full candor. I do not think there are many legislators and public officials that are engaging in full candor much of the time, so I do not think the sacrifice there is too great, but I think that is a substantial point that you have made.

Judge Sykes: All right, next question.

Question 4: I would celebrate Professor Audi's inimical attitude toward relativism, but on the point at which you raised that, perhaps taking the extreme, you are correct. But I do not think it would be at all incorrect or particularly relativistic to suggest that making policies, say, based on *Earth in the Balance*[8] or the kind of Crystal Cathedral preaching tour that Al Gore is now engaged in would not be in a sense giving in to arguments of a very spiritual territory. And my concern is not that we have a legal prohibition, but at least currently we seem to have a social prohibition or an allowance to throw tomatoes at somebody that would make a biblically based argument, but to insulate from that style of criticism the types of advocacy in which people of the ilk of Al Gore are now engaged.

Would you see at least bringing them into the sphere of your criticism?

---

[8] AL GORE, EARTH IN THE BALANCE (1992).

Professor Audi: Well, I think you have been a little abstract. It might help to distinguish the religious from the spiritual. There are spiritual people who are pretty secular and often cite spiritual considerations, like respecting the beauty of the environment; such considerations can be secular, it seems to me. Also, the call here may be for voluntary conservation rather than coercion. So, I think I can see much of the value in the direction you are going, but I am not sure exactly what policy implications you are aiming at, and I do not know that I said anything incompatible with the view you are moving toward.

Judge Sykes: Anyone else? All right, next question.

Question 5: Would it make more sense to have an ethic of respect for the points of view of other citizens rather than a requirement that people limit their discourse? Would it make more sense to have an ethic of citizenship that says, "When I hear a citizen make an argument that comes from a philosophical or religious point of view that I do not share, it would be good for me as a citizen to evaluate the argument, see if there is perhaps something there that I might agree with, something even in their basic grounding that makes more sense than I thought it had," so that instead of encouraging people to say less, we encourage people to say more and encourage listeners to hear in an understanding way to try to make sense out of what their fellow citizens are saying? That is my first question.

The second question is for Professor Greenawalt. I wonder if a restraint on officials giving religious reasons for advocating public policy, I mean if that is to be a standard, what does that do to the Declaration of Independence, for example? What does that do to Lincoln's oratory? And, is it, in a sense, the effectiveness of the advocacy in those cases, as with Jefferson's Statute for Religious Liberty,[9] in part due to the appeal to a people who are largely religious, and for a very good result? Thank you.

Judge Sykes: Let us take that one first, the question to you, Professor Greenawalt.

Professor Greenawalt: Okay. Well, there certainly are things in the past that would not fit what I said. That is why I talked about time and place. I think what Lincoln says, if one is careful and looks at it, usually is not to say we should do *X* because of some theological

---

[9] Virginia Statute of Religious Liberty (Jan. 16, 1786), *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY 125, 125–26 (Henry Steele Commager ed., 7th ed. 1963).

argument. It is to rely on theological arguments in very different ways that I think are perfectly acceptable.

And, on the first point, I think there is a lot to what you say. I think it does not apply so much to officials. There is a book by Jeffrey Stout called *Democracy and Tradition*[10] that I think is very good on that.

Judge Sykes: Any other reactions?

Dr. Skillen: From my religious standpoint, and I would hope from that of others, I want us to be teaching children and students an ethic of respect, but to say that is to express a kind of an abstraction. When it comes to the political-legal world, how should we show respect? It is not simply that I want somebody to hear me and say, "Well, I will respect what you say." We need to learn how to argue with one another about what will make for a good public order. If I have respect for you but I think the argument you are making is very unsound and is going to lead to injustice, my respect calls for me to argue back and say, "Oh, but that is not right."

Civil discourse has to be very vigorous. It has to clarify the different standpoints we have so that we can try to figure out how to live together. So, I am fully for an ethic of respect. But it has to extend to the different kinds of discourse in which we engage, including political and legal debate. It has to mean showing respect to those with whom we deeply disagree by deeply disagreeing with them.

Professor Audi: Very briefly, I think we all think we are proposing an ethic of respect, and I have emphasized theo-ethical equilibrium, which involves learning on the religious side from secular thinking and on the secular side from religious thinking. This is not possible for just anyone, but even non-religious people can think their way into a religious perspective. A general point on sharing ideas is that arguments on the whole tend to be valuable, though they can be overdone. Arguments are both paths to understanding and pillars of conviction. So, in many contexts, the more, the better.

Judge Sykes: All right, last question. We have less than five minutes.

Question 6: First of all, I want to thank the panel. It has been very, very stimulating, and my compliments. I am sure that when we finish this, we will all give you a round of applause.

---

[10] JEFFREY STOUT, DEMOCRACY AND TRADITION (2004).

But given that religious arguments and secular arguments all proceed from the citizen's own individual view of how the world works, can any member of this panel explain why we should carve out secular views as having a special role as a gatekeeper?

Judge Sykes: Who would like to field that one?

Dr. Skillen: I do not think there is any reason to give special public privilege to any viewpoint, including a viewpoint that is called "secular." What does one mean by a secular viewpoint? Which "secular" viewpoint should be given special privilege? There are Libertarian, Marxist, and all kinds of other so-called secular viewpoints.

I think the proper question is how to do justice in a pluralistic society to all voices, all viewpoints, whether they are called religious or secular. The difficulty often arises when there is public funding, public institutionalization, or public support for citizens. But in all cases, I would call for equal treatment of the full diversity of viewpoints. Public law should not exclude anyone by a prejudgment that a person or group holds an insufficiently secular (or religious) viewpoint.

Question 6: Well, I would argue that being secular is a religion in itself, so to speak. That was my point. Why should someone who has a world view that does not include God, which in effect is its own world view, impose that as a gatekeeper on me?

Judge Sykes: Professor Audi?

Professor Audi: I think that it is important to emphasize that the secular does not have to be anti-religious. At least when we talk about secular reasons, we are talking about considerations that can be seen to be evidential without depending on theology, but they may be reasons that can also be seen to be evidential from a theological point of view.

One other comment. We do share . . .

Question 6: Well, why does it make a difference if it depends on theology?

Professor Audi: Pardon me?

Question 6: Why does it make a difference if it is theology?

Professor Audi: Oh, it makes a difference for free democracy because we have different theologies, and our capacity to iron out differences that come from our theologies is hampered in ways that our

capacity is not hampered when it comes to findings of fact, a point in the law as well as in the theory of knowledge. But no . . .

Question 6: So you do not believe that the secular should be a gatekeeper?

Professor Audi: The gatekeeper analogy, like a pre-screening analogy, I reject. I am not proposing any such thing. I am proposing that we have in common perception, memory, intuition, and standard inductive and deductive logic. Those things cross the religious traditions and they are a meeting point from which we can compare notes, whether theologically or otherwise. Even theology has to use some kind of logic. Perception is always crucial. It is even crucial in mystical experience.

Judge Sykes: All right, final word?

Professor Greenawalt: Just on this point, I think most of the people that are taking the position in favor of self-restriction would include other comprehensive views including atheism and other things. If what you are arguing depended definitely on an atheist view of the world, that would be knocked out also. What is supposed to be relied upon are sorts of shared ways of understanding and ways of determining facts that are shared by the population generally. That is the idea. The idea is not to stick religion out here and treat everything else more favorably.

Judge Sykes: We have one final comment here.

Judge McConnell: I was just going to say that not only do we have many different theologies; we have many different perspectives of all sorts. The idea that there are some shared perspectives that we all have, I think, is a contradiction of the fact of life in a pluralistic republic. There is no more reason to think that we should look for a shared perspective of a secular sort than of a religious sort.

Democracy is all about discussions and coming to determinations, given that we do not agree about the premises. And, sure, there are going to be facts beyond religion, as well as beyond secular ideologies. They proceed from facts. Arguments proceed from authorities. They proceed from experiences. They all do. I just do not think that any of them are privileged.

Judge Sykes: All right. With that we will have to conclude. Our thanks to the panel.

TRUTH BE TOLD: TRUTH SERUM AND ITS ROLE IN THE WAR ON TERROR

INTRODUCTION

It is a terrifying scenario: a terrorist group has acquired numerous canisters of deadly poison gas and has threatened to unleash these weapons of mass destruction upon American civilians. A valiant counter terrorism agent has apprehended an individual who possesses valuable information that could thwart the impending attack, but the individual is immune to traditional methods of "information extraction." To facilitate a more effective interrogation, the counter terrorist agent transports the subject to agency headquarters and injects him with a chemical compound, which inhibits the subject's psychological defenses and makes him more responsive to questioning. Fortunately, this scenario is the product of popular Hollywood fiction, and not a description of a real-life occurrence.[1]

The events of September 11th fundamentally altered America's awareness concerning the threat of devastating terrorist attacks. The al-Qaeda terrorists who perpetrated the September 11th attacks used commercial airliners as weapons,[2] but the specter of an attack employing radiological, chemical, or biological weapons looms over American cities.[3] Furthermore, the likelihood that a nuclear, chemical, or biological attack will occur has increased due to the emergence of Iran and North Korea as nations that are currently producing, or could have the potential to produce, nuclear weapons.[4] The level of insecurity and anxiety is only

---

1 *24: Day 5: 5 pm–6 pm* (FOX television broadcast Mar. 6, 2006).

2 THE 9/11 COMM'N REPORT: FINAL REPORT OF THE NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S. 1–14 (authorized ed. 2004) (describing how nineteen al-Qaeda terrorists hijacked four commercial airliners, carried out attacks against the World Trade Center and the Pentagon, and crashed Flight 93 in Pennsylvania).

3 *Goss Warns of Terror Threat to U.S.*, CNN.COM, Feb. 17, 2005, http://www.cnn.com/2005/ALLPOLITICS/02/16/intelligence/threats/index.html?iref=newsearch (quoting CIA Director Porter Goss that it "may be only a matter of time before al-Qaeda or other groups attempt to use chemical, biological, radiological, or nuclear weapons"); *Terror Attack 'A Matter of Time,'* BBC.CO.UK, June 17, 2003, http://news.bbc.co.uk/1/hi/uk/2997146.stm (reporting that intelligence sources suggest it is only a matter of time before a terrorist group unleashes a chemical, biological, or radiological attack against a Western city).

4 *See* Graham Allison, Editorial, *Deterring Kim Jong Il*, WASH. POST, Oct. 27, 2006, at A23 (examining what course of action the U.S. would take if North Korea or Iran sold nuclear weapons to terrorist groups); Michael Barone, *Uneasy for a Reason*, U.S. NEWS & WORLD REP., Oct. 30, 2006, at 46 (arguing that Iran and North Korea have the potential to manufacture weapons of mass destruction and are both state sponsors of terrorism).

heightened amidst reports that al-Qaeda is actively seeking to acquire chemical and biological weapons.[5]

To combat the dangerous threat posed by terrorist organizations, the United States has engaged in a war on terrorism aimed at apprehending and detaining individuals suspected of engaging in or aiding terrorist activity.[6] According to the latest accessible data, United States forces are currently holding 270 detainees at Guantanamo Bay, Cuba, in addition to the individuals detained at various military installations surrounding active combat zones.[7] The interrogation of detainees has been vital to the War on Terror[8] and according to President Bush "has given us information that has saved innocent lives by helping us stop new attacks—here in the United States and across the world."[9] Agreeing with this assertion, former defense secretary James R. Schlesinger stated, "It is essential in the war on terror that we have adequate intelligence and that we have effective interrogation."[10]

Yet, to the chagrin of intelligence officials, some captured terrorists have not been willing to divulge information during interrogation.[11] In response, several columnists have argued that intelligence officials should consider the use of truth serum as a possible way of forcing suspected terrorists to divulge sensitive and possibly life saving information.[12] The former director of the CIA and FBI, William Webster,

---

[5] *Pentagon: al-Qaeda Pursuing Bio Weapons*, USATODAY.COM, May 24, 2003, http://www.usatoday.com/news/washington/2003-05-23-us-wmd_x.htm.

[6] Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

[7] Press Release, U.S. Dep't of Def., Detainee Transfer Announced (May 2, 2008), http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=11893. Previous data indicates that between 2002 and 2006, United States forces detained as many as 500 individuals at Guantanamo Bay. The Office of the Sec'y of Def. and Joint Staff Reading Room, Complete list of individuals detained at Guantanamo Bay, Cuba from January 2002 through May 15, 2006, http://www.dod.mil/pubs/foi/detainees/detaineesFOIArelease15May2006.pdf (last visited May 2, 2008).

[8] H.R. REP. NO. 109-175, at 81–82 (2005).

[9] Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569, 1570–71 (Sept. 6, 2006).

[10] Bradley Graham, *Abuse Probes' Impact Concerns the Military; Chilling Effect on Operations is Cited*, WASH. POST, Aug. 29, 2004, at A20.

[11] Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 21, 2001, at A6 (describing how intelligence officials have become increasingly frustrated by the continued silence of several terror suspects).

[12] Jonathan Alter, *Time to Think About Torture: It's a New World, and Survival May Well Require Old Techniques That Seemed Out of the Question*, NEWSWEEK, Nov. 5, 2001, at 45 (contemplating the use of truth serum in the War on Terror due to the change in conditions caused by September 11th); Paulette Cooper, Op-Ed., *Telling the Truth Isn't Torture; But Should Terrorists Be Given Truth Serums*, WASH. TIMES, Aug. 15, 2002, at A19, *available at* 2002 WL 397782 (describing how author was administered sodium amytol to prove innocence in a criminal investigation, and arguing that interrogators could use the same procedure to gain valuable information from terrorists); Frank J. Murray,

acknowledged that the United States is justified in using truth serum to acquire information that "would save lives or prevent some catastrophic consequence."[13] Even one prominent legal scholar has argued that the administration of truth serum on a captured terrorist would be acceptable.[14]

At this point, it is unclear where truth serum fits into the government's framework for the interrogation of captured terrorists.[15] However, President Bush recently admitted that CIA officials have subjected some detainees to "an alternative set of procedures. These procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations."[16] Recent media reports have described which tactics U.S. officials have used during interrogation in order to make captured terrorists divulge information.[17] Although the techniques highlighted by the latest media reports do not include the use of truth serum, at least one detainee, Jose Padilla, has alleged that he "was given drugs against his will, believed to be some form of lysergic acid diethylamide ("LSD") or phencyclidine ("PCP"), to act as a sort of

---

Using Truth Serum an Option in Probes; Court OK Likely to Keep Public Safe, WASH. TIMES, Nov. 8, 2001, at A1 (arguing that courts would likely permit the use of truth serum on captured terrorists on account of the life saving information that interrogators could obtain).

[13] Ann Scott Tyson, *U.S. Task: Get Inside Head of Captured bin Laden Aide*, THE CHRISTIAN SCI. MONITOR, Apr. 4, 2002, at 1, 11.

[14] Alan M. Dershowitz, Commentary, *Is There a Torturous Road to Justice?*, L.A. TIMES, Nov. 8, 2001, at 19, *quoted in* ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 247–49 (2002) (asserting that the use of truth serum would not violate the Constitution if an individual were granted "use immunity" but still refused to answer questions).

[15] *See* Clarence Page, Editorial, *Wicked Ways to Make Them Talk*, JEWISH WORLD REV., Nov. 2, 2001, *available at* http://www.newsandopinion.com/1101/page110201.asp (stating that the FBI has denied reports that it has considered and used truth serum during the interrogation of captured terrorists); *60 Minutes II: Truth Serum: A Possible Weapon* (CBS television broadcast Apr. 23, 2003), *available at* http://www.cbsnews.com/stories/2003/04/07/60II/main548221.shtml. When asked if intelligence agents were using truth serum during the interrogation of al-Qaeda prisoners the former undersecretary of defense, Jed Babbin, stated, "I can't say that there are . . . . A lot of other folks in and around the military are saying, 'This is something we ought to at least try and determine if it can work reliably.'" *Id.* (internal quotation marks omitted).

[16] Remarks on the War on Terror, *supra* note 9, at 1571.

[17] *See, e.g.*, Michael Hirsh & Mark Hosenball, *The Politics of Torture*, NEWSWEEK, Sept. 25, 2006, at 32 (describing the technique known as waterboarding which "is an interrogation method that involves strapping a prisoner face up onto a table and pouring water into his nose . . . to create the sensation of drowning so that the panicked prisoner will talk"); Walter Pincus, *Waterboarding Historically Controversial*, WASH. POST, Oct. 5, 2006, at A17 (explaining how one senior intelligence official reported that waterboarding was used successfully against captured terrorist Khalid Sheik Mohammed to make him talk to interrogators); Sheryl Gay Stolberg, *Experts Say Bush's Goal in Terrorism Bill Is Latitude for Interrogators' Methods*, N.Y. TIMES, Sept. 19, 2006, at 20 (stating that techniques used by interrogators include sleep deprivation and "playing ear-splittingly loud music").

truth serum during his interrogations."[18] Indeed, the use of truth drugs persists as an important legal and social issue, but the question as to whether truth drugs are permitted or prohibited has not yet been resolved. Government agencies deny claims that they administer truth drugs during interrogations,[19] while at the same time they urge that intelligence officials should use truth serum on captured terrorists.[20] Although recognized as invasive, the use of truth serum is deemed to fall short of the level requisite for torture.[21] In fact, in his discussion concerning truth serum and torture, Professor Dershowitz advocates for the use of truth serum before discussing the idea of employing physical torture to force a subject to respond to questioning.[22] Similarly, *Newsweek* columnist, Jonathan Alter, remarked that "[s]hort of physical torture, there's always sodium pentothal ('truth serum'). The FBI is eager to try it, and deserves the chance."[23]

Additionally, individuals who have analyzed whether the use of truth serum constitutes torture have arrived at conflicting results.[24] The lack of consensus within the legal community and the conflicting interpretations of the applicable United States torture laws led John Yoo, former deputy assistant attorney general in the Justice Department's Office of Legal Counsel, to remark "a much-fabled truth serum that did not cause pain . . . might be legal."[25]

As the opinions of the aforementioned authors indicate, whether the use of truth serum during interrogation constitutes torture is not a black and white issue that is easily resolved, but instead resides in a gray area. This Note analyzes whether the use of truth serum constitutes torture under the applicable United States provisions that prohibit torture. Part I explores the concept of truth serum, detailing the history

---

[18] Defendant's Motion to Dismiss For Outrageous Government Conduct at 5, United States v. Padilla, No. 04-60001 (S.D. Fla. Oct. 4, 2006).

[19] Page, *supra* note 15.

[20] *Use of Truth Serum Urged*, CHI. TRIB., Apr. 26, 2002, § 1, at 2.

[21] *See* Dershowitz, *supra* note 14.

[22] *Id.*

[23] Alter, *supra* note 12.

[24] *See* Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 237–39 (2004) (arguing that the use of truth serum, which is minimally invasive and creates virtually no pain or discomfort, does not constitute torture); Jason R. Odeshoo, Note, *Truth or Dare?: Terrorism and "Truth Serum" in the Post-9/11 World*, 57 STAN. L. REV. 209, 253 (2004) (arguing that the use of truth serum during interrogation of terror suspects is not absolutely prohibited under United States and international law). *But see* Linda M. Keller, *Is Truth Serum Torture?*, 20 AM. U. INT'L L. REV. 521, 602–03 (2005) (arguing that the threatened administration of truth serum is torture, but the actual application of truth serum is not, but should be considered torture).

[25] JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 176 (2006).

behind the quest for an effective truth serum, describing which substances have been used by individuals as a possible truth serum, and discussing the possibility that a new and more effective truth serum may exist. Part II analyzes the existing domestic laws that prohibit torture and how the courts have interpreted those provisions in determining what conduct rises to the level of torture. Part III turns to the question of truth serum and analyzes whether the Military Commissions Act of 2006 prohibits its use as a form of torture. Finally, Part IV examines several aspects of constitutional law, specifically, what invasive procedures the Constitution permits and prohibits.

I. TRUTH SERUM: HISTORY, REALTY, AND POPULAR CULTURE

When one refers to truth serum, one probably imagines a chemical substance that bends the mind of the subject to the will of the interrogator and compels the affected individual to tell the truth. This conception of truth serum is incorrect in several aspects. First, there is no substance known as a truth serum, but instead that term has been applied to a group of barbiturate drugs, most notably sodium pentothal, sodium amytal, and scopolamine.[26] Second, contrary to popular belief, the name truth serum is a misnomer since truth serum is not a serum and does not compel the subject to respond to questions truthfully.[27] Instead, truth drugs lower inhibitions and increase talkativeness.[28] Although references to truth serum in Hollywood movies abound, any reference is usually to one of the barbiturate drugs commonly called truth serum.[29]

A. Truth Serum: A Brief History

In the beginning of the twentieth century, German doctors first discovered the truth eliciting properties of barbiturate drugs when they administered a combination of scopolamine and morphine to young mothers to reduce labor pains during childbirth.[30] During these procedures "it was noted that one of the after effects of the anesthetics was that patients made candid and uninhibited remarks about their personal life or about others which they normally would not have

---

[26] Andre A. Moenssens, *Narcoanalysis in Law Enforcement*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 453, 453 (1961).

[27] *See* John M. Macdonald, *Truth Serum*, 46 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 259, 259 (1955).

[28] Scott Martelle, *The Truth About Truth Serum: It May Make for Loose Lips but Not Necessarily Elicit Honest Answers*, L.A. TIMES, Nov. 5, 2001, at E1.

[29] *See, e.g.*, MEET THE FOCKERS (Universal Studios 2004); RED DRAGON (Universal Studios 2002); TRUE LIES (Twentieth Century-Fox 1994).

[30] *See* Moenssens, *supra* note 26.

revealed."[31] In 1922, Dr. Robert House, considered by many to be the father of truth serum, was the first to use truth serum in a criminal context, a procedure commonly referred to as narcoanalysis.[32] Dr. House administered scopolamine to two suspected criminals and asked them a series of questions to determine their guilt or innocence.[33] Based on this interview, Dr. House concluded that the two individuals were innocent.[34]

Drawing upon the use of truth serum in law enforcement, United States intelligence agencies began actively pursuing an effective truth serum. In 1942, the Office of Strategic Services, the predecessor to the CIA, was directed to develop a chemical substance that would breach the psychological defenses of enemy spies and POW's and compel them to disclose intelligence information.[35] The U.S. military first attempted to manufacture an effective truth serum in 1947 when it initiated project Chatter, which included laboratory experiments entailing the administration of scopolamine and mescaline to humans and animals.[36]

The first CIA foray into the development of an effective truth drug, conducted under the name project BLUEBIRD, commenced in 1950.[37] One objective of the project was to investigate the potential of extracting information from individuals via specialized interrogation techniques.[38] In 1951, project BLUEBIRD was renamed project ARTICHOKE, and experiments included the use of sodium pentothal and hypnosis during interrogation of subjects.[39] Project ARTICHOKE was reportedly abandoned in 1956, but evidence suggests that officials conducted experiments for several more years.[40] In 1953, the CIA launched its most comprehensive program in the quest to develop an effective interrogational truth serum.[41] Known as MKULTRA, the program's

---

[31] *Id.* (citing Gilbert Geis, *In Scopolamine Veritas: The Early History of Drug-Induced Statements*, 50 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 347–57 (1959)).

[32] *Id.*

[33] George H. Dession et al., *Drug-Induced Revelation and Criminal Investigation*, 62 YALE L.J. 315, 318 (1953).

[34] *Id.*

[35] Martin A. Lee, *Truth Serums & Torture*, THE CONSORTIUM, June 11, 2002, http://alternet.org/story/13341/; *see also*, Odeshoo, *supra* note 24, at 217–21 (describing how the U.S. government spent over twenty years attempting to manufacture an effective truth serum).

[36] *Project MKULTRA, The CIA's Program of Research in Behavioral Modification: J. Hearings Before the Select Comm. on Intelligence and the Subcomm. on Health and Scientific Research of the S. Comm. on Human Resources*, 95th Cong. 67, 70–72 (1977) [hereinafter *MKULTRA Hearings*].

[37] *Id.* at 67.

[38] *Id.*

[39] *Id.* at 67–68.

[40] *Id.* at 68.

[41] *Id.* at 69–70.

objective was to study the effect of biological and chemical agents in altering human behavior.[42] The second phase of the program involved the testing of designated substances on voluntary human subjects.[43] The CIA implemented the second phase of MKULTRA by giving LSD to prisoners in order to observe the effect the drug had on the subjects.[44] Due to reports that LSD had been administered to non-voluntary human subjects, the MKULTRA program was eventually abandoned in the late 1960s.[45]

B. How Truth Serum Works

Thiopental Sodium, otherwise known as sodium pentothal, is probably the drug most commonly referred to as truth serum. Sodium pentothal is "an ultra-short-acting barbiturate, administered . . . to produce general anesthesia of brief duration . . . ."[46] When used as a truth serum "[t]he drug is injected slowly into a vein in order to induce a relaxed state of mind in which the suspect becomes more talkative and has less emotional control."[47] Moreover, sodium pentothal and sodium amytol "act as a central nervous system depressant, primarily on the cerebral cortex—the highest level of the nervous system—and on the diencephalon or 'between-brain,' and their pathways."[48] As a result, truth serum tends to make an individual become more loquacious while at the same time reducing psychological inhibitions.[49] Furthermore, subjects injected with truth serum experience reduced levels of fear and anxiety.[50]

Interestingly, the mental state produced in an individual injected with truth serum is similar to the mental state produced after the consumption of alcohol.[51] Knowledge concerning the truth-telling properties associated with the imbibing of alcoholic beverages is not a novel discovery. The ancient Romans understood that the consumption of wine had the secondary effect of loosening the tongue, and making the

---

[42] *Id.* at 69.

[43] *Id.* at 70–71.

[44] *Id.* at 71.

[45] *Id.* at 72.

[46] DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1903 (30th ed. 2003).

[47] Macdonald, *supra* note 27.

[48] Dession, *supra* note 33, at 317.

[49] *See* Martelle, *supra* note 28. Martelle explains that barbiturates, like sodium pentothal, "help channels in the neurotransmitters stay open longer, and in the ensuing flow of gamma-amniobutyric acid, or GABA, personal inhibitions fall away." *Id.*

[50] Dession, *supra* note 33, at 317.

[51] Macdonald, *supra* note 27.

unwilling individual more willing to disclose sensitive secrets.[52] Due to this similarity, the use of traditional truth drugs has been criticized because "[t]he intravenous injection of a drug by a physician in a hospital may appear more scientific than the drinking of large amounts of bourbon in a tavern, but the end results displayed in the subject's speech may be no more reliable."[53] Despite claims that truth serum is ineffective, reports indicate that skilled interrogators have been able to obtain truthful information when interrogating individuals under the influence of truth serum.[54]

C. Truth Serum of the Twenty-First Century

What if, however, a more reliable and effective truth serum were developed? No reports have surfaced to date indicating that a new truth serum exists[55] Yet, even if a more effective truth serum does not yet exist, in light of recent scientific discoveries it may only be a matter of time before a new and more effective truth serum is created. Using enhanced brain mapping technology, scientists at the University of Pennsylvania have discovered that truth telling involves different neurological processes than telling a lie.[56] The researchers discovered that telling a lie activates the areas of the brain corresponding to inhibition, memory, and fabrication which were different than the areas involved in truth-telling.[57] In light of this research, a new and more effective truth serum may exist or may be developed because "scientific discoveries in biology . . . have led to the development of new

---

[52] *See* PLINY, 4 NATURAL HISTORY, book XIV, 278 (H. Rackham trans., Harvard Univ. Press 1968) (1945). The exact Latin phrase "volgoque veritas iam attributa vino est" translates to "and truth has come to be proverbially credited to wine." *Id.* However, the more familiar form of this proverb is rendered as "in vino veritas," which means "in wine there is truth." *Id.* at 278 n.a; C.W. Muehlberger, *Interrogation Under Drug Influence: The So-Called "Truth Serum" Technique*, 42 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 513, 513 (1951).

[53] Macdonald, *supra* note 27.

[54] *See generally* Muehlberger, *supra* note 52.

[55] *See* Martelle, *supra* note 28, at E4. When asked about the existence of a government developed truth serum one professor of psychiatry responded "[w]hether some secret CIA lab has something, I have no idea. They don't share with me their pharmacological stuff." *Id.*

[56] Daniel D. Langleben et al., *Telling the Truth From Lie in Individual Subjects With Fast Event-Related fMRI*, 26 HUMAN BRAIN MAPPING 262, 269 (2005), *available at* http://repository.upenn.edu/cgi/viewcontent.cgi?article=1012&context=neuroethics_pubs (noting that one significant way in which telling a lie differs from telling the truth is the person must first prevent themselves from answering truthfully before concocting a lie).

[57] *Id.* at 271.

drugs . . . ."[58] As discussed earlier, traditional truth drugs have the effect of lowering personal inhibitions and thus increase the likelihood of a truthful response.[59] Perhaps a new and more effective truth serum would specifically target the areas of the brain involved in telling a lie; a cocktail of sodium pentothal or sodium amytol combined with other chemical substances that suppress the areas of the brain involved in telling a lie could function as a powerful and effective truth serum. This new truth serum would retain the pain killing properties and relaxing effects of traditional barbiturate drugs, but would also have the additional effect of affecting the areas of the brain involved with telling a lie. Indeed, if this substance does or will exist in the future, it would be a powerful weapon to use in interrogations in the War on Terror. But would the use of such a substance constitute torture?

II. UNITED STATES OBLIGATIONS CONCERNING TORTURE

Despite familiarity with the word torture, a precise definition of the term torture is difficult to articulate.[60] The United States's domestic legislation dealing with torture represents a crazy quilt of statutory enactments, which were enacted pursuant to obligations arising under international treaties and agreements. The most prominent and respected international agreements are the Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva Convention"),[61] and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment ("CAT").[62]

A. United States Torture Statutes

To implement the provisions of CAT domestically, the United States enacted legislation designed to fulfill its obligations and provide a definition of torture.[63] Section 2340 defines torture as "an act committed by a person acting under the color of law specifically intended to inflict

---

[58] *See generally* Roger N. Beachy, Editorial, *IP Policies and Serving the Public*, 299 SCIENCE 473 (2003) (beginning discussion with proposition that many scientific discoveries result in the development of new drugs).

[59] *See* Martelle, *supra* note 28.

[60] *See* Strauss, *supra* note 24, at 208–09 (stating that confusion over what conduct amounts to torture stems from sensational media reports and judicial decisions that describe a wide array of conduct as torture).

[61] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (consented to by the U.S. Senate on July 6, 1955, with reservations) [hereinafter Geneva Convention].

[62] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (1988) [hereinafter CAT].

[63] *See* 18 U.S.C. § 2340 (2000) (CAT, not a self-executing treaty, required the U.S. to implement the provisions of the treaty through enacting legislation.).

severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control . . . ."[64] With a few exceptions, the definition of torture spelled out in section 2340 resembles the definition of torture in the text of the CAT treaty.[65] However, unlike CAT, section 2340 elaborates further as to what constitutes severe mental harm. The U.S. legislation defines severe mental pain or suffering as:

> the prolonged mental harm caused by or resulting from—
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or
>
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality . . . .[66]

If the use of a truth serum that interacted with an individual's brain chemistry were administered that made him or her divulge the truth, and resulted in no pain, it may nonetheless constitute torture under the definition of severe mental harm laid out in subsection (B). However, the effects of the truth serum would have to result in a "prolonged" mental harm.

Furthermore, in light of the Supreme Court's recent ruling in *Hamdan v. Rumsfeld*,[67] Congress recently re-examined the issue of torture as it relates to terrorists apprehended and detained by U.S. forces fighting in the War on Terror. Responding to reports that U.S. officials had engaged in interrogation techniques of questionable legality,[68] Congress enacted the Military Commissions Act of 2006 ("MCA").[69] The MCA empowers the President to issue executive orders which "interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations

---

[64] *Id.* § 2340(1).

[65] *Compare* CAT, *supra* note 62, at 3–4 at; 1465 U.N.T.S. at 113–14 (requiring that the infliction of physical or mental harm be for the purpose of acquiring information or securing a confession and be carried out with authority or under color of law), *with* 18 U.S.C. § 2340(1) (requiring only that severe physical or mental pain be inflicted without requirement of a specific purpose).

[66] 18 U.S.C. § 2340(2).

[67] 126 S. Ct. 2749, 2755 (2006) (holding that the provisions of Common Article 3 of the Geneva Convention apply to enemy detainees captured during the War on Terror).

[68] *See* Hirsh & Hosenball, *supra* note 17.

[69] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 [hereinafter MCA].

which are not grave breaches of the Geneva Conventions."[70] The President's interpretative authority under the MCA allows the President to construe the provisions of Article 3 of the Geneva Convention, which vaguely proscribes "violence to life and person . . . cruel treatment and torture."[71] Furthermore, the MCA clarifies what conduct would rise to the level of torture, and in doing so gives guidance to interrogators who were not cognizant of the types of conduct that were prohibited.[72] The MCA defines torture as:

> The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.[73]

The definition of torture provided in the MCA differs from the definition of torture stated in section 2340 in two key respects. First, an individual violates section 2340 if the individual actually commits an act that causes severe physical or mental pain or suffering; but an individual commits torture under the MCA if they commit, conspire, or attempt to commit an act that results in severe physical or mental pain or suffering.[74] Second, the definition of torture spelled out in the MCA requires that the severe physical or mental pain or suffering be "for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind."[75] The definition of torture in Section 2340 omits this requirement.[76] Nevertheless, despite these differences, the drafters of the MCA adopted the same definition for "severe mental pain or suffering" as the one established in Section 2340(2).[77] Therefore, conduct

---

[70] MCA, § 6(a)(1)(3)(A), 120 Stat. at 2632.

[71] *See* Geneva Convention, *supra* note 61, at 3320, 75 U.N.T.S. at 138.

[72] *See* Warren Richey, *Torture of Detainees? No. 'Coercion'? It Depends.*, THE CHRISTIAN SCI. MONITOR, Oct. 19, 2006, at 2 (explaining that the MCA establishes procedures for the interrogation of enemy combatants in order to comply with the provisions of the Geneva Convention); Scott Shane & Adam Liptak, *Shifting Power to a President: Bill Creates Legal Basis for Policy on Detainees*, N.Y. TIMES, Sept. 30, 2006, at A1, A11 (stating that the MCA elucidates U.S. obligations under Article 3 of the Geneva Conventions by allowing the President to issue authoritative interpretations of select provisions of the Geneva Conventions).

[73] MCA § 6(d)(1)(A), 120 Stat. at 2633 (codified as amended at 18 U.S.C. § 2441).

[74] *Compare* 18 U.S.C. § 2340(1) (2000), *with* MCA § 6 (d)(1)(A), 120 Stat. at 2633 (codified as amended at 18 U.S.C. § 2441).

[75] MCA, § 6(d)(1)(A), 120 Stat. at 2633 (codified as amended at 18 U.S.C. § 2441 (Oct. 17, 2006)).

[76] 18 U.S.C. § 2340(1).

[77] MCA § 6(d)(2)(A), 120 Stat. at 2634 (codified as amended at 18 U.S.C. § 2441).

that results in severe mental harm under Section 2340(2) also constitutes a violation under the provisions of the MCA because both statutes have provisions providing identical definitions.[78] If the use of truth serum violated the United States CAT torture statutes found in section 2340, then it would also violate the MCA and vice versa.

B. Torture as Understood by United States Courts

Before analyzing whether the use of truth serum constitutes torture, it is helpful to examine how U.S. courts have understood torture in construing U.S. torture statutes. To date, no court has provided an extensive interpretation of U.S. torture legislation. Instead, courts have opted to analyze torture claims on a case-by-case basis and usually base their decision on the gruesomeness, intensity, or shock value of the treatment alleged. As one court stated, the term torture is reserved for "'extreme, deliberate and unusually cruel practices . . . .'"[79] The court went on to state that examples of torture include "'sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.'"[80] Although the list provided by the court is by no means exhaustive, it does indicate that "'only acts of a certain gravity shall be considered to constitute torture.'"[81] As a result, under this conception of torture "[n]ot *all* police brutality, not *every* instance of excessive force used against prisoners, is torture . . . ."[82] Thus, for certain conduct to rise to the level of torture it must meet a high threshold in terms of intensity, brutality, and pain.

For instance, in *Price v. Socialist People's Libyan Arab Jamahiriya* the plaintiffs alleged that Libyan officials tortured them by beating and clubbing them with weapons while they were held hostage.[83] The court determined that these allegations were insufficient to establish a claim of torture because the plaintiffs omitted details relating to the frequency,

---

[78] I will analyze whether the use of truth serum constitutes torture under the provisions of the MCA because it was, arguably, enacted in response to questions concerning the interrogation of captured terror suspects. Additionally, the MCA interprets the provisions of Article 3 of the Geneva Convention, which now apply to terror suspects detained by U.S. military forces.

[79] Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 92 (D.C. Cir. 2002) (quoting S. EXEC. REP. NO. 101-30, at 14 (1990)).

[80] *Id.* at 92–93.

[81] *Id.* at 92 (quoting J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE 117 (1988)).

[82] *Id.* at 93.

[83] *Id.*

duration, and intensity of the beatings.[84] On remand, however, the court found that the plaintiffs did allege sufficient facts to plead a valid claim for mental torture.[85] The plaintiffs' amended complaint included allegations that they were forced to witness the beatings of several prisoners and were told they would receive similar treatment if they did not confess to being American spies.[86] The court indicated that the facts alleged in the amended complaint satisfied the high standard required to establish a claim for mental torture.[87] Thus, under the court's analysis in *Price*, claims that one witnessed the severe beating of another and was threatened with similar treatment are sufficient to at least establish a claim for mental torture. Similarly, in *Doe v. Qi*, the court held that the plaintiff suffered physical torture after she was kicked, beaten, knocked unconscious, and subjected to having liquid pumped into her body through a tube inserted in her nostrils.[88] In addition, the plaintiff claimed that prison officials subjected her to mental torture by forcing her to watch the sexual assault of a close friend.[89] Courts have also acknowledged that rape and sexual assault or the threatened rape of either oneself or another can constitute mental torture because such offenses represent extreme violations of dignity and humanity.[90]

Several courts have also found credible claims of prolonged mental pain and suffering when individuals survived harrowing experiences in which their captors threatened them with death.[91] In one particular case,

---

[84] *Id.* at 93–94 (holding that the claim under the Foreign Sovereign Immunities Act was not specific enough to determine whether the facts alleged amounted to police brutality or torture).

[85] Price v. Socialist People's Libyan Arab Jamahiriya, 274 F. Supp. 2d 20, 25 (D.D.C. 2003).

[86] *Id.* (stating that one prisoner was beaten until he was unconscious; a Libyan journalist was beaten because he had spoken to and assisted the plaintiffs; and another prisoner was beaten to death with a hammer because he shared food with the plaintiffs).

[87] *Id.*

[88] 349 F. Supp. 2d 1258, 1317 (N.D. Cal. 2004) (analyzing claim under the Torture Victim's Protection Act, whose provisions are very similar to the torture provisions found in the MCA and 18 U.S.C. § 2340).

[89] *Id.* at 1318 (describing how the plaintiff was subjected to mental torture after watching the physical and sexual assault of her friend and watching her friend's assaulters refuse medical treatment after her friend started hemorrhaging).

[90] Namo v. Gonzales, 401 F.3d 453, 455 (6th Cir. 2005) (explaining how the plaintiff was forced to witness the rape of a woman and threatened with the rape of his wife during his two week detention); *see also* Zubeda v. Ashcroft, 333 F.3d 463, 472 (3d Cir. 2003) (stating that the emotional effects of rape can be severe and such conduct is recognized as activity prohibited as torture under the law of nations).

[91] *See* Aldana v. Del Monte Fresh Produce, Inc., 416 F.3d 1242, 1252 (11th Cir. 2005) (explaining how several individuals were held captive and told they would soon be killed); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1333–40 (N.D. Ga. 2002) (describing how Serbian police officers physically assaulted four Bosnian prisoners and threatened them with death in a game-like fashion).

seven Guatemalan citizens were threatened with death and recorded messages on a video camera because they were told they would be "giving their last messages."[92] The seven individuals were also photographed because one guard indicated that he wanted a picture of their faces before they were killed.[93] Based on those allegations, the court concluded that the allegations could constitute torture based upon intentionally inflicted emotional pain and suffering.[94] In another case, the individuals were also threatened with imminent death as police officials forced them to play a game of Russian roulette.[95]

In both cases, the alleged conduct rose to a high enough level to constitute both physical and mental torture. Moreover, in *Mehinovic* the court indicated that the psychological after-effects from which the victims suffered satisfied the requirements of a long-term mental harm.[96] In contrast, other courts have not found the requisite mental torture in other cases for a variety of reasons.[97] For example, in *Jo v. Gonzales* the court stressed that although the definition of torture includes both physical and mental suffering, the definition of mental suffering encompasses suffering that results from conduct towards a person and does not encompass mental suffering that arises from the anguish caused by the destruction of a home or personal property.[98] Thus, one is able to conclude that the mental harm accompanying extreme physical abuse manifested by "anxiety, flashbacks, and nightmares" is sufficient to constitute torture,[99] but the mental harm caused by the deprivation or destruction of personal property is insufficient.[100]

Although illustrative, these cases provide little insight in determining whether the use of truth serum is torture. First, the claims set forth in these cases allege torture under every statutory provision except the provision defining severe mental pain or suffering as the mental harm caused by the administration or threatened administration

---

92 *Aldana*, 416 F.3d at 1252 (internal quotation marks omitted).

93 *Id.*

94 *Id.* at 1252–53.

95 *Mehinovic*, 198 F. Supp. 2d at 1346. In *Mehinovic*, the victims also testified that they feared they would be killed during the beatings. *Id.*

96 *See id.* at 1333–40 (specifying that all four victims suffered from nightmares, anxiety, insomnia, and flashbacks).

97 *See, e.g.*, Jo v. Gonzales, 458 F.3d 104, 109 (2d Cir. 2006) (claiming mental harm and pain ensued from the destruction of property); *see also* Dushi v. Gonzales, 152 F. App'x 460, 469 (6th Cir. 2005) (stating that rough and abusive treatment at the hands of police officials was not sufficient to constitute torture).

98 458 F.3d at 109.

99 *See Mehinovic*, 198 F. Supp. 2d at 1333–40.

100 *Jo*, 458 F.3d at 109.

of mind-altering substances.[101] The claims in *Mehinovic* alleged physical torture at the hands of police officials,[102] while the claims in *Price*, *Aldana*, and *Namo* alleged mental torture resulting from conduct that satisfies the definitions of severe mental pain or suffering spelled out in 18 U.S.C. §§ 2340(2)(A), (C), and (D) respectively.[103] As of this date, only one court has analyzed a claim where the complainant alleged mental torture resulting from the administration or threatened administration of mind-altering substances.[104] Second, one could argue that the use of truth serum does not rise to the level of the shocking, outrageous, and brutal conduct described in these cases. The use of truth serum would not result in the subject feeling any pain; on the contrary, truth serum would diminish pain and ease tension and anxiety.[105] Moreover, the physical intrusion involved with the administration of truth serum does not resemble the physical intrusion involved with rape or sexual assault.[106] Truth serum, including an advanced version of the drug, is designed to be fast acting and the effects of the drug would dissipate quickly. The subject injected with such a substance would not lose complete control or become unaware of surrounding events, but would respond to questions truthfully while under the influence of the drug. As one commentator stated, if such a substance did exist it "might be legal."[107]

---

[101] *See* 18 U.S.C. § 2340(2)(B) (2000).

[102] 198 F. Supp. 2d at 1333–40.

[103] *See* Namo v. Gonzales, 401 F.3d 453, 455 (6th Cir. 2005) (threatening individual with the rape of his wife if he did not cooperate with Iraqi authorities); Aldana v. Del Monte Fresh Produce, Inc., 416 F.3d 1242, 1252 (11th Cir. 2005) (threatening captives with imminent death); Price v. Socialist People's Libyan Arab Jamahiriya, 274 F. Supp. 2d 20, 25 (D.D.C. 2003) (threatening captives with similar abuse as that suffered by other prisoners).

[104] Sackie v. Ashcroft, 270 F. Supp. 2d 596, 601–02 (E.D. Pa. 2003) (alleging severe mental pain and suffering caused by the forced consumption of alcohol, marijuana, and cocaine). Another case making such allegations is still within the course of litigation. *See* Motion of Defendant to Dismiss For Outrageous Government Conduct at 18, United States v. Padilla, No. 04-60001 (S.D. Fla. Oct. 4, 2006) (claiming that Mr. Padilla was tortured by the administration of mind-altering substances, including LSD and PCP). *But see* Order Denying Defendant Padilla's Motion to Dismiss for Outrageous Government Conduct, United States v. Padilla, No. 04-60001, 2007 WL 1079090 (S.D. Fla. Apr. 9, 2007).

[105] *See* Dession, *supra* note 33, at 319; DORLAND'S, *supra* note 46.

[106] *Compare* Strauss, *supra* note 24 at 238 (stating that the injection of truth serum is not a severe bodily intrusion because it is minimally invasive and causes no pain or negative side effects), *and* Rana Lehr-Lehnardt, Note, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 B.Y.U. J. PUB. L. 317, 330 (2002) (describing rape as conduct that attacks the integrity of the person and is intended to intimidate, degrade, and humiliate the victim), *with* Keller, *supra* note 24, at 587–88 (arguing that the administration of truth serum would constitute mental rape due to feelings of helplessness and loss of control).

[107] *See* YOO, *supra* note 25.

III. TRUTH SERUM AND TORTURE

Although the language of the MCA does not prohibit the use of truth serum outright, the Act may nonetheless prohibit its use under one of the enumerated torture provisions. If the MCA does exclude the use of truth serum in the War on Terror, then one must show that its use satisfies all of the requisite elements in order to rise to the level or either physical or mental torture. Under the MCA's definition of torture, if an individual were to assert that the administration of truth serum was torture, that person would have to satisfy several requirements, including: (1) that the person who administered the truth serum acted with specific intent; (2) to inflict severe physical or mental pain or suffering; (3) that the person was within the custody or physical control of the one who administered the drug; and (4) that the drug was administered in order to obtain a confession, or information, or to punish, intimidate, coerce, or "based on discrimination of any kind."[108] A detainee would most likely be able to show (3) because that individual would be within the custody and control of U.S. military forces. Furthermore, requirement (4) would probably be satisfied because interrogators would administer the truth serum in order to acquire information about terrorist operations or the threat of future attacks. Therefore, questions concerning whether the administration of truth serum constitutes torture under the MCA would hinge on a resolution of elements (1) and (2).

A. Physical Torture

Because there is little case law or congressional material specifying exactly what the phrase "severe physical suffering" means, analysis must necessarily focus on the language of the statute. In interpreting a federal statute "it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.'"[109] Moreover, in drafting a statute "'Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning.'"[110]

The administration of truth serum would most likely not constitute torture in a physical sense under the MCA because the truth serum would not cause severe physical pain. In a 2002 legal memo, the Justice Department's Office of Legal Counsel examined what conduct would rise

---

[108] *See* MCA 6(d)(1)(A).

[109] Mills Music, Inc. v. Snyder, 469 U.S. 153, 164 (1985) (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189 (1985)).

[110] Beanal v. Freeport-McMoRAN, Inc., 969 F. Supp. 362, 381 (E.D. La. 1997) (quoting United States v. Gray, 96 F.3d 769, 774 (5th Cir. 1996)).

to the level of torture.[111] Examining the severity requirement, the Memo asserted that the word "'severe' conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure."[112] The Memo also posited that severe pain would be pain of such a high caliber that it would result in "death, organ failure, or serious impairment of body functions . . . ."[113] However, the Office of Legal Counsel subsequently retreated from several of the arguments made in the 2002 Memo, including that severe physical pain means the pain accompanying "'organ failure, impairment of bodily function, or even death.'"[114] Nevertheless, the Revised Memo did confirm the 2002 Memo's assertions that the word "severe" meant that pain must be "intense [and] . . . [h]ard to sustain or endure."[115]

Under this understanding, the administration of truth serum would not constitute torture because it would not result in "severe physical pain." The simple injection of truth serum with a medical syringe would not cause severe pain, but would only result in momentary and fleeting discomfort. In fact, the Supreme Court has upheld involuntary medical procedures involving the use of a medical syringe.[116] Furthermore, the effect of truth serum on the subject does not cause pain but in fact reduces pain and also creates feelings of relaxation.[117] Thus, the administration of truth serum would not constitute physical torture. This conclusion does not foreclose the possibility that it may cause severe mental pain or suffering.

B. Severe Mental Pain or Suffering

Instead of providing a new definition of the term "severe mental pain or suffering," the MCA adopts the definition established by Congress in 18 U.S.C. § 2340(2).[118] Section 2340(2)(B) defines "severe

---

[111] Memorandum from Jay S. Bybee, Assistant Att'y Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Memo], *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

[112] *Id.* at 5.

[113] *Id.* at 6.

[114] Memorandum from Daniel Levin, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to James B. Comey, Deputy Att'y Gen. 2 (Dec. 30, 2004) [hereinafter Revised Memo], *available at* http://news.findlaw.com/hdocs/docs/terrorism/dojtorture123004mem.pdf (quoting Memo, *supra* note 111, at 1).

[115] *Id.* at 5 (internal quotation marks and citations omitted).

[116] *See* Schmerber v. California, 384 U.S. 757, 771 (1966) (holding involuntary extraction of blood permissible because the procedure involves no trauma or pain).

[117] *See* discussion *supra* Part II.B.

[118] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(d)(2)(A), 120 Stat. 2600, 2634 (adopting the definition of severe mental pain or suffering found in 18 U.S.C. § 2340(2) (2000)).

mental pain or suffering" as "the prolonged mental harm caused by or resulting from . . . the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality . . . ."[119]

1. Truth Serum as a Mind-Altering Substance

The MCA does not define "mind-altering substances." The Justice Department Memo, relying on a few cases and state statutes, stated that drugs, alcohol, and psychotropic drugs are mind-altering substances.[120] One court implicitly affirmed this designation in determining that alcohol, marijuana, and cocaine were mind-altering substances.[121] Truth serum is most likely a mind-altering substance since the most common drug recognized as a truth serum, sodium pentothal, is a barbiturate class drug.[122] Even a new and improved truth serum would probably qualify as a mind-altering substance, especially if, as specified earlier, one component of the new truth serum was a barbiturate drug, such as sodium pentothal or sodium amytol.[123]

Even if truth serum qualifies as a mind-altering substance, it would also have to result in a profound disruption of the senses or the personality. This language, the Justice Department Memo asserted, also applied to the term "mind-altering substances" as well as the term "other procedures."[124] The Memo stated that a profound disruption would occur when acts "penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities . . . ."[125] Such a disruption could manifest itself in a myriad of ways, such as "a drug-induced dementia [where] the individual suffers from significant memory impairment . . . deterioration of language function, [or] impaired ability to execute simple motor activities . . . ."[126] In addition, a profound disruption could occur with "the onset of 'brief psychotic disorder' [when] . . . the individual suffers . . . delusions, hallucinations, or even a catatonic state."[127]

---

[119] 18 U.S.C. § 2340(2)(B) (definition adopted by MCA § 6(d)(2)(A)).

[120] Memo, *supra* note 111, at 9–10.

[121] *See* Sackie v. Ashcroft, 270 F. Supp. 2d 596, 602 (E.D. Pa. 2003).

[122] *See* discussion *supra* Part II.B.

[123] *See* discussion *supra* Part I.C.

[124] Memo, *supra* note 111, at 10 (stating that the use of the word "other" to pair mind-altering substances with procedures signifies that the mind-altering substances must also cause a profound disruption).

[125] *Id.* at 11.

[126] *Id.*

[127] *Id.*

Although not dispositive, the Memo's arguments are helpful in determining what constitutes a profound disruption of the senses or personality. Analyzed under this standard, truth serum would probably not cause such a severe effect. Instead, truth serum has quite the opposite effect by placing the subject in a relaxed and uninhibited state.[128] The effects of truth serum do not impair language ability and do not substantially impair cognitive function. To do so would make truth serum entirely ineffective for its purpose. On the contrary, an individual under the influence of truth serum is able to understand questions and answer those questions with verbal responses, albeit with less inhibitions. The only time a court has ruled that severe mental pain or suffering resulted from the administration of mind-altering substances, the individual consumed alcohol, cocaine, and marijuana over a period of three to four years.[129] However, the court did not provide specific analysis and did not indicate whether the severe mental pain or suffering stemmed from the consumption of drugs and alcohol or the repeated death threats and brutal treatment that the plaintiff suffered at the hands of his superiors.[130] If the plaintiff's severe mental pain or suffering did stem from the drugs and alcohol, it could be the case that the severe mental trauma was caused by prolonged and repeated use.[131] Viewed from that vantage point, it appears unlikely that a one-time dose of truth serum would cause severe mental pain or suffering.

2. Prolonged Mental Harm

The drafters of the MCA and section 2340 did not elaborate on the requirement of prolonged mental harm, but the use of the word "prolong" mandates that the mental harm persist for some duration. The Justice Department Memo states that the harm "must be one that is endured over some period of time."[132] The Memo went on to state that the harm "must cause some lasting, though not necessarily permanent, damage."[133] Furthermore, the Revised Memo states that the use of the word "harm" "suggests some mental damage or injury."[134] The Justice Department Memo posited that the mental strain produced by an extended and intense police interrogation would not satisfy the statute, but that the onset of "posttraumatic stress disorder" ("PTSD") or "chronic

---

[128] *See* Dession, *supra* note 33, at 319.

[129] *See* Sackie v. Ashcroft, 270 F. Supp. 2d 596, 601–02 (E.D. Pa. 2003).

[130] *Id.* at 602.

[131] *Id.* at 601 (testifying that drug and alcohol consumption occurred over the span of three to four years while plaintiff was a member of a Liberian rebel force).

[132] Memo, *supra* note 111, at 7.

[133] *Id.*

[134] Revised Memo, *supra* note 114, at 14.

depression" would satisfy the prolonged harm requirement.[135] The Memo noted that both of these disorders can last for months or even years and thus would meet the prolonged harm requirement.[136] Evidence of prolonged mental harm can manifest itself by way of depression, insomnia, nightmares, anxiety, and flashbacks.[137]

It is unlikely that the administration of truth serum would cause a prolonged mental harm. The effects of the drug would dissipate within hours and would not cause any negative lasting side effects.[138] Furthermore, the experience of undergoing an injection and interrogation in no way resembles the traumatic and harrowing events that resulted in prolonged mental harm in situations where a court did find the requirement satisfied.[139] On the other hand, one could argue that an individual who receives an involuntary injection of truth serum would suffer prolonged mental harm on account of feelings of helplessness, loss of control, and fear.[140] The onset of a serious mental disorder would not be the result of the administration of the drug, but instead would be an unintended consequence based upon feelings of guilt and remorse caused by statements made while under the influence of truth serum. The same onset of a serious mental disorder could be caused by the simple act of a voluntary confession and does not require the administration of truth serum.[141]

3. Specific Intent

In order to satisfy the requirement for mental harm an individual must specifically intend that the conduct cause severe mental pain or

---

[135] Memo, *supra* note 111, at 7.

[136] *Id.* This interpretation of "prolonged" comports with a reasonable understanding of the word. *See* Tex. Mun. Power Agency v. EPA, 89 F.3d 858, 875 (D.C. Cir. 1996) (holding the *EPA*'s construction of the world "prolonged" to mean "at least three months" was reasonable under *Chevron, U.S.A., Inc., v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984)).

[137] *See* Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1333–40 (N.D. Ga. 2002) (indicating that all four victims suffered from these mental conditions ten years after the traumatic events occurred).

[138] *See supra* note 46 and accompanying text.

[139] *See Mehinovic*, 198 F. Supp. 2d at 1333–40 (maintaining that the prolonged mental harm resulted from the severe beatings, death threats, degrading treatment, and physical injuries suffered by the plaintiffs at the hands of Serbian police officials).

[140] *See* Keller, *supra* note 24, at 586 (arguing that an individual injected with truth serum would suffer emotional trauma resulting in PTSD because of feelings of guilt and anguish associated with divulging truthful information that leads to the death of others).

[141] *See* Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-At-Law: Lessons from Dostoyevsky*, 35 HOUS. L. REV. 327, 367–68 (1998) (illustrating that a confession can cause stress, guilt, and damage to personal reputation and family relationships).

suffering.[142] The Justice Department Memo adopted the specific intent requirement stating that the infliction of pain must be the "precise objective."[143] Although the Revised Memo did retreat somewhat from the assertions of the original Memo, it did say that the specific intent requirement would be satisfied if an individual "consciously desired" to inflict severe pain and suffering, but the requirement would not be met if the individual acted in "good faith."[144] Thus, an unintended mental disorder suffered as a result of the administration of truth serum would not satisfy the requirement of the statute because the individual who administered the drug would not have the requisite intent to specifically cause that particular mental harm.[145] The development of PTSD or chronic depression due to the experience of undergoing a truth serum interrogation or feelings of guilt and anxiety would not constitute torture because the interrogator did not specifically intend to cause that emotional trauma. One court has expanded this narrow requirement and concluded that the specific intent requirement "distinguishes between suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct."[146] Even under a foreseeability standard, the development of a serious mental disorder would probably not satisfy the statutory requirement because the disorder would likely be an accidental result of the intentional act of administering a truth serum. Nevertheless, such speculation is unnecessary as the reference to a foreseeability standard was dicta, and the Third Circuit has since retreated from this position.[147]

C. The Threatened Administration of Truth Serum

If the actual administration of truth serum does not constitute torture, would the threat of its administration? The question seems to present a paradox. Yet, the threatened administration may cause the same mental trauma as the actual administration of truth serum with the only difference being the fact that the interrogator intended to cause the mental harm.[148] In threatening to use truth serum, the interrogator is not seeking to inflict severe mental pain or suffering or to cause the

---

[142] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(d)(1)(A), 120 Stat. 2600, 2633; *see also* 8 C.F.R § 208.18(a)(5) (2007).

[143] Memo, *supra* note 111, at 3.

[144] Revised Memo, *supra* note 114, at 17 (internal quotation marks omitted).

[145] *Id.* The regulation states that "[a]n act that results in unanticipated or unintended severity of pain and suffering is not torture." 8 C.F.R § 208.18(a)(5) (2007).

[146] Zubeda v. Ashcroft, 333 F.3d 463, 473 (3d Cir. 2003).

[147] *See* Toussaint v. Att'y Gen., 455 F.3d 409, 415 (3d Cir. 2006).

[148] *See* Keller, *supra* note 24, at 601–03 (arguing the precise objective of threatening to use truth serum is to cause mental anguish and anxiety so that the subject divulges the desired information).

subject to develop a serious mental disorder. Instead, the interrogator's aim is to use coercive pressure in order to convince the subject to willingly divulge the desired information. Although not with the use of truth serum, interrogators sometimes do use threats as a coercive tactic to convince an individual to disclose valuable information. As one commentator stated, "[i]f attempting to gain intelligence by breaking the 'will of the prisoners' and making them 'wholly dependent on their interrogators' constitutes torture, then virtually all interrogation is torture and illegal, including what goes on in U.S. police stations every day."[149] Viewed in this light, the threatened administration of truth serum is less likely to be construed as torture.

IV. THE CONSTITUTION DOES NOT PROHIBIT USING TRUTH SERUM

Does the Constitution prohibit the use of truth serum? The Supreme Court has interpreted the Constitution as prohibiting confessions procured under the influence of truth serum from being introduced against the accused in a criminal proceeding.[150] No Supreme Court ruling has prohibited the use of truth serum as a general matter. Rather, in *Townsend v. Sain*, the defendant, a heroin addict, was a murder suspect and began suffering withdrawal symptoms during police questioning.[151] To ease the defendant's symptoms, a doctor administered a dose of scopolamine and shortly thereafter the defendant confessed to the murder.[152] The Court ruled that the confession was inadmissible because it was not "'the product of a rational intellect and a free will' . . . ."[153] Thus, the Supreme Court's holding only bars the admission of truth serum-induced confession at trial, but says nothing about prohibiting outright the use of truth serum in other contexts. Indeed, other procedures deemed permissible might provide some leeway for the use of truth serum during the interrogation of terror suspects.

A. Involuntary Blood Tests

The Supreme Court has regularly upheld the practice of involuntary blood testing as a reasonable search and seizure under the Fourth Amendment.[154] In *Schmerber v. California*, the Court stressed several

---

[149] YOO, *supra* note 25, at 173.

[150] *See* Townsend v. Sain, 372 U.S. 293 (1963), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 504 U.S. 1, 5 (1992).

[151] *Id.* at 298.

[152] *Id.* at 298–99.

[153] *Id.* at 307 (quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1960)).

[154] *See* Schmerber v. California, 384 U.S. 757 (1966) (holding that the involuntary withdrawal of blood against the defendant's will did not violate the Fourth Amendment); *see also* Breithaupt v. Abram, 352 U.S. 432 (1957) (holding that the withdrawal of blood from the defendant while he was unconscious did not offend the Fourth Amendment).

factors including: the effectiveness of the procedure, the absence of risk and pain to the subject, and the fact that the procedure was performed in a hospital setting under medical supervision.[155] Analyzed under these factors, the Court concluded that the involuntary withdrawal of blood was not an unreasonable search and seizure under the Fourth Amendment.[156] More recently, several courts have upheld the involuntary withdrawal of blood required under the Federal DNA Analysis Backlog Elimination Act of 2000,[157] which requires parolees to submit a blood sample, even against their will.[158] In contrast, in *Winston v. Lee*, the Supreme Court held that a surgical procedure to recover a bullet lodged in the defendant's body was an unreasonable search and seizure under the Fourth Amendment.[159] To determine whether a surgical procedure was reasonable, the Court applied a balancing test weighing "the individual's interests in privacy and security . . . against society's interests in conducting the procedure."[160] The Court held that the risk of surgery to the defendant and the intrusion of anesthetics outweighed the state's interest in collecting evidence since other evidence was available.[161]

Furthermore, in *Rochin v. California*, the Court held that the use of emetics to recover drug evidence swallowed by the defendant violated the Due Process Clause of the Fourteenth Amendment.[162] The Court stated that the use of such procedures "shocks the conscience" because "[t]hey are methods too close to the rack and the screw to permit of constitutional differentiation."[163]

The framework provided by such cases suggests that the Constitution permits the use of truth serum. First, the use of truth serum is unlike the emetics used in *Rochin* and does not "shock[] the conscience."[164] Rather, it more closely resembles an involuntary withdrawal of blood. The administration of truth serum, like the withdrawal of blood, subjects the individual to the minor intrusion of a

---

155 384 U.S. at 771.

156 *Id.* at 772.

157 42 U.S.C. § 14135a(a)(4)(A) (2000).

158 *See* United States v. Kincade, 379 F.3d 813, 832 (9th Cir. 2004) (holding that the state interest in requiring an involuntary blood sample outweighed the privacy interests of the defendant); Velasquez v. Woods, 329 F.3d 420, 421–22 (5th Cir. 2003) (same); Jones v. Murray, 962 F.2d 302, 306–07 (4th Cir. 1992) (same).

159 470 U.S. 753, 758–67 (1985).

160 *Id.* at 760.

161 *Id.* at 764–66.

162 342 U.S. 165, 166–174 (1952).

163 *Id.* at 172.

164 *Id.*

needle prick, and the effects are not harmful or long lasting.[165] Moreover, applying the use of truth serum to a Fourth Amendment reasonableness analysis will likely generate the same result.[166] The government has an interest in preventing another terrorist attack; national security is a compelling state interest.[167] On the other hand, the Supreme Court has allowed minimal intrusions into privacy so long as the results are reliable, the procedure involves little pain or risk, and the procedure is conducted under medical supervision.[168] Thus, as long as medical personnel administer truth serum under appropriate medical conditions, the invasion of privacy may be acceptable if the procedure is reliable and could allow intelligence officials to procure information that would thwart a catastrophic terrorist attack.

B. Forced Administration of Psychotropic Drugs

The forced administration of psychotropic drugs may provide further justification for the forced administration of truth serum in limited circumstances. Both truth serum and psychotropic drugs are mind-altering substances, so if the government may administer one type of mind-altering substance to a person against his or her will, the same could hold true for truth serum as well. The Supreme Court has stated that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment . . . ."[169] In certain contexts the government may forcibly administer psychotropic drugs against an individual's will.[170] In a prison environment, officials may administer psychotropic drugs against an inmate's will "if the inmate is dangerous to . . . others and the treatment is in the inmate's medical interest."[171] A government's power to forcibly administer psychotropic drugs is rooted in its "police power"; thus, a government must determine that "the need to prevent violence in a particular situation outweighs the possibility of harm to the medicated individual."[172] Furthermore, a government must rule out other alternatives before it resorts to the forced administration

---

[165] *See* Odeshoo, *supra* note 24 (noting that the effects of truth serum are confined to the period of administration).

[166] *See* E.V. Kontorovich, Op-Ed., *Make Them Talk*, WALL ST. J., June 18, 2002, at A16 (arguing that the use of truth serum more closely resembles a search under the Fourth Amendment than torture).

[167] *See* Doe v. Gonzales, 126 S. Ct. 1, 3 (2005) (acknowledging that national security can be a compelling state interest).

[168] *See* Schmerber v. California, 384 U.S. 757 (1966).

[169] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

[170] *See* Washington v. Harper, 494 U.S. 210, 227 (1990).

[171] *Id.*

[172] Rogers v. Okin, 634 F.2d 650, 656 (1st Cir. 1980).

of psychotropic drugs.[173] The government does not face as stiff an obligation to pursue reasonable alternatives when administering one application of a drug because "it would appear that treatment for a limited period is not as likely to have as intrusive an effect upon the patient as administration for an extended time."[174] Because a government is able to forcibly administer psychotropic drugs, the same could hold true for the administration of truth serum. A terrorist planning to carry out an attack against American civilians represents a dangerous threat to others. In that situation, perhaps the government could use truth serum so long as it was a one-time application, which represents less harm to the subject, and it is reasonably believed that the use of truth serum may result in the acquisition of intelligence to prevent a devastating attack. Although the forcible administration of psychotropic drugs pertains mainly to correctional facilities, it does illustrate that the forcible administration of mind-altering substances against another's will is not an alien concept to American constitutional jurisprudence.

CONCLUSION

The events of September 11th fundamentally altered our attitude and made us aware of the dangerous new enemy that threatened innocent civilian lives. After September 11th, people began to reconsider which tactics the government should employ to keep America safe from another deadly and terrifying attack. One such tactic is the use of truth serum. This Note has argued that the use of truth serum would not constitute torture because it does not comport with the more brutal and violent practices that have been considered to be torture. Furthermore, the U.S. definition of torture, although covering the use of mind-altering substances, is not broad enough to cover the use of truth serum. Finally, while the Constitution does not explicitly permit the use of truth serum, the Supreme Court has upheld practices that, by analogy, should permit the use of truth serum in limited circumstances.

Seth Lowry

---

[173] *Id.*

[174] Rennie v. Klein, 653 F.2d 836, 847 (3d Cir. 1981).

THE DEFENSE OF MARRIAGE ACT AS AN EFFICACIOUS EXPRESSION OF PUBLIC POLICY: TOWARDS A RESOLUTION OF *MILLER V. JENKINS* AND THE EMERGING CONFLICT BETWEEN STATES OVER SAME-SEX PARENTING

INTRODUCTION

When Nietzsche proclaimed the death of God, some suggested that determining the Deity's demise laid "at the foundation of a distinctly modern thought and experience."[1] Has modern thought now also proclaimed the death of mom and dad? A few states through legislative acts and judicial decrees have already answered this question in the affirmative.[2] Biologically, gametes are still necessary for child-bearing, of course, but beyond that do motherhood and fatherhood have any significance?

Although popular debate over that question continues to proliferate,[3] established law already bears on the subject. The Federal Defense of Marriage Act ("DOMA") legally defines marriage as existing only "between one man and one woman." Through DOMA, the United States has not only stated something about marriage, but it has made a robust statement in favor of the uniqueness and intrinsic value of motherhood and fatherhood.[4] DOMA and recent state caselaw regarding same-sex unions exhibit how an understanding of parenthood and a definition of marriage are intertwined; the definition or concept of one weighs heavily on decisions regarding the other. Moreover, in DOMA, Congress did not merely state a truism—DOMA is an efficacious expression of public policy.

This Note finds its impetus in the particular struggle over child visitation rights between Lisa Miller-Jenkins and Janet Miller-Jenkins. *Miller-Jenkins v. Miller-Jenkins* ("*Miller v. Jenkins*") involves the interaction of Vermont, Virginia, and federal law.[5] The case carries

---

[1] THOMAS J.J. ALTIZER & WILLIAM HAMILTON, RADICAL THEOLOGY AND THE DEATH OF GOD ix–x (1966).

[2] *See infra* note 50 and text accompanying notes 53–66.

[3] For one example in the culture war over parenting, compare Jennifer Chrisler, *Two Mommies or Two Daddies Will Do Fine, Thanks*, TIME, Dec. 14, 2006, http://www.time.com/time/nation/article/0,8599,1569797,00.html (arguing for same-sex family parenting as a societal good), and James C. Dobson, *Two Mommies Is One Too Many*, TIME, Dec. 18, 2006, at 123 (arguing that same-sex family parenting is not a societal good).

[4] Defense of Marriage Act, 1 U.S.C. § 7 (2000); *see infra* text accompanying notes 30–33.

[5] The Supreme Court of Vermont made its definitive ruling on the case in *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), and the Court of Appeals of Virginia issued its ruling on the matter in a case by the same name found at 637 S.E.2d 330 (Va. Ct.

significance as more individuals leave the homosexual lifestyle,[6] as more same-sex unions come to an end,[7] and as the states wrestle with how to legally deal with the consequences.

A brief recounting of the facts and disposition of the case weaves a winding course between Virginia and Vermont. The parties characterize the case very differently in their briefs.[8] The essential facts are that, while living together in Virginia, Lisa and Janet traveled to Vermont and entered into a civil union in December of 2000.[9] After returning to Virginia, Lisa and Janet selected an anonymous sperm donor, and Lisa was impregnated by means of artificial insemination.[10] She gave birth to a daughter in 2002 with Janet present in the delivery room.[11] The three then moved to Vermont in August of 2002 when the infant girl ("IMJ") was about four months old.[12] The relationship between Lisa and Janet then soured, and Lisa traveled back to Virginia with IMJ in September of 2003, with Janet staying in Vermont.[13] Lisa then filed to dissolve the civil union on November 24, 2003, in Vermont family court.[14]

App. 2006). Commonly, and in this Note, the Virginia case will be referred to simply as *Miller v. Jenkins*.

[6] Lisa Miller left lesbianism, sparking the Miller-Jenkins' breakup and the ensuing legal battle. S. Mitra Kalita, *Vt. Same-Sex Unions Null in Va., Judge Rules*, WASH. POST, Aug. 25, 2004, at B1; *see generally* Parents and Friends of ExGays and Gays, http://www.pfox.org (last visited Feb. 26, 2008) (providing testimonials of individuals who have left the homosexual lifestyle).

[7] For instance, *The New York Times* noted the "split" of Julie and Hillary Goodridge, the couple named in the case of *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), the case that first legalized same-sex marriage in Massachusetts. *See* David Tuller, *A Knottier Knot for Gay Couples*, N.Y. TIMES, Nov. 12, 2006, at 2, *available at* http://www.nytimes.com/2006/11/12/weekinreview/12basic.html. As more same-sex couples separate, the newspaper observed that the legal "questions are new, so answers are in short supply, and court rulings have been mixed." *Id.*

[8] *See* Brief of Appellant at 6–10, *Miller-Jenkins*, 637 S.E.2d 330 (R. No. 2654–04–4); Brief of Appellee at 4–8, *Miller-Jenkins*, 637 S.E.2d 330 (R. No. 2654–04–4). For example, Janet characterizes the breakdown of the relationship by simply stating, "in the fall of 2003, Lisa and Janet decided to separate." Brief of Appellant, *supra*, at 6. Lisa's account more expansively states: "Becoming fearful of Janet's abusive actions, Lisa eventually indicated she desired the relationship to end. Janet insisted Lisa leave immediately [and] . . . drove Lisa and the child back to Virginia where Lisa's family lives." Brief of Appellee, *supra*, at 5. Any interested reader should look at both accounts of the facts to better appreciate both sides of the case.

[9] *Miller-Jenkins*, 912 A.2d at 956. For ease of identification, this Note will only use the first names of the parties.

[10] *Id.*

[11] *Id.*

[12] *Id.* Keeping with the custom of the two court systems, this Note will refer to the biological daughter of Lisa by her initials "IMJ" instead of using her full name.

[13] *Id.*

[14] *Id.*

On June 17, 2004, the Vermont court issued a "Temporary Order Re: Parental Rights & Responsibilities" that gave Lisa "temporary legal and physical responsibility for" IMJ and gave Janet "on a temporary basis, *parent-child* contact with the minor child."[15] Then, on July 1, 2004, Lisa filed a "Petition to Establish Parentage and for Declaratory Relief" in the Circuit Court of Frederick County, Virginia, seeking a declaration that she was the sole parent of IMJ and that any parental rights claimed by Janet were void or without effect.[16] On October 15, 2004, the Virginia circuit court defined the case as one which concerned *parenthood* and issued a "Final Order of Parentage," declaring Lisa to be IMJ's sole parent and refusing to recognize any claims of parental or visitation rights by Janet; thus, no full faith and credit was accorded to the Vermont court's ruling.[17]

The Supreme Court of Vermont issued a resolute opinion on August 4, 2006, approaching the case as, "at base, an interstate *jurisdictional* dispute over visitation with a child."[18] The Vermont court's ruling contained four holdings: (1) Lisa and Janet's civil union was valid even though they were residents of Virginia at the time of its inception; (2) the Vermont family court had exclusive jurisdiction to dissolve the civil union and issue its orders on visitation; (3) Janet was a parent of IMJ; and (4) Lisa was in contempt for violating the visitation order of the family court.[19] Vermont supported its exercise of jurisdiction, as opposed to that of any Virginia court, based on the Federal Parental Kidnapping Prevention Act ("PKPA"). The PKPA provides that "a court that had initial jurisdiction to issue a custody or visitation order continues to have jurisdiction as long as it continues to have jurisdiction under state law and one of the contestants remains a resident of the state."[20] Vermont, however, left one question unanswered in its opinion: "[W]hether DOMA, and not the PKPA, governs to determine the effect of a Vermont custody or visitation decision based on a civil union."[21]

On November 28, 2006, the Court of Appeals of Virginia published its much anticipated opinion and reversed the lower court's decision.[22] Reversal came on the narrow issue of jurisdiction, turning on the fact

---

15 *See Miller-Jenkins*, 637 S.E.2d at 332 (emphasis added).

16 *Id.*

17 *Id.* at 332–33.

18 *Miller-Jenkins*, 912 A.2d at 957 (emphasis added). Elsewhere the court reiterated that "none of Lisa's arguments change our conclusion that this is a straightforward interstate jurisdictional dispute over custody." *Id.* at 962.

19 *Id.* at 956.

20 *Id.* at 959 (citing Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A(d) (2000)).

21 *Id.* at 962.

22 *Miller-Jenkins*, 637 S.E.2d at 338.

that "Lisa invoked the jurisdiction of the courts of Vermont and subjected herself and the child to that jurisdiction" by filing her first action in Vermont.[23] According to the court, "[t]he PKPA forbids [Lisa's] prosecution of this action in the courts of [Virginia]."[24] In its final analysis, the Virginia court did not read DOMA as prevailing upon the PKPA, but rather, the court stated: "Nothing in the wording or the legislative history of DOMA indicates that it was designed to affect the PKPA and related custody and visitation determinations."[25]

At the time of this Note's publication, *Miller v. Jenkins* is before the Supreme Court of Virginia[26] on appeal from the Court of Appeals's decision that Vermont's visitation order awarding parent-child contact to Janet must be allowed registration in Virginia.[27] Oral argument was held on April 17, 2008.[28] Regardless of how Virginia's highest court rules, the Supreme Court of the United States will undoubtedly receive a petition to hear the case from one of the parties.[29]

This Note demonstrates that the Federal DOMA and similar state statutes that define marriage likewise embody an intentional, generalized good about parenthood. Section I argues that this generalized good should be respected and furthered because legislators and citizens rationally understand that motherhood and fatherhood enhance the well-being of children. Section II posits that mothers and fathers are uniquely beneficial for children and that a respect for both affirms the inherent dignity in femininity and masculinity. Section III explains that DOMA was implemented to impact a large body of federal law. DOMA was not designed to simply state a truism, but also to enable

---

[23] *Id.*

[24] *Id.*

[25] *Id.* at 337.

[26] *See* Supreme Court of Virginia, Appeals Granted, http://www.courts.state.va.us/scv/appeals/main.htm (under the heading "Appeals Posted to the Web on 09-18-2007") (last visited Apr. 14, 2008). The record number of the case at the Virginia Supreme Court is 070933. *Id.*

[27] For this case, the Court of Appeals of Virginia issued only a concise opinion, Miller-Jenkins v. Miller-Jenkins, No. 0688–06–4, 2007 Va. App. LEXIS 158 (Va. Ct. App. Apr. 17, 2007) (ordering the trial court to allow Janet to register the Vermont order in Virginia), choosing to rely on the same reasoning it expressed in detail in *Miller-Jenkins*, 637 S.E.2d at 332 (refusing to recognize Virginia's jurisdiction over Lisa's parentage claims after the trial court ruled that Lisa was the sole parent of IMJ and that Janet had no claim to parentage or visitation rights).

[28] *See* Supreme Court of Virginia, April Argument Docket, http://www.courts.state.va.us/docket.htm (last visited Apr. 14, 2008).

[29] Especially if the Supreme Court of Virginia's holding is in conflict with Vermont's, the U.S. Supreme Court will likely take the case. *See* SUP. CT. R. 10(b) (stating that conflicting interpretations of a federal law issue by the highest courts in two states is a likely reason for granting certiorari). Lisa's counsel has already petitioned the Court to review the Supreme Court of Vermont's decision but was denied. Miller-Jenkins v. Miller-Jenkins, 127 S. Ct. 2130 (2007).

the states to give effect to the statute's expression of public policy as they desire. Section IV reveals how DOMA prevails upon the PKPA to enable, even encourage, Virginia to act consistently with and in furtherance of its own public policies. Moreover, the people of Virginia have clearly expressed their policy on the matter, and Virginia's courts ought to rule accordingly. Thus, this Note concludes that DOMA is the prevailing law in *Miller v. Jenkins* and that Virginia should not register a Vermont court's order that was issued based on a Vermont civil union.

I. DOMA DEFENDS MORE THAN JUST MARRIAGE

A. DOMA's Definition of Marriage Is Interwoven with a Particular View of Parenthood

Signed into law by President Clinton in 1996, the Federal DOMA incorporates two prongs into the United States Code.[30] First, it defines the meaning of "marriage" for all federal laws:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[31]

Second, the Federal DOMA affirmed the principles of federalism under the Full Faith and Credit Clause of the Constitution[32] and protected the ability of states to develop and carry out their own public policy:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe *respecting a relationship between persons of the same sex that is treated as a marriage* under the laws of such other State, territory, possession, or tribe, *or a right or claim arising from such relationship*.[33]

Questions about DOMA's constitutionality surfaced before its passage, and litigants have attacked its validity. However, having marked its ten year anniversary, DOMA remains in place as a constitutional and efficacious expression of public policy.[34]

---

[30] Defense of Marriage Act, Pub. L. No. 104-199, §§ 1–3, 110 Stat. 2419, 2419–20 (1996).

[31] 1 U.S.C. § 7 (2000).

[32] U.S. CONST. art. IV, § 1.

[33] 28 U.S.C. § 1738C (2000) (emphasis added).

[34] *See* Smelt v. Orange County, 447 F.3d 673, 686 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 396 (2006) (ruling by the Ninth Circuit that a couple lacked standing to challenge DOMA's constitutionality); Wilson v. Ake, 354 F. Supp. 2d 1298, 1302, 1309 (M.D. Fla. 2005) (upholding the constitutionality of DOMA against challenges brought under the Full Faith and Credit, Equal Protection, and Due Process Clauses of the U.S. Constitution); 142

DOMA's legislative history reveals why Congress passed it. Amidst the testimony promoting its passage, DOMA's supporters expressed a clear desire to protect the special status of marriage precisely because it forms the family as the foundation of our society, a society in which a father and mother who are committed to one another can raise their children. In other words, the definition of marriage was important because a particular view of parenting and family was considered worthy of special promotion.

Representative Charles Canady, a co-sponsor of the DOMA bill, submitted House Report 664 which recommended DOMA for passage. The beginning of the report states the "two primary purposes" of DOMA:

> The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.[35]

The Court of Appeals of Virginia quoted this portion of the report on its way to ruling that DOMA did not "effectively trump[]" the PKPA.[36]

The PKPA is not mentioned in this report by name in the quotation above. That omission, though, does not mean that DOMA has no bearing on the PKPA in *Miller v. Jenkins* because there is still a relevant question to explore based on House Report 664: *Why* is the institution of traditional heterosexual marriage worth defending? The Judiciary Committee asked that question, stating: "To understand why marriage should be preserved in its current form, one need only ask why it is that society recognizes the institution of marriage and grants married persons preferred legal status."[37] Further reading reveals the committee's answer:

> At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging *responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children.*
>
> Recently, the Council on Families in America, a distinguished group of scholars and analysts from a diversity of disciplines and perspectives, issued a report on the status of marriage in America. In the report, the Council notes the *connection* between marriage and children:

CONG. REC. 17,068, 17,068–96 (1996) (recording statements of representatives questioning DOMA's constitutionality).

[35] H.R. REP. NO. 104–664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

[36] Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330, 336–37 (Va. Ct. App. 2006).

[37] H.R. REP. NO. 104–664, at 12, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916.

> ". . . . Why is marriage our most universal social institution, found prominently in virtually every known society? Much of the answer lies in the irreplaceable role that marriage plays in *childrearing and in generational continuity.*"
>
> And from this *nexus* between marriage and children springs the true source of society's interest in safeguarding the institution of marriage:
>
> "Simply defined, marriage is a relationship within which the community socially approves and encourages sexual intercourse and the birth of children. It is society's way of signaling to would-be parents that their *long-term relationship* is socially important—a public concern, not simply a private affair."[38]

The legislative history of DOMA ties a concern for marriage with a corollary concern for parenthood and not just for the "procreation" of children but for the "rearing" of children, as well.

The floor debate in the House of Representatives over DOMA elicited similar contentions. Mr. Canady opened the debate by calling the family "the fundamental building block of society."[39] Mr. Largent admonished that "a definition of marriage that transcends time has always been one man and one woman united for the purposes of forming a family."[40] Mr. Ensign expressed that "it is important to reaffirm our commitment to ensuring that *moms and dads* are encouraged and strengthened in the task of *raising their children.*"[41] Mr. Barr described the bill as being "of fundamental importance to this country, to our families, to our children . . . ."[42] Furthermore, Mr. Stearns added, "If traditional marriage is thrown by the wayside . . . children will suffer because family will lose its very essence."[43] Lastly, Mr. Weldon, a co-sponsor, advocated that a "marriage relationship *provides children with the best environment in which to grow and learn.*"[44]

The debate on the Senate floor echoed the themes of the House debate. Mr. Gramm called marriage a "special union between a man and a woman which forms the foundation of our traditional family."[45] Mr. Byrd contended, "If same-sex marriage is accepted, the announcement will be official, *America will have said that children do not need a mother*

---

38 *Id.* at 13–14, *reprinted in* 1996 U.S.C.C.A.N. at 2917–18 (emphasis added) (quoting COUNCIL ON FAMILIES IN AMERICA, MARRIAGE IN AMERICA: A REPORT TO THE NATION 10 (1995), *reprinted in* PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 293, 303 (David Popenoe et al. eds., 1996)).

39 142 CONG. REC. 16,969, 16,969 (1996).

40 *Id.* at 16,971.

41 *Id.* at 16,977 (emphasis added).

42 *Id.* at 17,070.

43 *Id.* at 17,076–77.

44 *Id.* at 17,081 (emphasis added).

45 *Id.* at 22,443.

and a father . . . ."[46] Finally, Mr. Coats argued: "There is no longer any doubt that the slow demise of marriage in our country has been terribly harmful to children. It is time that we remind this country and ourselves how critically important heterosexual marriage is to a healthy society."[47]

DOMA's proponents in House Report 664 and in the House and Senate floor debates understood that the legislation to protect marriage between one man and one woman also promoted a certain view of marriage's natural corollaries of family, children, and parenthood. Running through the debates was the belief that in promoting opposite-sex marriage DOMA would have an effect of promoting the valuable roles of both a mother and a father for the raising of children. The opponents to DOMA made adamant objections, but, in the end, DOMA passed with a large, bi-partisan majority of 342 to 67 in the House and 85 to 14 in the Senate.[48]

B. A State's Definition of Marriage Is Interwoven With Its Policies on Parenting—Defining One Bears Significantly on the Other

Presently, twenty-six states have passed constitutional amendments defining marriage as existing only between one man and one woman[49] and sixteen have declared the definition by statute.[50]

---

[46] *Id.* at 22,448 (emphasis added).

[47] *Id.* at 22,451.

[48] *See id.* at 17,094, 22,467 (recording the full vote tallies of the House and the Senate).

[49] The twenty-six states are Alabama, Alaska, Arkansas, Colorado, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin. For specific provisions, see Alliance Defense Fund, DOMA Watch: Issues by State, http://www.domawatch.org/stateissues/index.html (last visited Feb. 27, 2008) [hereinafter DOMA Watch: Issues by State]. Hawaii, which nearly qualifies as state twenty-seven, did not define marriage but stated that its "[L]egislature shall have the power to reserve marriage to opposite-sex couples." HAW. CONST. art. I, § 23.

[50] The sixteen states are Arizona, California, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Minnesota, New Hampshire, North Carolina, Pennsylvania, Washington, and West Virginia. *See* DOMA Watch: Issues by State, *supra* note 49. The remaining states consist of New Mexico, New York, Rhode Island, and Wyoming, which have no DOMA statutes, *id.*; New Jersey, whose Supreme Court has ruled that same-sex couples must be given the same benefits and privileges as heterosexual couples, Lewis v. Harris, 908 A.2d 196, 231 (N.J. 2006); Connecticut, which offers civil unions, CONN. GEN. STAT. ANN. §§ 46b-38aa–pp (Supp. 2007); Vermont, which offers civil unions, VT. STAT. ANN. tit. 15, §§ 1201–07 (2002) (Vermont does, though, define marriage as "the legally recognized union of one man and one woman." VT. STAT. ANN. tit. 15, § 8 (2002)); and Massachusetts which allows same-sex marriage, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968–70 (Mass. 2003). California, Hawaii, Maine, New Hampshire, and the District of Columbia formally recognize same-sex relationships in some capacity. *See* CAL. FAM. CODE §§ 297–99.6 (West 2004 & Supp. 2008); HAW. REV. STAT. §§ 572C-1–7

Similar to the connection made at the federal level, states recognize that a definition of marriage links to a particular concept of family and parenthood. A glimpse at recent significant state court decisions regarding marriage solidifies this point. It holds true that "[w]hen society changes marriage it changes parenthood."[51] So, when a society affirms an understanding of marriage it, likewise, affirms a certain understanding of parenthood.

1. Where Motherhood and Fatherhood are Irrelevant

Vermont, Massachusetts, and New Jersey are among the few states that have administered last rites to moms and dads—deciding that it is irrelevant whether a child grows up with one or the other.[52] In seeking and achieving a hollow kind of equality—essentially, that everything is equal when everything is meaningless—these states have mapped out an undetermined future for children and have degraded the masculinity inherent to fatherhood and the femininity inherent to motherhood.

The Supreme Court of Vermont in *Baker v. Vermont* mandated that the same benefits and protections under the Vermont Constitution afforded to opposite-sex couples in marriage be given to same-sex couples, forcing the Vermont legislature to ultimately create its civil union statutes.[53] In arriving at its unprecedented decision, the Vermont court evaluated certain "rationales" as to why only opposite-sex couples received "the statutory benefits and protections of marriage."[54] The court considered "the State's purported interests in 'promoting child rearing in a setting that *provides both male and female role models*' [and in] 'bridging differences' between the sexes."[55] Additionally, the court acknowledged other "claims [of the state] relat[ing] to the issue of *childrearing*."[56] According to the court, the "fundamental flaw" of these proffered rationales was grounded in the state's existing legislation regarding matters of parenthood:

> In 1996, the Vermont General Assembly enacted, and the Governor signed, a law removing all prior legal barriers to the adoption of children by same-sex couples. At the same time, the Legislature

(2006); ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2007); N.H. REV. STAT. Ann. § 457-A:1 (2008) (establishing same-sex civil unions in 2008); D.C. CODE ANN. §§ 32-701–710 (LexisNexis 2007).

51 ELIZABETH MARQUARDT, COMM'N ON PARENTHOOD'S FUTURE, INST. FOR AM. VALUES, THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN'S NEEDS 32 (2006), *available at* http://www.americanvalues.org/pdfs/parenthood.pdf.

52 *See supra* note 50.

53 744 A.2d 864, 886, 889 (Vt. 1999).

54 *Id.* at 884.

55 *Id.* (emphasis added).

56 *Id.* (emphasis added).

> provided additional legal protections in the form of court-ordered child support and parent-child contact in the event that same-sex parents dissolved their "domestic relationship." In light of these express policy choices, the State's arguments that Vermont public policy favors opposite-sex over same-sex parents . . . [are] patently without substance.[57]

The Vermont legislature's actions in the areas of parenthood were interpreted as at odds with the claims Vermont made in the case for protecting opposite-sex marriage.[58] The people of Vermont changed their approach to parenthood, and the Supreme Court of Vermont interpreted that as meaning a change in marriage.

Massachusetts alone allows same-sex couples to marry following the case of *Goodridge v. Department of Public Health*.[59] Again, parenthood issues bore much weight in the ultimate decision to change Massachusetts's concept of marriage. In defending the uniqueness of opposite-sex marriage, two of the three "legislative rationales" that the Massachusetts Department of Public Health offered stemmed from parenthood: "(1) providing a 'favorable setting for procreation'; [and] (2) ensuring the optimal setting for child rearing, [that being] 'a two-parent family with one parent of each sex.'"[60]

The Supreme Judicial Court of Massachusetts disagreed with both rationales, finding that Massachusetts "facilitates bringing children into a family regardless of whether . . . the parent or her partner is heterosexual, homosexual, or bisexual."[61] The court found "no rational relationship between the marriage statute and the . . . goal of protecting the 'optimal' child rearing unit."[62]

In support of its anomalous ruling, the court itself incorporated a parenthood rationale: "The preferential treatment of civil marriage reflects the Legislature's conclusion that marriage 'is the foremost setting for the education and socialization of children' precisely because it 'encourages parents to remain committed to each other and to their children as they grow.'"[63] Lost from the court's reasoning, though, is any recognition that the unique and inherent qualities of a father and a

---

[57] *Id.* at 884–85 (internal citations omitted).

[58] *Id.* at 885.

[59] 798 N.E.2d 941 (Mass. 2003).

[60] *Id.* at 961.

[61] *Id.* at 962; *see id.* at 962 n.24 (citing the fact that, in Massachusetts, "adoption and certain insurance coverage for assisted reproductive technology are available to married couples, same-sex couples, and single individuals alike").

[62] *Id.* at 963.

[63] *Id.* at 964 (quoting *id.* at 996 (Cordy, J., dissenting)). Note how the court referenced the legislature's conclusions about marriage in general to justify its holding but did not withhold its judgment in favor of waiting for the Massachusetts Legislature to make a conclusion regarding same-sex marriage.

mother actually contribute to marriage being that "foremost setting"—apparently the number of parents is all that matters.

In similar fashion to Vermont and Massachusetts, New Jersey by judicial order has joined the few states that give same-sex couples the same legal privileges as those given to opposite-sex marriages.[64] Again, the topics of children and parenthood permeated the opinion of the New Jersey court in *Lewis v. Harris*. Notably, in defending its marriage laws, the State of New Jersey did not even try to "argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children."[65] Even if the state had made those arguments, though, it is likely that the court would have dismissed them. The court quoted past New Jersey court decisions with much approval, opining that "no one 'particular model of family life' has a monopoly on '"family values"' and that '[t]hose qualities of family life on which society places a premium . . . are *unrelated to the particular form a family takes*.'"[66] Why would the Supreme Court of New Jersey mention past statements from court decisions involving issues of parenthood in order to make a decision regarding same-sex unions? Simply because parenthood and marriage are intertwined—the concept of one is made to justify the other.

As a foundation to the decisions of Vermont, Massachusetts, and New Jersey, each has accepted that it is irrelevant whether a child grows up with a mother or with a father. Children are very important, of course, in those states, but the courts' implicit conclusion is that fatherhood and motherhood innately have no unique contribution to the best interests of children. Their decisions void fatherhood and motherhood of any unique value; moms and dads are viewed as irrelevant, or, as Nietzsche might say, they have died with the changing times.

2. Where Moms and Dads Still Matter

The respective uniqueness of moms and dads is still respected in most states. The majority of states still operate under the rationale articulated in two momentous marriage cases decided in New York and Washington in 2006. The two cases considered a definition of marriage, and, again, parenthood took center-stage. In New York, the highest court

---

[64] As in Vermont in 1999, the Supreme Court of New Jersey in 2006 gave an order to the state's legislature to provide an avenue by which same-sex couples may receive all of the same "rights and benefits enjoyed by heterosexual married couples." Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006).

[65] *Id.* at 217.

[66] *Id.* at 213 (quoting V.C. v. M.J.B., 748 A.2d 539, 555–56 (N.J. 2000) (Long, J., concurring)) (emphasis added) (holding a woman to be a *"psychological parent"* of the children of her former same-sex partner and granting the woman visitation rights (emphasis added)).

held that the New York Constitution did not "compel" same-sex marriage and accepted two rational reasons as to why.[67] Both reasons came from the connection between marriage and its importance for rearing children. The court stated:

> First, the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science . . . the Legislature could find that this will continue to be true. . . . It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an *inducement*—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.
>
> . . . .
>
> There is a second reason: The Legislature could rationally believe that it is better, other things being equal, for children to grow up with *both a mother and a father*. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule . . . [,] but the Legislature could find that the *general rule* will usually hold.[68]

Only twenty days later, the Supreme Court of Washington echoed the opinion of the New York court and upheld Washington's DOMA by "conclud[ing] that limiting marriage to opposite-sex couples furthers the State's interests in procreation and *encouraging families with* a *mother and father* and children biologically related to both."[69] Relying on testimony in the legislative history of Washington's DOMA, the state argued and the court accepted that "rearing children in a home headed by their opposite-sex parents is a legitimate state interest furthered by limiting marriage to opposite-sex couples because children tend to thrive in families consisting of a father, mother, and their biological children."[70]

New York and Washington recognize the connection between a particular definition of marriage and a particular concept of parenthood. Other states have reflected this connection statutorily.[71] In the end,

---

[67] Hernandez v. Robles, 855 N.E.2d 1, 5, 7 (N.Y. 2006).

[68] *Id.* at 7 (emphasis added).

[69] Andersen v. King County, 138 P.3d 963, 985 (Wash. 2006) (emphasis added).

[70] *Id.* at 983.

[71] For example, Florida has a state DOMA statute and also does not allow adoption by those practicing a homosexual lifestyle. *See* FLA. STAT. ANN. §§ 63.042(3), 741.212 (West 2005). Similarly, Mississippi and Utah have approved constitutional amendments defining marriage as existing between one man and one woman and both state codes preclude adoption by couples of the same-sex. MISS. CONST. art. XIV, § 263A; UTAH CONST. art. II, § 29; MISS. CODE ANN. § 93-17-3(5) (Supp. 2007); UTAH CODE ANN. § 78-30-9(3) (2002) ("The

caselaw and statutes demonstrate that a definition of marriage likely mirrors an understanding of parenthood.[72]

II. MOTHERHOOD AND FATHERHOOD BESTOW UNIQUE BENEFITS ON CHILDREN AND ENCOURAGE A HEALTHY RESPECT BETWEEN THE SEXES

How a court frames the issue in cases over same-sex relationships makes all the difference. Is the issue whether there is "any public need that would justify the legal *disabilities* that now afflict" same-sex couples who cannot marry,[73] or is the issue whether there is a legitimate state interest furthered by inducing opposite-sex couples to marry? Are states disabling some of its citizens or strategically inducing some of them toward a desired end? The answer hinges on whether any generalized good is found in one relationship beyond the other; or, stated differently, is one institution worthy of inducement beyond the other. The question centers on whether opposite-sex marriages and same-sex relationships are equal in terms of parenting potential to serve the best interests of children.[74]

A. The Importance of Moms and Dads

Through heterosexual marriage, a child can experience both the femininity of motherhood and the masculinity of fatherhood. By definition, same-sex relationships deny one or the other to children. The logical extension, then, of sanctioning same-sex unions is that

---

Legislature specifically finds that it is not in a child's best interest to be adopted by a person or persons who are cohabitating in a relationship that is not a legally valid and binding marriage under the laws of this state.").

[72] It is possible to uphold marriage laws defining marriage as existing between a man and a woman without relying on the importance of fathers and mothers. Maryland, for instance, upheld its legal definition of marriage with only a loose connection to parenting. In *Conaway v. Deane*, the Maryland high court considered under rational basis review two governmental interests supporting opposite-sex marriage. 932 A.2d 571, 629–30 (Md. 2007). The second of the two was Maryland's interest in "encouraging" opposite-sex marriage as "a union that is uniquely capable of producing offspring within the marital unit." *Id.* at 630. The court found this interest legitimate and sufficiently linked to Maryland's legal definition of marriage, stating "marriage enjoys its fundamental status due, in large part, to its link to *procreation*." *Id.* (emphasis added). Beyond the desirability of opposite-sex parents for procreation, Maryland did not outright assert an interest in encouraging families with both a mom and dad to raise their children. The legitimate governmental interest addressed more pointedly the need for "safeguarding an environment most conducive to the stable propagation and continuance of the human race." *Id.*

[73] Lewis v. Harris, 908 A.2d 196, 218 (N.J. 2006) (emphasis added).

[74] The honest musings of Judge Parrilli in his concurring opinion to *In re Marriage Cases* are worth pondering: "The nuance at this moment in history is that the institution (marriage) and emerging institution (same-sex partnerships) are distinct and, we *hope*, equal. We hope they are equal because of the great consequences attached to each. Childrearing and passing on culture and traditions are potential consequences of each." 49 Cal. Rptr. 3d 675, 728 (Ct. App. 2006) (Parrilli, J., concurring) (footnote omitted).

motherhood and fatherhood are independently irrelevant. Within that framework, only the aggregate number of parents in a child's life is of foremost significance.[75]

As states, such as New York and Washington, render judicial opinions like those discussed above, and as dozens of states legislatively define marriage as existing only between one man and one woman, the message becomes clear that motherhood and fatherhood are worth defending. Likewise, the social sciences affirm the value of mothers and fathers. Sociologist David Blankenhorn[76] observes that, from even pre-historic times, the definition of marriage itself has "reflect[ed] one idea that does not change: For every child, a mother *and* a father."[77] Blankenhorn describes that type of marriage as "our society's most *pro-child* way of living . . . ."[78]

Two reports from 2006, one focusing on marriage ("Marriage Report")[79] and the other on parenthood ("Parenthood Report"),[80] together drew over 100 family and legal scholars from around the country, including makers of family law such as judges, legislators, members of the family law bar, and academia as signatories. The reports express grave concern over the radical changes being advocated for and taking place around the world in the realms of marriage and parenting without a proper amount of supportive social science research.[81] Though the

---

[75] If only the number of parents for a child was important, it would seem that same-sex advocates would argue as well for legitimizing bigamous and polygamous marriages. However, not all of them make that argument. *See, e.g.*, *Lewis*, 908 A.2d at 206 ("Plaintiffs do not profess a desire to overthrow all state regulation of marriage, such as the prohibition on polygamy . . . .").

[76] Mr. Blankenhorn graduated magna cum laude with a degree in social studies from Harvard in 1977 and is founder and president of the Institute for American Values, "a private, nonpartisan organization devoted to contributing intellectually to the renewal of marriage and family life." AmericanValues.org, About David Blankenhorn, http://www.americanvalues.org/html/about_david_blankenhorn.html (last visited Feb. 27, 2008).

[77] DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 91 (2007).

[78] *Id.* at 120 (emphasis added).

[79] INST. FOR AM. VALUES, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES (2006) [hereinafter MARRIAGE AND THE LAW], *available at* http://www.marriagedebate.com (click on "Marriage and the Law: A Statement of Principles (101 legal and family scholars)" under the "New From iMAPP" heading on the right-side column).

[80] MARQUARDT, *supra* note 51.

[81] The Parenthood Report concluded that, "[a]round the world, the two-person, mother-father model of parenthood is being fundamentally challenged." *Id.* at 5. For example, Canada and Spain approved same-sex marriage and immediately, advocates called for the erasing of the words "mother" and "father" from legal documents issued to children. *Id.*

In the United States, "by far the most striking and potentially far-reaching development signaling slippage in the meaning of motherhood and fatherhood . . . is the increasing recognition of 'psychological' parenthood or 'de facto' parental status" by adults who are not connected to children by blood or marriage. *Id.* at 23–25. The danger comes in

reports endorse no official position on same-sex marriage,[82] the Parenthood Report did issue a precaution: "The legalization of same-sex marriage, while sometimes seen as a small change affecting just a few people, raises *the startling prospect of fundamentally breaking the legal institution of marriage from any ties to biological parenthood*" because, very pointedly, "[t]his much is clear: *When society changes marriage it changes parenthood.*"[83]

As such, society should contemplate why parenthood needs to change. Are the advocates for re-defining marriage focused on the best interests of children or on the rights of adults?[84] There is a "large body of social science evidence showing that children, on average, do best when raised by their own married mother and father."[85] Conversely, existing research regarding same-sex parenting is not conclusive enough to make any definitive statements about how children fare in such families.[86]

B. Same-Sex Parenting: What Do the Studies Really Show?

Some studies purport to show that children fare just as well under same-sex parenting as under the parental guidance and example of both

---

the form of judges making discretionary decisions trying to ascertain who has become a parent figure in the minds of children. *Id.* Other examples of changes in notions of parentage have come in California which allows a "second mother" to be entered on a birth certificate instead of a child's father. *Id.* at 14. Also, California's entire public education system must adjust in 2008 to the California Student Civil Rights Act which amends the Education Code to prohibit educators from "giving instruction . . . [and] sponsoring any activity, that reflects adversely upon persons" because of their sexual orientation or gender identity. 2007-6B Cal. Adv. Legis. Serv. 667 (Deering). How the law will be interpreted is unknown. Among other things, it "could feasibly prohibit lessons or stories that treat the terms 'mother' and 'father' as normative." Jennifer Roback Morse, *Gender Jumble: California Student Civil Rights Act Ends Gendered Education*, NAT'L REV. ONLINE, Nov. 7, 2007, http://article.nationalreview.com/?q=MDExZDE4MDIxZDhmODdkODE4ZjZmZDE1ZFkYTNlODU=. In New Jersey, a "judge [has] ruled for the first time . . . that the same-sex partner of a woman who conceives with donor sperm has an automatic right to be listed as a birth parent on the child's birth certificate . . . , just as the husbands of women who use donor sperm are listed." MARQUARDT, *supra* note 51, at 14.

82 MARRIAGE AND THE LAW, *supra* note 79, at 18.

83 MARQUARDT, *supra* note 51, at 32 (emphasis added).

84 The Parenthood Report emphasizes how radical changes in marriage and parenting "are being taken in the name of adult rights to form families they choose." *Id.* at 6. The report advocates a child-centered focus to these issues. *Id.*; *see also* BLANKENHORN, *supra* note 77, at 20 (favoring "limiting certain adult freedoms in the name of *child well-being* and the health of marriage as an institution" and explaining that even with some personal "anguish," he would "choose *children's collective rights and needs*" and thus opposite-sex marriage "as a public good" over "the rights and needs of . . . same-sex couples" when those two priorities conflict (emphasis added)).

85 MARQUARDT, *supra* note 51, at 6.

86 *Id.* at 21 (noting that the data is "limited because same-sex couples raising children comprise a very small part of the overall population and are only recently becoming more visible").

a mother and a father.[87] Multiple scholars, however, have discredited the studies as flawed. The late sociologist, Professor Steven Lowell Nock, from the University of Virginia, who taught Research Methods,[88] was asked by the Attorney General of Canada to submit an affidavit for a major same-sex "marriage" case in Canada.[89] Professor Nock reviewed the studies available, including ones that had been submitted to the court in *Baker v. Vermont*, and concluded that all of them "contained at least one fatal flaw of design or execution" and that "not a single one of those studies was conducted according to general accepted standards of scientific research."[90] Professor Nock's conclusions do not stand alone. Without taking any position on same-sex relationships, two other experts analyzed and eventually discounted every study that purports to bolster same-sex parenting because, in their words, "the methods used in these studies are so flawed that these studies prove nothing. . . . Their claims have no basis."[91]

C. Degrading the Sexes

Recognizing the value of fathers and mothers serves the best interest of children and also facilitates a healthy respect between men and women. An "[i]rreplaceable good[]" found in "the equal dignity of men and women . . . [is] at stake in the marriage debate."[92] The dignity of men and women is applauded when society affirms that fatherhood and motherhood enable men and women to contribute their unique characteristics as men and women to their families. The uniqueness of men and women dictates that only women may express their femininity through motherhood and that only men may express their masculinity through fatherhood. In rendering women irrelevant as mothers and men irrelevant as fathers within a family, courts and legislators suppress, confuse, and degrade a fundamental expression of each sex.

---

[87] *See* Maggie Gallagher & Joshua K. Baker, Inst. for Marriage & Pub. Pol'y, *Do Mothers and Fathers Matter? The Social Science Evidence on Marriage and Child Well-Being*, IMAPP POL'Y BRIEF, Feb. 27, 2004, at 1, *available at* http://www.marriagedebate.com/pdf/MothersFathersMatter.pdf (containing full citations to the studies).

[88] Univ. of Va., Dep't of Sociology, Steven L. Nock, http://www.virginia.edu/sociology/peopleofsociology/snock.htm (last visited Apr. 14, 2008). Professor Nock passed away on January 20, 2008. *Id.*

[89] Affidavit of Steven Lowell Nock at ¶¶ 1, 5, Halpern v. Att'y Gen. of Can., No. 684/00 (Ont. Super. Ct. of Just.), *available at* http://marriagelaw.cua.edu/Law/cases/Canada/ontario/halpern/aff_nock.pdf.

[90] *Id.* at ¶¶ 1, 3. Those incredulous of Mr. Nock's conclusions would benefit from his copious description of proper research methodology contained in his eighty-one page affidavit. His statements are far from conclusory.

[91] ROBERT LERNER & ALTHEA K. NAGAI, NO BASIS: WHAT THE STUDIES *DON'T* TELL US ABOUT SAME-SEX PARENTING 4–6 (2001).

[92] MARRIAGE AND THE LAW, *supra* note 79, at 7.

Only women as mothers can know the bond found in sensing a child moving within the womb. Only women as mothers can know the experience of bringing forth new life into the world at birth. Only women as mothers can know the satisfaction of physically nursing their children from the fruits of their own body. The uniqueness and dignity of these acts ought to be honored. Of course, motherhood is in no way the sum total of a woman's dignity, but failing to honor and encourage women as mothers discards an inherent and exclusive source of esteem bestowed upon women in general, regardless of whether every individual woman becomes a mother.

Likewise, the role and bond of fathers to their children should not be trivialized to that of a simple "sperm donor"—the view that men are equivalent to "nothing more than a minimal and fairly crude biological product."[93] Along with women, men "need and want a vision of masculinity that affirms the indispensable role of good family men in protecting, providing for, and nurturing children, as well as in caring for and about their children's mother."[94] In the life of a family, characterizing fathers as no more than contributors of necessary genetic material dehumanizes them and degrades notions of masculinity.

Legally ratifying same-sex couples in marriage and as parents deprives motherhood and fatherhood of unique meaning and degrades the sexes in the pursuit of individual rights and so-called equality. Admittedly, a form of equality is achieved when everything is rendered meaningless. But, rather than rendering the sexes irrelevant and proffering androgyny to society, a more esteeming and empowering way to promote mutual respect and dignity between the sexes is through a celebration of the inherent value of each sex—especially when that value is as uniquely expressed as it is in mothers and fathers.

III. DOMA: MORE THAN A TRUISM

A definition of marriage draws from the corollary matters of family, children, and parenting. Motherhood and fatherhood offer distinct value to children. States ought to encourage marriages that provide both mothers and fathers, and they may do so regardless of how sister jurisdictions approach the issue because of the Federal DOMA. DOMA does more than simply state a truism.

A. DOMA Impacts a Vast Body of Federal Law

House Report 664 reflects the understanding that DOMA affects a vast amount of federal law. Consider the words of the House Report:

---

93 MARQUARDT, *supra* note 51, at 23.

94 MARRIAGE AND THE LAW, *supra* note 79, at 10.

> [T]he Committee believes it can be stated with certainty that none of the federal statutes or regulations that use the words "marriage" or "spouse" were thought *by even a single Member* of Congress to refer to same-sex couples.
>
> . . . [P]ermit[ting] homosexuals to "marry" . . . could have profound practical implications for federal law. For to the extent that federal law has simply accepted state law determinations of who is married, a redefinition of marriage in [one state] to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits. While there are *literally hundreds of examples* that would illustrate this point, the Committee will recount two . . . .[95]

In addition to the two examples recounted by the committee, the above quote informs that DOMA was intended to impact "literally hundreds" of other federal statutes—statutes concerning which it could be "stated with certainty" that none of them was passed with "even a single Member of Congress" thinking they referred to same-sex couples.[96] Could same-sex unions and the differences in state laws that exist today have been on the minds of legislators in 1980 when they passed the PKPA?[97] Certainly not. Ultimately then, when it became law in 1996, DOMA affected a vast amount of federal law, including the PKPA. Even in terms of placement, the second prong of DOMA was inserted in the U.S. Code immediately after the text of the PKPA.[98] These factors cast serious doubt on the opinion that "[*n*]*othing* in the wording or the legislative history of DOMA indicates that it was designed to affect the PKPA."[99]

B. DOMA Is Efficacious by Enabling States to Implement Their Own Public Policies

Besides defining marriage, DOMA allows a state to pursue its own public policies surrounding marriage and related issues. DOMA provides: "*No State* . . . shall be required to give effect to any . . . judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . *or a right or claim arising from such*

---

[95] H.R. REP. NO. 104–664, at 10–11, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2914–15 (emphasis added). The first example cited in the report involved a claim for increased veterans educational benefits because the claimant listed a same-sex partner as a dependent spouse. *Id.* The second centered on the passage of the Family and Medical Leave Act and an amendment that defined a "'spouse'" as "'a husband or wife, as the case may be.'" *Id.* (quoting 29 U.S.C. § 2611(13) (2000)).

[96] *Id.*

[97] *See* Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (2000).

[98] *See id.*; Defense of Marriage Act, 28 U.S.C. § 1738C (2000).

[99] Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330, 337 (Va. Ct. App. 2006) (emphasis added).

relationship."[100] DOMA thus simply codifies in this area of law the long-recognized public policy exception to the Full Faith and Credit Clause.[101] As the U.S. Supreme Court has stated, "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."[102] Consequently, DOMA explicitly allows a state to give no effect to a judicial proceeding, such as a custody or visitation order, issued by another state when the other state's proceeding is held only out of respect for a right or claim arising from a relationship between persons of the same-sex that is treated like a marriage.

Commentators on DOMA from both sides admit to its efficacy. For example, one commentator, even while disparaging the statute, accepted that "civil unions under Vermont . . . are given *no effect for federal law* purposes" because of DOMA.[103] A second, this time favorable, commentator on DOMA pointed out that it "modifies [the] PKPA, explicitly expanding the authority of states to refuse recognition to same-sex marriages [and] their imitations (such as Vermont civil unions), and their incidents," which means that the "authority of a forum state, such as Virginia . . . , to implement its public policy on matters of marriage and child custody . . . is almost certainly wider, not narrower" after DOMA's passage.[104] A third commentator, who approached DOMA from a conflict of laws perspective and urged mutual respect among the states, also squarely addressed DOMA's interaction with the PKPA:

> In most situations, the right to a child's relationship with a parent . . . is independent of the marital status of the parents. . . . The situation could arise, however, if a state does tie custody to marital status. One example is a custody or visitation order that results from the presumptive rule adopted in many states that when a child is born to a married couple, both of those parties are legal parents. If a nonbiological "parent" in a same-sex union would not be entitled to custody or visitation but for this presumption, it could be said that such a right of custody or visitation is a "right or claim arising from" a "relationship between persons of the same sex that is treated as a marriage." Under [DOMA], such a judgment would not have to be recognized by a sister state, even if it otherwise would be entitled to

---

[100] 28 U.S.C. § 1738C (2000) (emphasis added).

[101] The Full Faith and Credit Clause of the Federal Constitution states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

[102] Nevada v. Hill, 440 U.S. 410, 422 (1979) (citing Pac. Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 502–05 (1939)).

[103] Dominick Vetri, *The Gay Codes: Federal & State Laws Excluding Gay & Lesbian Families*, 41 WILLAMETTE L. REV. 881, 885–86 (2005) (emphasis added).

[104] David M. Wagner, *A Vermont Civil Union and a Child in Virginia: Full Faith and Credit?*, 3 AVE MARIA L. REV. 657, 667–68 (2005).

> recognition and enforcement under the [PKPA] . . . in effect in all the states.[105]

DOMA's text, legislative history, detractors and defenders alike appear to support that DOMA does more than express a truism. It modifies and informs federal law. Consequently, DOMA modifies the PKPA and allows a state like Virginia to operate according to its own public policies regarding marriage and corollary issues.

IV. RESOLVING *MILLER V. JENKINS*: THE PKPA DOES NOT BIND VIRGINIA

A. DOMA Modifies the PKPA and Encourages Virginia to Implement Its Own Public Policy

The Court of Appeals of Virginia acted as if its hands were bound by the PKPA and by Lisa's own choice of first filing to dissolve the civil union in Vermont; that, however, is not the case. Janet's visitation and parentage claims to IMJ rest on the Vermont civil union that Lisa and Janet obtained when the two were Virginia residents in 2000. No parentage was conferred upon Janet at IMJ's birth, nor did Janet ever adopt IMJ.[106] The civil union was never recognized in Virginia when the couple traveled back from Vermont because their civil union was premised on the same-sex of the couple. Janet's present claims and the Vermont visitation order arose only because Vermont gave legal significance to the same-sex relationship of the couple. Vermont's order is, thus, a type of judicial proceeding meeting the definition of what DOMA encompasses when it affirms: "No State . . . shall be required to give effect to any . . . judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . *or a right or claim arising from such relationship.*"[107] Consequently, if a Virginia court's hands are tied under the PKPA in this case, it is only because that court has chosen to bind itself.

One of Janet's attorneys has commented, "'Virginia could become the Las Vegas of gay divorces. You would simply pack up and move to Virginia, and your partner would have no rights . . . .'"[108] But the real

---

[105] Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2207 n.55 (2005) (quoting 28 U.S.C. § 1738C (2000)).

[106] *See* Brief of Appellee, *supra* note 8, at 4, 6 (noting that "Lisa is listed as the sole parent of IMJ on the official Virginia birth certificate" and that the provisions of Virginia's assisted fertilization statute, VA. CODE ANN. § 20-158(A)(1) (West 2001), only give parental rights to the gestational mother).

[107] 28 U.S.C. § 1738C (2000) (emphasis added).

[108] The attorney, Joseph Price, is quoted in Leah C. Battaglioli, Comment, *Modified Best Interest Standard: How States Against Same-Sex Unions Should Adjudicate Child Custody and Visitation Disputes Between Same-Sex Couples*, 54 CATH. U. L. REV. 1235, 1261–62 (2005) (quoting Kalita, *supra* note 6, at B4).

look-a-like to the Las Vegas hot-bed of expedient legal proceedings is Vermont: Vermont is the state that allows non-residents to travel in and receive a "quickie" civil union and then return home. A neutral and scholarly commentator on the conflict of laws issues involved in this case has urged states to mutually respect each other's policies:

> As for states asked to "recognize" for various purposes a same-sex relationship entered into elsewhere, the appropriate choice of law rule for determining the rights and obligations of same-sex couples should also be the law of domicile or residence of the parties *at the time of the marriage. Such a rule gives deference to the policies of the state* that has the most significant connection to the parties, and is consistent with predictability and party expectations. . . . In return, states that decide to favor same-sex unions should not try to become the "Nevadas" of same-sex marriage.[109]

Clearly, *Miller v. Jenkins* presents vital issues of state sovereignty. Thus, in an action aimed at "preserving its sovereign power over domestic relations,"[110] the Commonwealth of Virginia has argued to its own Supreme Court that registering Janet's Vermont court order would "indirectly" force Virginia to recognize same-sex unions.[111] Such a result appears to run contrary to "our constitutional system of dual sovereignty, [in which] the States retain sovereignty over domestic relations."[112] Similarly, the Attorney General for the State of Michigan has sensed the importance of *Miller v. Jenkins* in terms of state sovereignty issues and supports Virginia's ability to preserve its own public policy, stating: "Historically, laws regarding marriage, adoption, and custody implicate core police functions over which the people of the State govern, not judicial officers from outside the State."[113] No plausible argument can be made that by enacting the PKPA in 1980 Congress intended to dismantle state sovereignty to an extent which would require the states to unwillingly recognize same-sex unions.

Even if a court is sympathetic to the PKPA's general purpose, no one should miss what the *Miller v. Jenkins* case is *not*—it is not a case about Lisa's forum-shopping to find a better jurisdiction for her legal

---

[109] Silberman, *supra* note 105, at 2214; *see also* Brief of the Commonwealth of Virginia as Amicus Curiae in Support of the Appellant at 4, *Miller-Jenkins*, 637 S.E.2d 330 (R. No. 2654–04–4) [hereinafter Brief of the Commonwealth] ("In our constitutional system of dual sovereignty, neither Vermont nor Virginia may create national policy.").

[110] Brief of the Commonwealth, *supra* note 109, at 5.

[111] *Id.* at 6.

[112] *Id.*; *see also id.* at 5 ("'The whole subject of the domestic relations of husband and wife, parent and child, *belongs to the laws of the States* and not to the laws of the United States.'" (emphasis added) (quoting *Ex parte* Burrus, 136 U.S. 586, 593–94 (1890))).

[113] Brief of Michael A. Cox, Attorney General of the State of Michigan, as Amicus Curiae in Support of Appellant at 5, *Miller-Jenkins*, 637 S.E.2d 330 (R. No. 2654–04–4).

claims, as she has been accused of doing.[114] The facts show that Lisa came back to Virginia because Virginia was her home, where her family lived.[115] It was also where IMJ was born. Lisa resided in Vermont for only a little over a year, from August 2002 to September 2003, and then briefly visited Vermont again only to dissolve her civil union, *which she could only dissolve in Vermont.*[116]

The declared purposes of the PKPA do not address this case. In 1980, well before legislators considered the possibility of states legally ratifying same-sex relationships, Congress declared the PKPA's six purposes.[117] The sixth listed and most potentially relevant purpose was to "deter interstate *abductions* and other *unilateral* removals of children undertaken to obtain custody and visitation awards."[118] This purpose, however, hardly fits here since Lisa returned to Virginia before even filing for the dissolution of the civil union as she considered Virginia her home. Additionally, the facts indicate that "Janet insisted Lisa leave immediately" after Lisa expressed her desire to end her relationship with Janet in Vermont, and then "*Janet* drove Lisa and the child back to Virginia."[119] There is no abducting or anything unilateral about the

---

[114] Brief of Appellant, *supra* note 8, at 7 (accusing Lisa of attempting to "end-run the decision she sought from the Vermont Court"); *see also* Jennifer Ellis Lattimore, *Life After* Lawrence v. Texas*: An Examination of the Decision's Impact on a Homosexual Parent's Right to Custody of His/Her Own Children in Virginia*, 15 GEO. MASON U. CIV. RTS. L.J. 105, 128 (2004) (calling Lisa a "forum-shopper").

[115] Brief of Appellee, *supra* note 8, at 5.

[116] Lisa argued in Vermont that the residency requirements for marriage in Vermont also applied to civil unions, which would have voided her civil union with Janet because the two were residents of Virginia when they traveled to Vermont for the civil union. The court rejected this argument because the Vermont legislature had not explicitly applied the residency requirement to entering into a civil union. In contrast, though, the court pointed out that to dissolve a Vermont civil union the legislature had stated that "'dissolution of civil unions shall follow the same procedures . . . that are involved in the dissolution of marriage . . . , *including any residency requirements.*'" Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 961–64 (Vt. 2006) (emphasis added) (quoting VT. STAT. ANN. tit. 15, § 1206 (2002)). Also, "the Legislature specifically required town clerks to provide civil union applicants with information to advise them 'that Vermont residency may be required for dissolution of a civil union in Vermont.'" *Id.* (quoting VT. STAT. ANN. tit. 18, § 5160(f) (2000)); *see also* Brief of Appellee, *supra* note 8, at 5.

Based on Vermont's requirements to dissolve the civil union, it seems a bit disingenuous for the Virginia Court of Appeals to fault Lisa as a *pro se* litigant for essentially tying its hands and sealing her own fate by first filing in Vermont. *See Miller-Jenkins*, 637 S.E.2d at 338; Brief of Appellee, *supra* note 8, at 5 ("Lisa filed *pro se* in Vermont the necessary forms" to seek a dissolution of the civil union.).

[117] Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(c), 94 Stat. 3568, 3569 (1980) ("Findings and Purposes").

[118] *Id.* at § 7(c)(6), 94 Stat. at 3569 (emphasis added).

[119] Brief of Appellee, *supra* note 8, at 5 (emphasis added). However, Janet's contention is that she "urged Lisa to remain in Vermont, but Lisa insisted on taking IMJ and returning to Virginia." Brief of Appellant, *supra* note 8, at 6.

situation. The facts do not evince anything that the PKPA was intended to deter.

Furthermore, the PKPA's first and fourth listed purposes express a commitment to allowing courts to act in the best interests of the child.[120] Regarding IJM's best interests, one commentator on this matter concludes that, under this standard, "Janet should, at the very least, be granted visitation rights."[121] As this Note addresses below, however, an examination of Virginia's clearly expressed public policy leads to a different conclusion.

B. Virginia Has Stated a Robust Public Policy in Support of Marriage and in Support of Moms and Dads

Legislatively and judicially, Virginia has affirmed the importance of fatherhood and motherhood. In the past ten years, Virginia has thrice affirmed the value of defining marriage as existing only between one man and one woman, which likewise makes a statement about Virginia's understanding of parenthood. First, in 1997, Virginia passed the Marriage Protection Act prohibiting "marriage between persons of the same sex" and voiding "any contractual rights created by such marriage."[122] Then, in 2004, Virginia passed the "Marriage Affirmation Act" ("MAA") expressly prohibiting legal recognition of any civil unions between members of the same-sex and any contractual rights created by them.[123] Of particular note is the legislative findings supporting the MAA, which recognized "the beneficial health effects of heterosexual marriage" in contrast with "the life-shortening and health compromising consequences of homosexual behavior" that could be "to the detriment of all citizens regardless of their sexual orientation or inclination."[124] Finally, in the November 2006 elections, the people of Virginia consummated the actions of their legislators by amending the Virginia Constitution to define marriage as a "union between one man and one woman" and to exclude from legal status all other forms or approximations.[125]

---

[120] Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(c)(1), (4), 94 Stat. 3568, 3569 (1980) ("Findings and Purposes"); *see also* Melissa Crawford, Note, *The Best Interests of the Child? The Misapplication of the UCCJA and the PKPA to Interstate Adoption Custody Disputes*, 19 VT. L. REV. 99, 109 (1994) ("Making custody determinations in the best interest of the child is an explicit goal of both the UCCJA [(the Uniform Child Custody Jurisdiction Act)] and the PKPA.").

[121] Battaglioli, *supra* note 108, at 1266–67.

[122] VA. CODE ANN. § 20-45.2 (West 2001).

[123] VA. CODE ANN. § 20-45.3 (Supp. 2007).

[124] H.D. 751, Gen. Assem., Reg. Sess. (Va. 2004).

[125] VA. CONST. art. I, § 15-A. The provision is worth quoting in its entirety:

> That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.

In child custody disputes, the Supreme Court of Virginia has not favored parents who live an active homosexual lifestyle in the same residence where the child lives.[126] In *Roe v. Roe*, the court divested a father of physical custody of his daughter in favor of restricted visitation rights because the father engaged in open homosexual activities with a partner who lived at the same residence.[127] In another case, the court cited a mother's homosexual practices as one of a variety of factors which justified removing a child from the mother's custody.[128]

Therefore, both in terms of legislation and judicial determinations of the best interests of the child standard, Virginia has expressed a robust public policy that values the institution and practices of opposite-sex marriage and the beneficial environment for children that is fostered when both a mother and father raise them.

C. Vermont Is Consistent; Virginia Should Be As Well

The Vermont Supreme Court did not see a need to consider the broader question of how DOMA affected the *Miller v. Jenkins* case. The court ruled consistently with Vermont's public policy as found in its civil

---

> This Commonwealth and its political subdivisions shall not create or *recognize* a legal status for relationships of unmarried individuals that *intends to approximate* the design, qualities, significance, *or effects of marriage*. Nor shall this Commonwealth or its political subdivisions create *or recognize* another union, partnership, or other legal status to which *is assigned* the rights, benefits, obligations, qualities, or *effects of marriage*.

Id. (emphasis added).

[126] Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985).

[127] *Id.* at 692. The court indicated that

> the father was living with a man who was his homosexual lover, that the two men occupied the same bed in a bedroom in the house in which the father lived with the child, that the child had reported seeing the two men 'hugging and kissing and sleeping in bed together,' and that other homosexuals visited the home and engaged in similar behavior in the child's presence.

Id. The court based its holding on *Brown v. Brown*, 237 S.E.2d 89 (Va. 1977), in which custody of two young sons was removed from a mother "on the sole ground that she was openly living in an adulterous relationship with a male lover, in the same home as the children, during the pendency of the divorce suit." *Roe*, 324 S.E.2d at 693. Based on *Brown*, the court in *Roe* explained:

> [W]e have no hesitancy in saying that the conditions under which the child must live daily are not only unlawful but also impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large.

Id. at 694. Since *Lawrence v. Texas*, 539 U.S. 558, 564 (2003), and *Martin v. Ziherl*, 607 S.E.2d 367, 371 (Va. 2005), the father's activity in *Roe* would no longer be "unlawful," but the court's second observation would still hold true in Virginia. To be clear, though, note that the Virginia Supreme Court has never held "that every lesbian mother or homosexual father is *per se* an unfit *parent*." *Roe*, 324 S.E.2d at 694. Neither does this Note argue such a point.

[128] Bottoms v. Bottoms, 457 S.E.2d 102, 107–08 (Va. 1995).

union statutes. There is little surprise that Vermont did not extend full faith and credit to the order of the Virginia circuit court that disavowed parental rights to Janet.[129]

Virginia, however, at least at the court of appeals, is oddly inconsistent. Virginia's citizenry and elected officials have thrice voted to affirm marriage as existing solely between one man and one woman, and Virginia's Supreme Court has seriously questioned whether exposing children to the homosexual lifestyle of a parent is in the best interests of the child. Even Virginia's Constitution appears to reject Janet's attempt to register the Vermont visitation order.[130] Virginia courts should chart a consistent course with expressed public policy. To do so, Virginia courts do not need to blindly go out on a legal limb: DOMA enables, even encourages, Virginia to carry out its own public policy.

Under Virginia law and public policy, Janet is not a parent of IMJ. IMJ was born in Virginia as Lisa's biological daughter. Further, Virginia values heterosexual marriage and its corollaries of fatherhood and motherhood. This does not discard Janet as having no role in IMJ's birth or mean that Lisa should never allow IMJ to have any contact with Janet. However, encouraging Lisa to deal kindly and graciously with Janet is entirely different than binding Lisa under court order. Vermont's determination of Janet's parentage rests solely on the Vermont civil union, and therefore, Federal DOMA enables Virginia to give such a determination no legal effect.

The Court of Appeals of Virginia voluntarily chose to give effect to a judicial proceeding from Vermont that was based on Vermont's recognition of a relationship between persons of the same-sex. DOMA does not require that result. Instead of side-stepping the express public policy of Virginia's legislature and citizens, Virginia courts should rule consistently with that public policy as DOMA enables, even encourages, states to do.

CONCLUSION

Defining marriage in our country largely turns on issues of parenthood. One understanding of marriage reinforces the value of mothers and fathers, while another renders them meaningless, "dead" in modern thought and experience. When society changes marriage, it changes parenthood, and, so too, when society affirms marriage, it affirms a particular understanding of parenthood. DOMA and state court decisions on marriage capture the reality of this connection. The Federal DOMA not only affirms heterosexual marriage to be a societal good but also efficaciously enables states to follow their own public policy

---

[129] *Miller-Jenkins*, 912 A.2d at 961–62.

[130] VA. CONST. art. I, § 15-A. See *supra* note 125 for the text of this provision.

on issues of marriage and its corollary of parenthood. DOMA modifies the PKPA and is the controlling factor in *Miller v. Jenkins*. Virginia's legislature and citizens have expressed a robust affirmation of opposite-sex marriage and a respect for fatherhood and motherhood—Virginia courts should rule accordingly.

Cort I. Walker