

HARVARD JOURNAL *of* LAW & PUBLIC POLICY

VOLUME 41, NUMBER 3

SUMMER 2018

ARTICLES

- IRRECONCILABLE DIFFERENCES? *WHOLE WOMAN'S HEALTH*,
GONZALES, AND JUSTICE KENNEDY'S VISION OF AMERICAN
ABORTION JURISPRUDENCE
Laura Wolk & O. Carter Snead719
- SURROGACY AND LIMITATIONS TO FREEDOM OF CONTRACT:
TOWARD BEING MORE FULLY HUMAN
Adeline A. Allen753
- UNASHAMED OF THE GOSPEL OF JESUS CHRIST: ON PUBLIC
POLICY AND PUBLIC SERVICE BY EVANGELICALS
Johnny Rex Buckles813
- LIBERAL SECULARISM AND RELIGIOUS FREEDOM IN THE PUBLIC
SPACE: REFORMING POLITICAL DISCOURSE
Alex Deagon901

NOTES

- THE PARTIALITY OF NEUTRALITY
Kelsey Curtis.....935
- A CONSTITUTIONAL OUTLIER: LEGITIMACY AS A STATE INTEREST
AND ITS IMPLICATIONS IN ELECTION LAW
Boyd Garriott973

HARVARD JOURNAL of LAW & PUBLIC POLICY

Editor-in-Chief
JOSHUA J. CRADDOCK

Deputy Editor-in-Chief
TIERNAN KANE

Executive Editors
JENNIFER BARROW
KATHRYN BOLAS
MATTHEW BURTON
HUSSEIN ELBAKRI
BOYD GARRIOTT
JASON HALLIGAN
FRANCES MANZO
MATTHEW REARDON
KYLE REYNOLDS

Events Manager
ANNIKA BOONE

Technology Manager
R.J. McVEIGH

Managing Editors
ANNE BROWN
STEPHEN J. HAMMER

Deputy Managing Editors
BRAD BARBER
WILL COURTNEY
KELSEY CURTIS
RYAN PROCTOR

Chief Financial Officer
ASHER PEREZ

Subscriptions Manager
NICK AQUART

Communications Editor
SAMUEL SETTLE

Articles Editors
JENNIFER BARROW
BOYD GARRIOTT

Assistant Articles Editors
NOAH HEINZ
DANIEL JOHNSON

Articles Board
ANNIKA BOONE
CASEY CONNOLLY
HAYLEY EVANS
BRANTON NESTOR

Notes Editors
CHADWICK HARPER
KYLE REYNOLDS

Senior Editors

ANNIKA BOONE
CASEY CONNOLLY
HAYLEY EVANS
RYAN FOLIO

VERONICA FULTON
CHANSLOR GALLENSTEIN
JORDAN GREENE
CHADWICK HARPER
DANIEL JOHNSON

VINCENT LI
AZFER ALI KHAN
PARKER W. KNIGHT III
BRANTON NESTOR
GRANT NEWMAN

JEREMY SAWYER
KEES THOMPSON
SAM WILLIAMS
SARAH ZHANG

Editors

NICOLE BAADE
CHASE BROWNDORF
DOUGLAS COLBY
HUGH DANILACK
BEN FLESHMAN
ANASTASIA FRANE
TERRENCE L. GEORGE

AARON GYDE
JOSHUA HA
AARON HSU
ASEEM JHA
JOSEPH LONGENECKER
ISABEL MARIN
R.J. McVEIGH

JOHN MITZEL
DAVID NABORS
FELIPE PINTO
JASJAAP SIDHU
ANDREW SKARAS
DYLAN SOARES
DOUG STEPHENS IV

STEVE SZROM
JACOB THACKSTON
MATTHEW WEINSTEIN
YI YUAN
NICHOLAS ZAHORODNY
ZHUORAN ZHONG

BOARD OF ADVISORS

E. Spencer Abraham, Founder

Steven G. Calabresi
Douglas R. Cox
Jennifer W. Elrod
Charles Fried
Douglas H. Ginsburg
Orrin Hatch
Jonathan R. Macey
Michael W. McConnell
Diarmuid F. O'Scannlain
Jeremy A. Rabkin
Hal S. Scott
David B. Sentelle
Bradley Smith
Jerry E. Smith

THE *HARVARD JOURNAL OF LAW & PUBLIC POLICY* RECEIVES NO FINANCIAL SUPPORT FROM HARVARD LAW SCHOOL OR HARVARD UNIVERSITY. IT IS FUNDED EXCLUSIVELY BY SUBSCRIPTION REVENUES AND PRIVATE CHARITABLE CONTRIBUTIONS.

The *Harvard Journal of Law & Public Policy* is published three times annually by the Harvard Society for Law & Public Policy, Inc., Harvard Law School, Cambridge, Massachusetts 02138. ISSN 0193-4872. Nonprofit postage prepaid at Lincoln, Nebraska and at additional mailing offices. POSTMASTER: Send address changes to the Harvard Journal of Law & Public Policy, Harvard Law School, Cambridge, Massachusetts 02138. Yearly subscription rates: United States, \$55.00; foreign, \$75.00. Subscriptions are renewed automatically unless a request for discontinuance is received.

The *Journal* welcomes the submission of articles and book reviews. Each manuscript should be typed double-spaced, preferably in Times New Roman 12-point typeface. Authors submit manuscripts electronically to harvardjlp@gmail.com, preferably prepared using Microsoft Word. Views expressed are those of the authors and do not necessarily reflect the views of the Society or of its officers, directors, editors, members, or staff. Unless otherwise indicated, all editors are students at the Harvard Law School.

Copyright © 2018 by the Harvard Society for Law & Public Policy, Inc.

PREFACE

For the first time since the fall of the Soviet Union, many in the West are reconsidering liberalism. Those on the left are quick to point out the rise of populism and capitalism's culture of consumption. Critics on the right, such as Professor Adrian Vermeule, question the neutrality of liberalism when it functions as a secular religion, complete with articles of faith and claims of exclusivity that crowd religion out of the public square. Others note the collateral casualties of liberalism's struggle against nature in the realm of bioethics. The "end of history," it seems, was only an intermission. Are liberalism's travails the result of Progressive corruption, or were the roots of its demise embedded in its theoretical underpinnings from the very beginning? Advocates of the former view seek a return to classical liberalism, hoping to prevent the "suicide of the West," while those of the latter persuasion tout liberalism's failures under its own consistent principles. Regardless of which view perceives liberalism more truly, this Issue considers some of liberalism's struggles and proposes ameliorative public policy solutions.

Our first Article addresses itself to the quintessential liberal himself, Justice Kennedy. Laura Wolk and Professor O. Carter Snead observe a tension in the Supreme Court's abortion jurisprudence after *Whole Woman's Health*, and suggest that Justice Kennedy could provide much-needed clarity to lower courts considering the constitutionality of state bans on dismemberment abortions. Professor Adeline A. Allen addresses another bioethical problem presented by liberal man's Baconian conquest of nature. She argues from a natural law perspective that gestational surrogacy arrangements are not within the freedom of contract and should be prohibited as against public policy.

Taking stock of recent congressional hostility toward religious nominees for public office, Professor Johnny Rex Buckles analyzes the Religious Test Clause and First Amendment norms to assess the constitutionality of congressional votes against nominees on the basis of religion. He then summarizes basic evangelical Christian beliefs to explain why such individuals are fit for public service. Finally, Professor Alex Deagon

critically examines Rawlsian liberalism's treatment of religious non-establishment. He argues that secularism is not truly neutral and advocates a broader view of religious freedom that permits greater participation in legal and political discourse.

This Issue also features two student Notes written by editors of the *Journal*. Kelsey Curtis picks up precisely where Professor Deagon leaves off. She argues that the Supreme Court's Establishment Clause and Free Exercise Clause jurisprudence is not neutral, and proposes that the Court's anti-discrimination and Free Speech Clause jurisprudence could lead toward some semblance of impartiality. Boyd Garriott closes this Issue by addressing whether the appearance of electoral legitimacy should be a judicially cognizable state interest in election law. He presents a persuasive case that it should not.

I would be remiss if I did not conclude with a word of gratitude. Editing Volume 41 of the *Harvard Journal of Law & Public Policy* has been the great privilege of my time in law school. I would like to thank the entire editorial staff for their continued faithfulness and dedication to the success of this *Journal*. Especially deserving of our thanks are those editors who went above and beyond their duties by volunteering for extra assignments, including Annika Boone, Hayley Evans, Jason Halligan, Stephen Hammer, and Ryan Proctor. Without the commitment of each and every member of our editorial staff, publication of this *Journal* would be impossible. In another forty years, I expect that the *Harvard Journal of Law & Public Policy* will remain a bulwark of conservative legal scholarship and a home to all those who resist the prevailing orthodoxies of our time.

Joshua J. Craddock
Editor-in-Chief

IRRECONCILABLE DIFFERENCES?
WHOLE WOMAN'S HEALTH, GONZALES, AND
JUSTICE KENNEDY'S VISION OF AMERICAN
ABORTION JURISPRUDENCE

LAURA WOLK* & O. CARTER SNEAD**

INTRODUCTION

A law is unconstitutional if it “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”¹ Twenty-five years have elapsed since a plurality of the Supreme Court articulated this undue burden standard in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,² yet its contours remain elusive. Notably, two current members of the Court—Justice Breyer and Justice Kennedy—seem to fundamentally differ in their understanding of what *Casey* requires and permits. In *Gonzales v. Carhart*,³ Justice Kennedy emphasized a wide range of permissible state interests implicated by abortion⁴ and indicated that courts should defer to States when they regulate in areas of medical uncertainty.⁵ According to Justice Kennedy, “[w]here [the State] has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power” to impose regulations “in furtherance of its legitimate interests.”⁶ More recently, Justice Breyer wrote in *Whole Woman's Health v. Hellerstedt*⁷ that

* J.D., Notre Dame Law School, 2016.

** William P. and Hazel B. White Director, Notre Dame Center for Ethics and Culture; Professor of Law and Concurrent Professor of Political Science, University of Notre Dame.

1. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion).

2. *Id.* at 877–79.

3. 550 U.S. 124 (2007).

4. *See id.* at 163.

5. *See id.*

6. *Id.* at 158.

7. 136 S. Ct. 2292 (2016).

Casey requires courts to “consider the burdens a law imposes on abortion access together with the benefits those laws confer” on pregnant women.⁸ Justice Breyer also opined that courts retain an active role in resolving questions of medical uncertainty⁹ and took a narrow view of permissible State interests.¹⁰ This decision maps onto the approach he took in authoring *Stenberg v. Carhart*,¹¹ another of the Supreme Court’s seminal abortion decisions.

As a purely academic matter, these fundamentally conflicting interpretations of *Casey* are notable because of Justice Kennedy’s co-authorship of that decision’s joint opinion. Yet, the Court’s alternative approaches have wide-ranging practical ramifications as well because they send radically different signals to state legislatures regarding the field of legitimate interests and the appropriate role of the courts in assessing legislation. Texas has recently brought this issue to the fore through its efforts to prohibit a particular type of second-trimester abortion procedure, which it calls a “live dismemberment abortion.”¹² Under *Gonzales*, the Texas law should easily pass constitutional muster: It invokes the same interests as those *Gonzales* held to be legitimate, leaves alternative abortion methods untouched, and regulates in an area of medical uncertainty. Yet, looking largely to *Whole Woman’s Health* for guidance, the United States District Court for the Western District of Texas struck down the law as facially unconstitutional.¹³

8. *Id.* at 2309.

9. *See id.* at 2310.

10. *See id.* at 2311, 2315–16.

11. 530 U.S. 914 (2000).

12. *See* Act of May 26, 2017, 85th Leg., R.S., ch. 441, § 6, 2017 Tex. Sess. Law Serv. 1167–68 (codified at TEX. HEALTH & SAFETY CODE §§ 171.151–.154).

13. *Whole Woman’s Health v. Paxton*, 280 F. Supp. 3d 938, 952–53 (W.D. Tex. 2017). Professor Snead testified as one of Texas’s expert witnesses in this litigation. Of course, the challenge to Texas’s legislation is still in its early stages, and there is never any guarantee that the Supreme Court will grant certiorari. However, at least seven other states have enacted similar laws, including Alabama, Arkansas, Kansas, and Oklahoma. *See id.* at 945–46 (listing and citing cases). It accordingly seems plausible that these issues will continue percolating in the district courts and eventually warrant Supreme Court review. Rather than addressing the idiosyncrasies of each state’s legislation, this essay uses Texas’s attempt as a general exemplar.

This Article uses Texas's latest legislative attempt to explore the tension arising out of the Court's inconsistent treatment of state interests and the role of the courts in assessing legislative factfinding. Part I re-examines the principles laid out in the Supreme Court's four canonical abortion decisions since *Roe v. Wade*.¹⁴ It emphasizes the difference between Justice Breyer's and Justice Kennedy's approaches to applying *Casey*, culminating in Justice Kennedy's curious decision to join Justice Breyer's opinion (without comment) in *Whole Woman's Health*. Part II then describes the aforementioned Texas statute, Texas Senate Bill 8, and the district court's assessment of its constitutionality. It explains how this case demonstrates the inherent conflict between *Gonzales* and *Whole Woman's Health* and argues that the Texas law affords Justice Kennedy an apt vehicle to decide which interpretation of *Casey* should prevail. Specifically, it contends that challenges to laws such as Texas Senate Bill 8 would present the Court—and in particular Justice Kennedy—with the opportunity to reaffirm *Gonzales* and, in so doing, clarify the meaning and scope of *Whole Woman's Health*.

I. REVIEW OF THE CASE LAW

This Part provides an overview of *Roe v. Wade*'s four most important progeny: *Planned Parenthood v. Casey*, *Stenberg v. Carhart*, *Gonzales v. Carhart*, and *Whole Woman's Health v. Hellerstedt*. Many are no doubt already familiar with the terrain that these decisions cover. This summary focuses on the Court's inconsistent pronouncements regarding what interests may support a state's pre-viability abortion regulations, as well as the courts' role in evaluating a law's effects. More specifically, it identifies the differences in Justice Breyer's and Justice Kennedy's approaches to answering these questions, and it concludes by presenting the question of whether *Gonzales* and *Whole Woman's Health* may coexist.

14. 410 U.S. 113 (1973).

A. *Planned Parenthood v. Casey*

In 1992, plaintiffs in *Casey* brought facial challenges to five provisions of the Pennsylvania Abortion Control Act.¹⁵ In assessing the provisions' constitutionality, a plurality of the Court replaced the "elaborate but rigid"¹⁶ trimester framework articulated in *Roe* with the now-familiar undue burden standard.¹⁷

The decision's joint opinion—co-authored by Justices Kennedy, Souter, and O'Connor—reaffirmed:

[T]he right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.¹⁸

Even so, it also explained that "the State has legitimate interests *from the outset* of the pregnancy in protecting the health of the woman *and the life of the fetus* that may become a child."¹⁹ Though the *Roe* Court had also recognized this "important and legitimate interest in protecting the potentiality of human life,"²⁰ the *Casey* joint opinion observed that subsequent Supreme Court decisions had "undervalue[d]" this "substantial interest,"²¹ giving it "too little acknowledgment and implementation."²² Accordingly, the undue burden standard, which prohibits laws that have the "purpose or effect" of erecting "substantial obstacle[s] in the path of a woman seeking an abortion of a nonviable fetus,"²³ seeks "[t]o protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life."²⁴ Thus, as the plurality explained, the standard permits "[r]egulations which do no more than create a structural mechanism by which the

15. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

16. *Id.* at 872 (plurality opinion).

17. See *id.* at 846 (majority opinion).

18. *Id.*

19. *Id.* (emphasis added).

20. *Id.* at 871 (plurality opinion) (quoting *Roe v. Wade*, 410 U.S. 113, 162 (1973)).

21. *Id.* at 875–76.

22. *Id.* at 871.

23. *Id.* at 877.

24. *Id.* at 878.

State . . . may express profound respect for the life of the unborn . . . if they are not a substantial obstacle” to a woman’s right to obtain an abortion.²⁵

The *Casey* plurality also made it clear that the state may invoke other interests to support pre-viability regulations, including to “further the health or safety of a woman seeking an abortion.”²⁶ Though “[u]nnecessary *health* regulations that have the purpose or effect of presenting a substantial obstacle . . . impose an undue burden,”²⁷ the state may legitimately regulate to protect a pregnant woman’s physical and psychological health.²⁸ Assessing one of the Act’s informed consent provisions, a plurality of the Court stated that providing “truthful, nonmisleading information”—even information concerning what happens to the fetus during an abortion procedure—“further[s] the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.”²⁹ In addition to fetal life and maternal health, the plurality also recognized the existence of “other valid state interest[s]” that may justify State regulations.³⁰

But *Casey*’s overall tone is in some ways even more important than the rules it lays out. Throughout, the plurality opinion seemed to self-consciously adopt a diplomatic approach that aspired to strike a more accommodating balance between the many societal views on abortion. The plurality acknowledged that the Court’s decision in *Roe* “call[ed] the contending sides of a national controversy to end their national

25. *See id.*; *see also id.* at 883 (“[W]e permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.”).

26. *Id.* at 878.

27. *Id.* (emphasis added).

28. *See id.* at 882 (“It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision.”); *see also Doe v. Bolton*, 410 U.S. 179, 192 (1973) (defining “health” for purposes of the health exception to include “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient”).

29. *Casey*, 505 U.S. at 882 (plurality opinion).

30. *See id.* at 877.

division by accepting a common mandate rooted in the Constitution,"³¹ but that abortion nevertheless remained as divisive as it did in 1973.³² It also recognized that, in practice, *Roe* systematically devalued state interests, which in turn prevented states "from expressing a preference for normal childbirth" through the "democratic processes."³³ Thus, the plurality stated that, unlike *Roe's* overly rigid framework, the undue burden standard provided "the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."³⁴

B. *Stenberg v. Carhart*

Eight years later, the Supreme Court had occasion to test *Casey's* attempt at conciliation in *Stenberg v. Carhart*.³⁵ There, an abortion provider challenged a Nebraska statute that criminalized performing "partial-birth" abortions. Writing for a five-Justice majority that included Justices O'Connor and Souter, Justice Breyer struck down the law as facially unconstitutional.³⁶

Before delving into its analysis, the Court described the procedures involved. As the Court explained, a partial-birth abortion, clinically known as an intact dilation and evacuation (intact D & E), refers to a second-trimester abortion that "begins with induced dilation of the cervix. The procedure then involves removing the fetus from the uterus through the cervix 'intact,' *i.e.*, in one pass, rather than in several passes."³⁷ The mechanics of the procedure depend on the presentation of the fetus. "If the fetus presents head first (a vertex presentation), the doctor collapses the skull; and the doctor then extracts the entire fetus through the cervix."³⁸ But "[i]f the fetus presents feet first (a breech presentation), the doctor pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix."³⁹

31. *Id.* at 867.

32. *See id.* at 869.

33. *Id.* at 872 (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989)).

34. *Id.* at 876.

35. 530 U.S. 914 (2000).

36. *See id.* at 922.

37. *Id.* at 927.

38. *Id.*

39. *Id.*

The intact D & E differs from its more standard counterpart, which also requires dilation of the cervix, because intact D & E involves the insertion of instruments through the cervix into the uterus.⁴⁰ After about fifteen weeks, due to increased fetal head size and bone rigidity, “dismemberment or other destructive procedures are more likely to be required” in a standard D & E.⁴¹ If so required, the abortion provider maneuvers forceps into the uterus, grips a part of the fetus, pulls it back through the cervix and vagina, and “continu[es] to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. . . . A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety.”⁴²

Abortion providers use intact D & Es to perform both pre- and post-viability abortions.⁴³ As a result, Nebraska needed to demonstrate that it did not run afoul of the pre-viability undue burden standard, which provides States with considerably less room to regulate compared to the post-viability timeframe.⁴⁴ Nebraska argued that the Act advanced its interests in “concern for the life of the unborn and ‘for the partially-born,’” “preserving the integrity of the medical profession,” and “erecting a barrier to infanticide.”⁴⁵ Justice Breyer’s majority opinion struck down the statute for two reasons. First, the act lacked a “health exception,” which the Court read *Casey* and *Roe* to require.⁴⁶ Additionally, the statute imposed an undue burden by prohibiting both standard and intact D & Es.⁴⁷

Regarding the need for a health exception, the Court quoted *Casey* and *Roe*’s statement that, “subsequent to viability, the State . . . may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judg-

40. *See id.* at 924–25.

41. *See id.* at 925. (citation omitted).

42. *Gonzales v. Carhart*, 550 U.S. 124, 135–36 (2007).

43. *See Stenberg*, 530 U.S. at 927–28.

44. *See id.* at 921, 930 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870, 877 (1992)).

45. *Id.* at 961 (Kennedy, J., dissenting) (citation omitted).

46. *See id.* at 930 (majority opinion).

47. *See id.*

ment, for the preservation of the life or health of the mother.”⁴⁸ If the health exception attached post-viability, the Court observed that it must also apply pre-viability, where a state’s interests are “considerably weaker.”⁴⁹ Thus, no recitation of state interests could obviate the need for the inclusion of a health exception.⁵⁰ Moreover, Justice Breyer’s majority opined that the law did “not directly further an interest ‘in the potentiality of human life’ by saving the fetus in question from destruction, as it regulates only a method of performing abortion.”⁵¹

The Court also addressed Nebraska’s assertion that a health exception was not required because banning intact D & Es posed no risk to women.⁵² In assessing this argument, the Court recognized the “division of medical opinion” regarding the safety of intact D & Es.⁵³ However, Justice Breyer’s majority opinion credited the district court’s findings that intact D & E is sometimes the safest option for women, a conclusion the Court determined was supported by “significant medical authority.”⁵⁴ Nebraska and certain supporting amici proffered contrary evidence, but rather than deferring, the Court considered their arguments “insufficient” to overcome the need for a health exception.⁵⁵ Instead, the majority concluded that the district court’s finding and the support in the record tipped the scales in favor of requiring a health exception, especially when combined with a division of medical opinion.⁵⁶ As Justice Breyer explained, division among medical professionals “at most means uncertainty, a factor that signals the presence of risk, not its absence.”⁵⁷ Justice Breyer emphasized that “unanimity of medical opinion” is not required.⁵⁸ However, he went on to observe that, “[w]here a significant body of medical opinion be-

48. *Id.* (emphasis omitted) (quoting *Casey*, 505 U.S. at 879 (internal quotation marks omitted)).

49. *Id.*

50. *See id.* at 930–31.

51. *Id.* at 930. (emphasis omitted).

52. *See id.* at 931.

53. *See id.* at 937.

54. *Id.* at 932.

55. *See id.* at 934.

56. *See id.* at 936–37.

57. *Id.* at 937.

58. *See id.*

lieves a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary."⁵⁹ It bears noting that neither the American Medical Association nor the American College of Obstetricians and Gynecologists were able to identify even one *actual case* in which the challenged procedure was necessary to preserve the health of a pregnant woman.⁶⁰

The Court next turned to answering the undue burden question. It first stated that "Nebraska [did] not deny that the statute imposes an 'undue burden' if it applies to the more commonly used D & E procedure."⁶¹ After establishing this concession, the Court analyzed the statute's text, which defined a partial-birth abortion as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery."⁶² Because standard D & Es also often involve movement of some part of the fetus into the cervix,⁶³ the Court determined that the statute's failure to include specific anatomical landmarks meant that its text covered the broader category of D & E procedures, and it struck down the statute.⁶⁴

Interestingly, Justice Kennedy's dissent took issue with both the majority's treatment of state interests and its failure to defer to the state's regulatory solution in an area of medical uncertainty. Justice Breyer's majority included the two other Justices who co-authored *Casey's* joint opinion. And yet, Justice Kennedy described the decision as a "misinterpretation of *Casey*" because it "close[d] its eyes to [the State's] profound concerns" even though the state "protected the woman's autonomous right of choice as reaffirmed in *Casey*."⁶⁵ Accordingly, he dissented "[f]rom the decision, the reasoning, and the judgment."⁶⁶

59. *Id.*

60. *See id.* at 965–66 (Kennedy, J., dissenting).

61. *Id.* at 938 (majority opinion) (emphasis omitted); *see also id.* at 978 (Kennedy, J., dissenting).

62. *Id.* at 922 (majority opinion) (quoting NEB. REV. STAT. ANN. § 28–328(9)).

63. *See id.* at 939.

64. *See id.* at 938–40, 945–46.

65. *Id.* at 979 (Kennedy, J., dissenting).

66. *Id.*

Justice Kennedy began his blistering dissent by criticizing the majority's "failure to accord any weight to Nebraska's interest[s]."67 In Justice Kennedy's view, "[w]hen the [*Casey*] Court reaffirmed the essential holding of *Roe*, a central premise was that the States retain a critical and legitimate role in legislating on the subject of abortion, as limited by the woman's right."68 This includes a state's ability to "take sides in the abortion debate and come down on the side of life."69 Thus, he took pains to remind the majority that "[t]he political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential."70 He reiterated this point by noting that "*Casey* is premised on the States having an important constitutional role in defining their interests in the abortion debate,"71 and that decision accordingly deemed it "inappropriate" to "provide an exhaustive list of state interests implicated by abortion."72

Against this backdrop, Justice Kennedy proceeded to argue that Nebraska's "critical" interests were legitimate under a proper reading of *Casey*.73 He described the standard and the intact D & E procedures in great detail, noted that a fetus can remain alive for some time during a standard D & E as the abortionist removes its limbs, and explained that witnesses of intact D & Es have reported seeing the fetus's body move outside the woman's body.74 Citing *Casey*'s statement that "abortion is 'fraught with consequences for . . . the persons who perform and assist in the procedure [and for] society which must confront the knowledge that these procedures exist,'"75 Justice Kennedy asserted that states "have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole

67. *Id.* at 957.

68. *Id.* at 956–57 (citation omitted).

69. *Id.* at 961.

70. *Id.* at 957 (emphasis added) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992)).

71. *Id.* at 961 (emphasis added).

72. *Id.* (citing *Casey*, 505 U.S. at 877).

73. *See id.* at 957.

74. *See id.* at 958–59.

75. *Id.* at 962 (alteration in original) (quoting *Casey*, 505 U.S. at 852).

to become insensitive, even disdainful, to life, including life in the human fetus."⁷⁶ This legitimate interest also permits them to protect the integrity of the medical profession through "measures to ensure . . . its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others."⁷⁷

Notably, Justice Kennedy acknowledged outright that Nebraska's decision to proscribe intact D & Es while permitting standard D & Es based on concern for the "humane" treatment of the fetus involved moral judgments. Yet, he contended that this was a decision that the State was "entitled" to make,⁷⁸ and he stressed that the Court was "without authority to second-guess" Nebraska's conclusion that intact D & E blurs the line between abortion and infanticide in a manner that puts the medical profession and all of society at risk.⁷⁹ He went so far as to say that "[t]he Court's refusal to recognize [Nebraska's moral choice] [was] a dispiriting disclosure of the illogic and illegitimacy of the Court's approach to the entire case."⁸⁰

Justice Kennedy next turned to the majority's approach to the health exception question, which he argued evinced "a further and basic misunderstanding of *Casey*."⁸¹ According to Justice Kennedy, the majority's approach "award[ed] each physician a veto power over the State's judgment that the procedures should not be performed."⁸² He reasoned that "[c]ourts are ill-equipped to evaluate the relative worth of particular surgical procedures[,] [whereas] [t]he legislatures of the several States have superior factfinding capabilities in this regard."⁸³ Thus, rather than taking on the role of "the Nation's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the

76. *Id.* at 961.

77. *Id.* at 962 (citing *Washington v. Glucksberg*, 521 U.S. 702, 730–34 (1997)).

78. *See id.* at 962–63.

79. *See id.* at 963.

80. *Id.* at 962.

81. *Id.* at 964.

82. *Id.*

83. *Id.* at 968.

United States,”⁸⁴ Justice Kennedy argued that the Court should remember that “the State may regulate based on matters beyond ‘what various medical organizations have to say about the physical safety of a particular procedure.’”⁸⁵ Accordingly, especially where confronted with areas of disagreement within the medical field, the Court should defer to legislatures rather than to physicians.⁸⁶

In sum, Justice Kennedy’s *Stenberg* dissent offered a threefold critique of Justice Breyer’s interpretation of *Casey*. First, he criticized the majority for giving the state’s interest too little weight. In particular, he described the majority as “view[ing] the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life.”⁸⁷ Second, he took issue with the majority’s unduly narrow view of permissible state interests because the opinion seemed to insinuate that states may only justify abortion regulations if they protect a pregnant woman’s health or the life of the fetus within her.⁸⁸ Third, he stated that courts should defer to legislative factfinding rather than to physicians, especially in areas of medical uncertainty. All three critiques accused the Court of turning back the clock to a pre-*Casey* regime, where state regulations needed to survive strict scrutiny and where courts employed a “physician-first view.”⁸⁹ All told, his stinging rebuke indicates that Justice Kennedy understood the plurality opinion in *Casey* as an effort to craft a balanced and statesmanlike solution to the perennially vexed issue of abortion, which the majority—including the two other co-authors of *Casey*’s joint opinion—had disregarded.⁹⁰

84. *Id.* (quoting *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 456 (1983) (O’Connor, J., dissenting)).

85. *Id.* at 967 (quoting *Akron*, 462 U.S. at 467 (O’Connor, J., dissenting) (emphasis omitted)).

86. *See id.* at 968–70.

87. *Id.* at 957.

88. *See id.* at 960.

89. *See id.* at 960, 969, 976.

90. Justice Kennedy also spoke out vehemently against Justice O’Connor’s separate concurrence, accusing her of “ignor[ing] the settled rule against deciding unnecessary constitutional questions” and offering “the people of Nebraska meaningless assurances.” *Id.* at 972, 978. He also cited some of Justice O’Connor’s

C. *Gonzales v. Carhart*

In 2007, the Supreme Court once again took up the issue of partial-birth abortion, this time with Justice Kennedy at the helm.⁹¹ In *Gonzales v. Carhart*,⁹² the Court assessed the validity of the federal Partial-Birth Abortion Act of 2003.⁹³ The Act banned the same procedure at issue in *Stenberg*, and it only provided for an exception “to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.”⁹⁴ Congress argued that the Partial-Birth Abortion Act prevented the coarsening of society and protected the integrity of the medical profession.⁹⁵

The Court held that the Act withstood the facial attack brought by four abortion providers.⁹⁶ In doing so, many of the points first presented in Justice Kennedy’s *Stenberg* dissent made their way into his *Gonzales* majority. First, Justice Kennedy’s opinion implicitly adopted the idea that it is permissible to assess an abortion method from the point of view of society writ large, rather than from the perspective of an abortion provider. The majority’s elaborate description of the procedure

previous dissents as support for the proposition that courts should defer to the legislatures in areas of medical uncertainty. *See id.* at 967–68.

91. By this point, Justice Alito had replaced Justice O’Connor.

92. 550 U.S. 124 (2007).

93. *See id.* at 132.

94. 18 U.S.C. § 1531(a).

95. *See Gonzales*, 550 U.S. at 156–57.

96. *See id.* at 133. This ruling rested on differences between the Nebraska law and the Partial-Birth Abortion Act, which, unlike the Nebraska law, defined the prohibited conduct more narrowly to include:

[D]eliberately and intentionally vaginally deliver[ing] 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.

18 U.S.C. § 1531(b)(1)(A). These linguistic differences led the Court to conclude that the Act was not void for vagueness, *see Gonzales*, 550 U.S. at 147–50, and that it did not create an undue burden by prohibiting all D & Es, *id.* at 150–54. However, in noting that the law applied pre-viability as well as post-viability, Justice Kennedy made a striking passing comment that “by common understanding and scientific terminology, the fetus is a living organism while within the womb, whether or not it is viable outside the womb.” *Id.* at 147.

supports this conclusion. Whereas Justice Breyer succinctly described an intact D & E as requiring the abortion provider to “collapse the [fetal] skull,”⁹⁷ Justice Kennedy provided the following extended narrative:

In the usual intact D & E the fetus’ head lodges in the cervix, and dilation is insufficient to allow it to pass At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and ‘hooks’ the shoulders of the fetus with the index and ring fingers (palm down). While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger. [T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening. The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.⁹⁸

More importantly, as in his *Stenberg* dissent, Justice Kennedy’s majority cited *Casey* to explicitly recognize the legitimacy of state interests in protecting society from becoming coarsened to “all vulnerable and innocent human life” and in protecting the integrity of the medical profession.⁹⁹ These interests remained permissible, even though they relied upon “ethical and moral concerns.”¹⁰⁰ Additionally, in contrast to Justice Breyer’s statement in *Stenberg*, Justice Kennedy’s majority held that the Act “further[ed] the legitimate interest of the Government in protecting the life of the fetus *that may* become a child.”¹⁰¹ This remained true, even though the Act still permitted alternative

97. *Stenberg v. Carhart*, 530 U.S. 914, 927 (2000).

98. *Gonzales*, 550 U.S. at 138 (internal quotation marks, citations, and paragraph indications removed) (first ellipsis added); *see also id.* at 138–39 (providing additional, equally vivid descriptions).

99. *See id.* at 157–58.

100. *Id.* at 158.

101. *Id.* at 146 (emphasis added).

ways to cause the death of the fetus through abortion.¹⁰² Lastly, Justice Kennedy went beyond his *Stenberg* dissent by explicitly contending that the state could assert an interest in the pregnant woman's psychological health to justify the prohibition of partial-birth abortions. As he explained, many physicians do not describe intact D & Es to their patients in great detail; this failure can later negatively impact a woman's psychological health once she realizes the mechanics of the procedure.¹⁰³ All three interests indicated that the law did not have the impermissible purpose of erecting a substantial obstacle in the path of a woman seeking an abortion.

Justice Kennedy also employed his *Stenberg* approach, as opposed to Justice Breyer's, to assess the law's effects.¹⁰⁴ As stated above, the act did not include a broad health exception. Like the *Stenberg* majority, *Gonzales* read *Casey*'s "preservation of the mother's health" language¹⁰⁵ to prohibit laws that "subject[] [women] to significant health risks."¹⁰⁶ And so, for Justice Kennedy, the question became whether women would experience adverse health risks as a result of the prohibition.¹⁰⁷ Departing from *Stenberg*, Justice Kennedy's *Gonzales* majority noted that this "ha[d] been a contested factual question," with medical professionals supporting each side's position.¹⁰⁸ Faced with this disagreement, Justice Kennedy observed that "[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertain-

102. *See id.* at 164–65.

103. *See id.* at 159–60 ("It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.").

104. Like the respondent in *Stenberg*, the Attorney General conceded that the Act would impose an undue burden if it covered standard D & Es. *Id.* at 147.

105. *Id.* at 161 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992)).

106. *Id.* (second alteration in original) (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328 (2006)); *see also Stenberg v. Carhart*, 530 U.S. 914, 931 (2000).

107. *See Gonzales*, 550 U.S. at 161.

108. *See id.* at 162–63.

ty.”¹⁰⁹ Again mirroring his thoughts in his *Stenberg* dissent, he noted that *Casey* is inconsistent with the view that a law must “give abortion doctors unfettered choice in the course of their medical practice” or “elevate their status above other physicians in the medical community.”¹¹⁰ Accordingly, medical uncertainty provided “a sufficient basis” to stave off the facial attack,¹¹¹ especially given that alternative abortion procedures existed.¹¹²

In emphasizing the proper deference owed to the legislature, however, Justice Kennedy’s majority pointed out that the Court must not give such findings “dispositive weight,” especially where, as here, some of Congress’s findings were incorrect.¹¹³ Even so, it would be equally inappropriate for courts “to leave no margin of error for legislatures to act in the face of medical uncertainty.”¹¹⁴ Instead of this “zero tolerance policy,” courts must keep in mind that “[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends.”¹¹⁵ Thus, “[w]here [the State] has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power” to pass laws “in furtherance of its legitimate interests.”¹¹⁶

Justice Breyer did not write separately, but he joined a dissent authored by Justice Ginsburg that (correctly) described Justice Kennedy’s majority as an “undisguised conflict with *Stenberg*.”¹¹⁷ The dissent looked to *Stenberg* to assess the state’s interests and the law’s effects.

Regarding the law’s purposes, the dissent reiterated that the state cannot invoke an interest in fetal life when an act only

109. *Id.* at 163 (citing cases, including his *Stenberg* dissent, 505 U.S. at 969–72 (Kennedy, J., dissenting)).

110. *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. at 884).

111. *See id.* at 164.

112. *See id.* at 167.

113. *See id.* at 165. Importantly, Justice Kennedy did not state outright that Congress’s findings were incorrect. Rather, he noted that “[w]hether or not accurate at the time, some of the important findings have been superseded.” *Id.* This phrasing also reflects a more deferential approach to the legislature.

114. *Id.* at 166 (citations omitted).

115. *Id.*

116. *Id.* at 158.

117. *See id.* at 179 (Ginsburg, J., dissenting).

eliminates a particular method of abortion,¹¹⁸ and it argued that the purported worries over societal coarsening are no more than “moral concerns” that Congress has used to “overrid[e] fundamental rights.”¹¹⁹ Moreover, Justice Ginsburg noted that these same interests could be invoked to proscribe the standard D & E procedure, which “could equally be characterized as ‘brutal,’ involving as it does ‘tear[ing] [a fetus] apart’ and ‘ripp[ing] off’ its limbs.”¹²⁰ Finally, Justice Ginsburg’s dissent dismissed the majority’s invocation of psychological health as reflecting “ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited,” and asserted that any problems with physicians withholding information should be solved by requiring that they provide women with the tools necessary to make an informed and autonomous choice.¹²¹

With respect to the law’s effects, the dissent cited *Stenberg* to argue that a health exception is required “as long as ‘substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health.’”¹²² It adopted *Stenberg*’s view that courts retain an active role in reviewing legislative fact finding, even implying that they may have greater institutional competence in this regard.¹²³

D. *Whole Woman’s Health v. Hellerstedt*

Most recently, in 2016, Justice Breyer authored an opinion in *Whole Woman’s Health v. Hellerstedt* that struck down two Texas regulations governing abortion providers.¹²⁴ Rather than representing another direct volley in the war over interests and effects, the *Whole Woman’s Health* opinion took an entirely different tack.¹²⁵ Overall, *the decision* marks a shift by Justice Kennedy—who joined the opinion in full and did not write

118. *See id.* at 181.

119. *See id.* at 182 (citations omitted).

120. *Id.* at 181–82 (alterations in original) (citations omitted).

121. *See id.* at 183–85 (citations omitted).

122. *Id.* at 174 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 938 (2000)).

123. *See id.* at 177–79.

124. 136 S. Ct. 2292, 2300 (2016).

125. *See id.* at 2323–24 (Thomas, J., dissenting).

separately—and a departure from the stance he took in *Stenberg* and *Gonzales*.

Whole Woman's Health assessed the validity of two provisions of a Texas law. The first required abortion providers to have admitting privileges at a hospital within thirty miles of where the abortion took place,¹²⁶ and the second mandated that abortion facilities employ the same minimum standards as those applicable to ambulatory surgical centers.¹²⁷ The statute contained no legislative findings, but the Court inferred that the two provisions sought to protect the health of women seeking abortions.¹²⁸

In applying the undue burden standard, the Court discussed a state's ability to further its interest in insuring "maximum safety for the patient."¹²⁹ When assessing such regulations, the Court stated that "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."¹³⁰ This consideration is required because, as *Casey*'s plurality explained, "[u]nnecessary *health* regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."¹³¹ In direct contradiction of both *Casey* and *Gonzales*, Justice Breyer also asserted that the Court "now use[s] 'viability' as the relevant point at which a State may begin limiting women's access to abortion for reasons *unrelated to maternal health*."¹³²

A six-Justice majority concluded that both provisions were unnecessary and had impermissible effects.¹³³ For instance, alt-

126. *See id.* at 2300 (majority opinion).

127. *See id.*

128. *See id.* at 2310; *see also id.* at 2303 (noting the Fifth Circuit's holdings that both requirements related to the State's interest in "rais[ing] the standard and quality of care for women seeking abortions and . . . protect[ing] the health and welfare of women seeking abortions" (alterations in original) (quoting *Whole Woman's Health v. Cole*, 790 F.3d 563, 584 (per curiam), *modified*, 790 F.3d 598 (5th Cir. 2015))).

129. *Id.* at 2309 (quoting *Roe v. Wade*, 410 U.S. 113, 150 (1973)).

130. *Id.*

131. *Id.* (alteration in original) (emphasis added) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion)).

132. *Id.* at 2320 (emphasis added).

133. *See id.* at 2300.

though Texas argued that the admitting privileges requirement would keep women safe if complications arose during an abortion, the district court found that complications were quite rare before the law's enactment.¹³⁴ The majority credited the district court's findings of fact and concluded that Texas failed to demonstrate that "compared to [the] prior law . . . the new law advanced Texas' legitimate interest in protecting women's health."¹³⁵ Moreover, because the provision caused significant clinic closures,¹³⁶ it imposed a substantial obstacle to abortion access, especially "when viewed in light of the virtual absence of any health benefit" conferred by the law.¹³⁷

The Court analyzed the surgical center requirement similarly. It again accepted the district court's factual findings that this provision did not lower risks for patients or positively affect their care in any meaningful way.¹³⁸ Again looking to the reduction in clinics resulting from the requirement and the associated effects on driving time, wait time, and overly taxed facilities,¹³⁹ the Court credited the district court's finding that the law erected a substantial obstacle to a woman's access to abortion.

As the above discussion indicates, Justice Kennedy's decision to join the benefits-and-burdens approach seems to mark a striking retreat from the position he took in *Stenberg* and *Gonzales*. In contrast to *Gonzales*, Justice Breyer's majority opinion reasserted a more active role for the Court in reviewing legislative fact finding. Citing *Casey*, the majority argued that the Court has often assessed abortion regulations by "plac[ing] considerable weight upon evidence and argument presented in judicial proceedings."¹⁴⁰ The majority sought to reconcile this

134. *See id.* at 2311.

135. *Id.*

136. *See id.* at 2301 (describing the district court's finding of fact that the number of facilities providing abortions dropped by half leading up to and following enactment of the admitting privileges requirement). Justice Alito argued in dissent that this point had not been adequately demonstrated. *See id.* at 2341 (Alito, J., dissenting).

137. *See id.* at 2313.

138. *See id.* at 2315.

139. *See id.* at 2316 (noting that the parties stipulated that the requirement would reduce the number of clinics to about seven or eight); *id.* at 2317–18 (describing the effects on the remaining clinics).

140. *Id.* at 2310 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 888–94 (1992)).

approach with *Gonzales* by pointing to that opinion's admonition not to give legislative findings "dispositive weight" nor to accept them "uncritical[ly]."¹⁴¹ The discussion, however, neglected the broader context in which those pronouncements were made. In particular, it did not grapple with *Gonzales's* contradictory declaration that the "traditional rule," the rule "consistent with *Casey*," instructs courts to defer to the discretion of legislatures, lest their "legitimate abortion regulations" be struck down "if some part of the medical community were disinclined to follow the proscription."¹⁴²

Additionally, as pointed out by Justice Thomas in dissent, applying the benefits-and-burdens approach broadly has serious ramifications for States.¹⁴³ The provisions in *Whole Woman's Health* only implicated the state's interest in promoting maternal health, but the majority did not cabin its benefits-and-burdens test to that interest. It also declared that states may not regulate for reasons unrelated to maternal health until after viability.¹⁴⁴ This assertion directly conflicts with Justice Kennedy's *Stenberg* view, which read *Casey* both to recognize a broader range of permissible state interests and to explicitly refrain from providing an exhaustive list of such interests.¹⁴⁵ As Justice Thomas observed, mirroring Justice Kennedy's concern in his *Stenberg* dissent, the benefits-and-burdens approach looks "far more like the strict-scrutiny standard that *Casey* rejected, under which only the most compelling rationales justified restrictions on abortion."¹⁴⁶

141. *Id.* (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165, 166 (2007)).

142. *Gonzales*, 550 U.S. at 163, 166; see also *Stenberg v. Carhart*, 530 U.S. 914, 971 (2000) (Kennedy, J., dissenting) (noting that the Court's cases had "establish[ed] beyond doubt the right of the legislature to resolve matters upon which physicians disagreed").

143. See *Whole Woman's Health*, 136 S. Ct. at 2326 (Thomas, J., dissenting).

144. See *id.* at 2320 (majority opinion).

145. See *Stenberg*, 530 U.S. at 961 (Kennedy, J., dissenting) (citing *Casey*, 505 U.S. at 877); see also *Whole Woman's Health*, 136 S. Ct. at 2325 (Thomas, J., dissenting) (contending that the majority failed to acknowledge a state's ability to "use its regulatory power" to impose regulations "in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." (quoting *Gonzales*, 550 U.S. at 158)).

146. *Whole Woman's Health*, 136 S. Ct. at 2326. See also *Stenberg*, 530 U.S. at 976 (Kennedy, J., dissenting) ("*Casey* disavows strict scrutiny review; and Nebraska must be afforded leeway when attempting to regulate the medical profession.").

II. TEXAS SENATE BILL 8:
TESTING THE CONTINUED VIABILITY OF *GONZALES*

The preceding Part has demonstrated that the Court has been far from consistent in its approach to assessing whether an abortion regulation imposes an undue burden. Most of this inconsistency centers on Justice Kennedy's and Justice Breyer's seemingly conflicting interpretations of the principles set forth in *Casey*, but it has been further compounded by Justice Kennedy's silent acquiescence in *Whole Woman's Health*. May states promulgate abortion regulations aimed at upholding the integrity of the medical profession and preventing the coarsening of society? May they regulate on behalf of life that "may become a child," even if that life nevertheless ends by abortion? May they expressly base these decisions on moral grounds? How much latitude should courts extend to legislatures to regulate in areas of medical uncertainty? The contradictory approaches taken by the *Stenberg* and *Gonzales* majorities, exacerbated by the novel framework set forth in *Whole Woman's Health*, leave all of these questions unanswered. Meanwhile, state legislatures are left in the lurch, knowing that their efforts may or may not be upheld as constitutional depending on which opinion a given court looks to for guidance. Similarly, courts are left to decipher and attempt to reconcile the Supreme Court's conflicting messages as they decide constitutional challenges to abortion regulations.

This Part describes Texas's recent effort to prohibit live dismemberment abortions and argues that this legislation provides an apt opportunity for Justice Kennedy to reaffirm his *Stenberg-Gonzales* view of *Casey* as a pragmatic compromise between fundamentally opposed interests. Moreover, it enables him to confirm the wide latitude enjoyed by States to restrict particularly gruesome and controversial abortion procedures when substantial medical authority supports the availability of safe alternatives. At a minimum, evaluating Texas's law permits the Court to provide some much-needed guidance to States, abortion providers, and patients about the interests at play and the standards that must be met for a law to survive scrutiny under *Casey*.

A. *The Texas Law and District Court Proceedings*

On May 26, 2017, Texas passed Senate Bill 8 (S.B. 8), which prohibits and criminalizes “live dismemberment abortions.”¹⁴⁷ This term is not used in the clinical setting, but the act defines it as an:

[A]bortion in which a person, with the purpose of causing the death of an unborn child, dismembers the living unborn child and extracts the unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors, or a similar instrument that, through the convergence of two rigid levers, slices, crushes, or grasps, or performs any combination of those actions on, a piece of the unborn child’s body to cut or rip the piece from the body.¹⁴⁸

S.B. 8 shares three characteristics with the laws at issue in *Stenberg* and *Gonzales*. First, because it regulates abortions in the second trimester, it applies to pre-viability abortions.¹⁴⁹ Second, the act does not contain a broad health exception. It only permits dismemberment abortions “in a medical emergency,”¹⁵⁰ which is defined as “a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function.”¹⁵¹ Third, S.B. 8 has a similar scope: rather than proscribe abortion outright, it prohibits a specific method of abortion. Namely, it prevents an abortion provider from performing a standard D & E on a living fetus.¹⁵² S.B. 8 instead requires induction of fetal demise prior to dismemberment, either through an injection of digoxin or potassium chloride into the fetus or through an umbilical-cord transection.¹⁵³ The abor-

147. *Id.*

148. TEX. HEALTH & SAFETY CODE §§ 171.151, 171.153.

149. Subject to exceptions for maternal health and fetal anomalies, Texas proscribes all abortions after twenty weeks. *See id.* §§ 171.044, 171.046.

150. *Id.* § 171.152.

151. *Id.* § 171.002.

152. *See id.* § 171.151 (noting that the Act also does not cover vacuum aspiration abortions).

153. *See Whole Woman’s Health v. Paxton*, 280 F. Supp. 3d 938, 947 (W.D. Tex. 2017) (describing an umbilical-cord transection as a method whereby the abortion provider passes an instrument through a woman’s cervix and into her uterus, cuts the fetus’s umbilical cord, and waits for the cessation of fetal heart activity).

tion provider can then remove the deceased fetus using standard D & E procedures.¹⁵⁴

Though S.B. 8 contains no legislative findings, Texas also asserts many of the same interests as those discussed in *Stenberg* and *Gonzales*: the Act “promotes respect for the dignity of the life of the unborn,” “protects the integrity of the medical profession,” and prevents the further coarsening of society.¹⁵⁵ Though not developed at length, the state also asserts that ensuring fetal demise prevents deleterious psychological stress to “both mothers and abortion providers.”¹⁵⁶

Regarding respect for the fetus’s life, Texas explains that most standard D & Es within the state take place between fifteen and twenty-two weeks gestation, as measured by a woman’s last menstrual period.¹⁵⁷ Texas notes that, at fifteen weeks gestation, the fetus “looks like a fully formed baby, with arms, legs, fingers, toes, and facial features,” and it retains these characteristics as it grows in size over the ensuing seven weeks.¹⁵⁸ Quoting Justice Kennedy’s *Stenberg* dissent, Texas observes that during a standard D & E “[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.”¹⁵⁹ Texas accordingly views the standard D & E as “brutal, gruesome and inhumane,”¹⁶⁰ especially because medical technology now makes it possible for fetuses born at twenty-two weeks to survive.¹⁶¹ Finally, Texas mentions that some physicians believe fetuses can feel pain at

154. See Defendants’ Response to Plaintiffs’ Motion for a Temporary Restraining Order at 4, *Whole Woman’s Health v. Paxton*, 280 F. Supp. 3d 938 (No. A-17-CV-690-LY) [hereinafter *Defendants’ Response to TRO*]. As providers recognize, induction of fetal demise by similar means prior to a standard D & E delivery likewise provides a method of compliance with the federal partial birth abortion law. See, e.g., Colleen C. Denny et al., *Induction of Fetal Demise Before Pregnancy Termination: Practices of Family Planning Providers*, 92 *CONTRACEPTION* 241, 243–44, tbl. 3 (2015).

155. See *Defendants’ Response to TRO*, *supra* note 154, at 5.

156. *Id.* at 6.

157. See Defendants’ Proposed Post-Trial Findings of Fact and Conclusions of Law at 3, 13, *Whole Woman’s Health v. Paxton*, 280 F. Supp. 3d 938 (No. A-17-CV-690-LY) [hereinafter *Defendants’ Proposed Findings*].

158. See *id.* at 11–12.

159. *Defendants’ Response to TRO*, *supra* note 154, at 3 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 958–59 (2000) (Kennedy, J., dissenting)).

160. *Id.* at 5.

161. See *Defendants’ Proposed Findings*, *supra* note 157, at 12.

this gestational age, and ensuring fetal demise would alleviate the ethical concerns associated with dismembering a live, sentient human fetus.¹⁶²

Though these justifications are most pertinent to the state's interest in fetal life, they also implicate Texas's interest in protecting the integrity of the medical profession and society as a whole. In support of these intertwining interests, Texas provides two graphic examples of events taking place during D & E procedures. In one, the face of the fetus "look[ed] back at the doctor" as dismemberment occurred.¹⁶³ In another, "part of a chest cavity [came] out with one lung attached and a still-beating heart."¹⁶⁴ Thus, because the state believes that the procedure affects all involved, it wishes to "require that a fully formed and nearly viable unborn child be accorded a more humane manner of death."¹⁶⁵

Various abortion providers brought a facial challenge to the relevant provisions of S.B. 8 in the United States District Court for the Western District of Texas.¹⁶⁶ At trial, Texas contended that providers have utilized fetal demise procedures for many years, and such practices are already commonplace in Texas.¹⁶⁷ It argued that multiple abortion providers use digoxin and potassium chloride as means of safely inducing fetal demise, and empirical studies confirm the drugs' safety and efficacy.¹⁶⁸ Texas also asserted that a study similarly attested to the efficacy of umbilical-cord transection.¹⁶⁹ Aside from this research, Texas maintained that certain physicians prefer inducing fetal demise because it makes the ultimate D & E procedure easier, and some pregnant women prefer that the fetus be killed prior to being

162. *See id.* at 13.

163. *See* Transcript of Bench Trial Volume 5 at 205, *Whole Woman's Health v. Paxton*, 280 F. Supp. 3d 938 (W.D. Tex. 2017) (No. A-17-CV-690-LY).

164. *Id.*

165. *Id.* at 206.

166. *See* *Whole Woman's Health v. Paxton*, 280 F. Supp. 3d at 940, 952.

167. *See Defendants' Proposed Findings, supra* note 157, at 6.

168. *See id.* at 7–9.

169. *See id.* at 10.

removed in pieces.¹⁷⁰ Unsurprisingly, the abortion providers presented contrary testimony and data.¹⁷¹

The district court concluded that the plaintiffs had the better argument and struck down the provision as facially unconstitutional.¹⁷² After citing the principles announced in *Casey* and expounded upon in *Stenberg* and *Gonzales*,¹⁷³ the district court discussed and applied *Whole Woman's Health v. Hellerstedt*'s benefits-and-burdens framework to assess the act's validity.¹⁷⁴ It did so even though the Texas law did not assert an interest in the health of the pregnant woman, which was the sole interest that justified the regulations at issue in that case.¹⁷⁵

The court began by interpreting *Stenberg* and *Gonzales* in light of *Whole Woman's Health v. Hellerstedt*. It read those cases as holding that, "to the extent a law directly reached or might be interpreted in such a way to reach the previability standard D & E procedure performed before fetal demise, the law imposed an undue burden on a woman seeking a pre-fetal-viability abortion."¹⁷⁶ Under this view of the cases, the district court summarily concluded that "based on existing precedent alone, the Act must fail."¹⁷⁷

Even though the district court considered its reading of *Stenberg* and *Gonzales* independently sufficient to dispose of the case, it went on to assess the parties' competing contentions regarding the safety of the methods used to cause fetal demise, the availability of those procedures, and other debated questions.¹⁷⁸ In doing so, it cited *Whole Woman's Health v. Hellerstedt* for the proposition that it is consistent with Supreme Court case law "[f]or a district court to give significant weight to evi-

170. *See id.* at 11.

171. *See Whole Woman's Health v. Paxton*, 280 F. Supp. 3d at 948.

172. *See id.* at 954.

173. *See id.* at 943.

174. *See id.* at 943–44.

175. *See* 136 S. Ct. 2292, 2309 (2016).

176. *Whole Woman's Health v. Paxton*, 280 F. Supp. 3d at 944 (citation omitted).

177. *Id.* at 945; *see also id.* at 954 ("This court concludes that *Stenberg* and *Gonzales* lead inescapably to the conclusion that the State's legitimate interest in fetal life does not allow the imposition of an additional medical procedure on the standard D & E abortion—a procedure not driven by medical necessity.").

178. *See id.* at 947–52.

dence in the judicial record” in circumstances where no legislative findings accompany a statute.¹⁷⁹

The district court assumed, without deciding, that Texas’s interests in fetal life and the medical profession were legitimate,¹⁸⁰ but these interests played no role in its analysis. Instead, the opinion focused exclusively on the benefits and burdens the law placed on the woman seeking an abortion.¹⁸¹ After assessing the competing evidence presented, the district court found that all three proposed methods of inducing fetal demise carried serious health risks and were not safe alternatives to the standard D & E procedure.¹⁸² The court also noted additional burdens resulting from the prohibition, such as the need for pregnant women to make additional visits to abortion providers, the increased duration of the procedure, and the imposition of additional training requirements on providers.¹⁸³ In sum, the district court concluded that it was “unaware of any other medical context that requires a doctor—in contravention of the doctor’s medical judgment and the best interest of the patient—to conduct a medical procedure that delivers no benefit to the woman.”¹⁸⁴ In so concluding, the court effectively adopted the arguments and narrative of the plaintiffs without a great deal of independent analysis or criticism. Accordingly, citing *Whole Woman’s Health v. Hellerstedt*, the court held that “[t]he State’s valid interest in promoting respect for the life of the unborn, although legitimate, is not sufficient to justify such a substantial obstacle to the constitutionally protected right of a woman to terminate a pregnancy before fetal viability.”¹⁸⁵

179. *See id.* at 947 (quoting *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. at 2310); *see also id.* at 948–49.

180. *See id.*

181. *See id.* at 947–53.

182. *See id.* at 949–50 (digoxin); *id.* at 950–51 (potassium chloride); *id.* at 951–52 (umbilical-cord transection).

183. *See id.* at 949–51.

184. *Id.* at 953.

185. *Id.* (citing *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. at 2299).

B. *The Tension Exposed by S.B. 8 and the District Court's Reasoning*

On the one hand, the district court's analysis amounts to nothing more than a straightforward application of *Whole Woman's Health v. Hellerstedt* to assess S.B. 8's constitutionality, even though the law does not promulgate health-related regulations. As a necessary result, the court made the pregnant woman's health its preeminent if not exclusive focus, downplayed the importance of the State's interests, and did not defer to Texas's fact finding.¹⁸⁶ Consequently, the district court's broad application makes the concerns raised by Justice Thomas's *Whole Woman's Health v. Hellerstedt* dissent a reality: the approach seems to displace if not nullify all state interests other than regulating the medical procedure itself, even those that the Supreme Court has previously declared to be legitimate.¹⁸⁷ Thus, the decision demonstrates how an expansive reading of *Whole Woman's Health v. Hellerstedt* conflicts with *Gonzales's* reasoning. This litigation therefore serves as a perfect vehicle for the Court to explore whether *Gonzales* remains good law

186. The district court's application is not without its own problems. As stated above, the court also interpreted *Gonzales* and *Stenberg* to "lead inescapably to the conclusion that the State's legitimate interest in fetal life does not allow the imposition of an additional medical procedure on the standard D & E abortion" if it is "not driven by medical necessity." *Id.* at 954. This interpretation of *Gonzales* and *Stenberg* greatly misreads both decisions. The district court maintained that those cases held that any imposition on the standard D & E procedure constituted an undue burden, but in both cases, the defendant explicitly conceded this point. See *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007) ("[T]he Attorney General does not dispute that the Act would impose an undue burden if it covered standard D & E."); *Stenberg v. Carhart*, 530 U.S. 914, 938 (2000) ("Nebraska does not deny that the statute imposes an 'undue burden' if it applies to the more commonly used D & E procedure as well as to [intact D & E]. And we agree with the Eighth Circuit that it does so apply."). Thus, the Supreme Court in both cases assumed, but never held, that the laws would impose an undue burden if they covered standard D & Es, and the district court erred by treating this question as explicitly presented and decided.

187. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. at 2326 (Thomas, J., dissenting) ("One searches the majority opinion in vain for any acknowledgment of the premise central to *Casey's* rejection of strict scrutiny: that the government has a legitimate and substantial interest in preserving and promoting fetal life from conception, not just in regulating medical procedures. Meanwhile, the majority's undue-burden balancing approach risks ruling out even minor, previously valid infringements on access to abortion." (internal quotation marks and citations omitted)).

and whether *Gonzales* and *Whole Woman's Health v. Hellerstedt* may be peaceably reconciled.

Answering both of these questions requires Justice Kennedy to take a stance on which interpretation of *Casey* should prevail—the broad, pragmatic view he espoused in *Stenberg* and *Gonzales*, or the narrower, more radical view he tacitly endorsed in *Whole Woman's Health*. Most importantly, it invites him to determine whether protecting the medical profession, preventing the coarsening of society to the value of human life, and expressing respect for fetal life remain legitimate state interests. S.B. 8 implicates all three, just like in *Gonzales*.¹⁸⁸ Furthermore, as in *Gonzales*, Texas has demonstrated a rational relationship between the regulation and the asserted interests and has left alternative methods of procuring an abortion available to pregnant women. Thus, should this case make its way to the Court, Justice Kennedy would be forced to decide whether these interests remain legitimate or if *Whole Woman's Health* has effectively narrowed the field.

Should Justice Kennedy decide that these interests may no longer serve as legitimate state ends, he would need to explain this rather drastic departure from his previous conclusions. Here, too, Texas provides an apt opportunity because its reasons map almost perfectly onto Justice Kennedy's statements justifying both bans on partial-birth abortions. For instance, Justice Kennedy remarked in *Stenberg* that the intact D & E is employed "only when the fetus is close to viable or, in fact, viable; thus the state is regulating the process at the point where its interest is nearing its peak."¹⁸⁹ So too here, at least during

188. See *Gonzales*, 530 U.S. at 157–58. Importantly, Justice Kennedy relies on *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) to support the State's ability to prohibit procedures that compromise the integrity of the medical profession. *Glucksberg's* own continued viability has been called into question in the wake of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court's landmark ruling that recognized a same-sex couple's constitutional right to marriage. Those critiques, however, focus on whether *Obergefell* swept aside *Glucksberg's* mode of constitutional interpretation, not its ultimate holding. See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. at 2618 (Roberts, C.J., dissenting).

189. *Stenberg*, 530 U.S. at 968 (Kennedy, J., dissenting).

the latter half of the second trimester, when the probability increases that an unborn child could survive outside the womb.¹⁹⁰

Furthermore, in *Stenberg*, Justice Kennedy found it permissible for a state to prohibit a method of abortion that resembles infanticide, which thus poses a greater risk to the medical profession and society as a whole.¹⁹¹ Texas has made precisely the same choice here. Whether because of advancements in scientific knowledge, increasing cultural awareness regarding stages of fetal development, or both, Texas has decided that it blurs the line between abortion and infanticide to dismember a living human fetus that has already assumed a recognizable human form through methods that put the child at risk of “surviv[ing] for a time while its limbs are being torn off.”¹⁹² Not only was a state entitled, in Justice Kennedy’s words, “to find the existence of a consequential moral difference” between a standard D & E and a procedure that first ensures fetal demise,¹⁹³ but the dis-

190. Such survivals are at this point extremely rare, but still possible. See Jacqueline Howard, *Born before 22 Weeks, “Most Premature” Baby is now Thriving*, CNN (Nov. 11, 2017, 6:46 PM), <https://www.cnn.com/2017/11/08/health/premature-baby-21-weeks-survivor-profile/index.html> [http://perma.cc/U4SY-JRN7] (discussing the survival of a Texas child born at twenty-one weeks and four days who weighed fifteen ounces). However, because legislatures enact broad, prospective laws, there is no reason why they should not account for promising advancements in medical technology aimed at keeping fetuses nearing the end of the second trimester alive. See Rob Stein, *Artificial Womb Shows Promise in Animal Study*, NPR (Apr. 25, 2017, 11:10 AM), <https://www.npr.org/sections/health-shots/2017/04/25/525044286/scientists-create-artificial-womb-that-could-help-prematurely-born-babies> [https://perma.cc/RM96-BNVM].

191. *Stenberg*, 530 U.S. at 963 (Kennedy, J., dissenting).

192. *Id.* at 959 (basing this description on of the testimony of an abortionist).

193. *Id.* at 962; see also *Gonzales*, 550 U.S. at 160 (noting that the medical profession “may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand”). Justice Kennedy’s explicit reference to a state’s ability to consider moral considerations seems to be at odds with decisions he has authored relating to same-sex couples. For instance, after *Stenberg*, Justice Kennedy wrote in *Lawrence v. Texas* that, though many view same-sex sexual activity as immoral, *Casey* required the Court to “define the liberty of all.” 539 U.S. 558, 571 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)); see also *Obergefell*, 135 S. Ct. at 2594. Yet, his analysis in *Gonzales* again relied in part on Congress’s determination that an intact D & E procedure “requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition.” 550 U.S. at 158. It could be that, in the ensuing years since *Gonzales*, Kennedy now concurs with Justice Ginsburg’s critique that a state cannot use moral considerations to prohibit a method of abortion in a way that “overrid[es]” a woman’s ability to access abortion. See *id.*

inction is also grounded in science. As Texas stated, the advancement of medical technology means that severely premature children are able to survive at earlier and earlier ages.¹⁹⁴ Thus, just like an intact D & E, a standard D & E “perverts the natural birth process,”¹⁹⁵ of medically fragile, severely disabled children.

Additionally, hearing this challenge would enable the Court to provide a clear standard regarding the appropriate deference owed to legislatures when regulating in areas of medical uncertainty. Justice Kennedy strongly condemned the majority in *Stenberg* for failing to extend deference, reminding it that “[c]ourts are ill-equipped to evaluate the relative worth of particular surgical procedures,”¹⁹⁶ and that “when a legislature undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad.”¹⁹⁷ This remains so, even in situations where—as in the Nebraska case—a law contains no legislative fact-finding.¹⁹⁸ This attitude toward deference persisted in *Gonzales*, where Justice Kennedy noted that, although the Court retains an independent duty to review factual findings in constitutional cases,¹⁹⁹ it cannot “serve as the country’s *ex officio* medical board with powers to approve or disapprove medical and operative practices and

at 182 (Ginsburg, J., dissenting). Yet, since *Casey*, Kennedy has stressed that abortion remains in part a philosophical inquiry and has emphasized the states’ ability to use the democratic processes as a means of expressing divergent views. *See id.* at 160; *Stenberg*, 530 U.S. at 957 (Kennedy, J., dissenting); *Casey*, 505 U.S. at 872. This, combined with abortion’s connection with human biology and medical science, could allow moral judgments to remain a permissible ground for regulation in the specific context of abortion. Either way, S.B. 8 provides an opportunity for Justice Kennedy to provide guidance and clarity on this important jurisprudential issue.

194. *See* Howard, *supra* note 190.

195. *Stenberg*, 530 U.S. at 962–63 (Kennedy, J., dissenting).

196. *Id.* at 968.

197. *Id.* at 970 (capitalization alteration removed) (internal quotation marks omitted) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997)).

198. *See id.* at 968–70; *see also Gonzales*, 550 U.S. at 164 (citing with approval *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (per curiam) (upholding a Montana law authorizing only physicians to perform abortions even though the law had no accompanying legislative findings and the respondents had argued that “all health evidence contradicts the claim that there is any health basis for the law”)).

199. *See Gonzales*, 550 U.S. at 165 (citing *Crowell v. Benson*, 285 U.S. 22, 60 (1932)).

standards throughout the United States.”²⁰⁰ Yet, Justice Kennedy seemed to retreat from this stance by joining Justice Breyer’s opinion in *Whole Woman’s Health*, including its interpretation that a court’s independent, in-depth evaluation of the evidence is consistent with *Casey*.²⁰¹

Here, the Court would again be confronted with a state law endeavoring to regulate in an area of medical uncertainty, with empirical evidence on both sides of the equation. Texas opted to side with medical professionals who believe that fetal demise is a safe and effective alternative to the standard D & E procedure, but the district court concluded that Texas’s decision was erroneous.²⁰² This, too, provides Justice Kennedy with an opportunity either to reaffirm an interpretation of *Casey* that seeks to accommodate both federalism concerns and the constitutional right to an abortion, or to provide an explanation for why this previous interpretation of *Casey* should no longer govern.

Finally, as an ancillary matter, Texas’s case provides the Court with an opportunity to answer yet another question left open by its abortion jurisprudence: what role do the states play in identifying and promoting new interests implicated by abortion? As mentioned above, Texas initially asserted that its law furthered the state’s interest in protecting both pregnant women and providers from the psychological distress that the state believes accompanies a standard D & E procedure.²⁰³ In support of this contention, Texas cited a study that found that clinic staffers “reported serious emotional reactions that produced physiological symptoms, sleep disturbances, effects on interpersonal relationships, and moral anguish.”²⁰⁴ The authors provided similar self-reports and noted that “the feelings and

200. *Id.* at 163–64 (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518–19 (1989) (plurality opinion)).

201. See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 888–94 (1992)).

202. See *Woman’s Health v. Paxton*, 280 F. Supp. 3d 938, 945 (W.D. Tex. 2017).

203. See *Defendants’ Response to TRO*, *supra* note 154, at 5–6.

204. See Warren M. Hern & Billie Corrigan, *What About Us? Staff Reactions to D & E*, 15 *ADVANCES IN PLANNED PARENTHOOD* 3, 3 (1980).

attitudes of those providing abortion services have a profound effect on the quality of care the patients receive.”²⁰⁵

Texas did not pursue this argument vociferously at trial. Even so, the state’s assertion of a novel interest implicates Justice Kennedy’s acknowledgment that *Casey* did not lay out an “exhaustive” list of permissible state ends²⁰⁶ because states “hav[e] an important constitutional role in defining their interests in the abortion debate.”²⁰⁷ Thus, unless Justice Kennedy now subscribes to the narrower view of permissible state interests intimated by *Whole Woman’s Health*, the case presents the opportunity to either reaffirm the states’ panoply of implicated interests or provide an explanation for the about-face. And, if the Court opts to discard *Gonzales*’s approach in favor of *Whole Woman’s Health*, it enables the Court to discuss to whom the benefits of an abortion-related law may apply. Must such benefits be exclusively experienced by pregnant women, or may the state take cognizance of the burdens and benefits that such laws present to others involved in the abortion procedure? Answering this question, too, would provide some much-needed prospective guidance regarding the scope and meaning of *Whole Woman’s Health*.

III. CONCLUSION

Eighteen years ago, Justice Kennedy dissented from both the reasoning and the judgment in *Stenberg v. Carhart*, calling both a “misinterpretation” of *Casey*.²⁰⁸ To Justice Kennedy, the majority’s decision to give the State interests “but slight

205. *Id.*; see also Colleen C. Denny, *supra* note 153, at 243–44 & tbl. 3 (noting that some clinics opt to induce fetal demise out of concern for the psychological well-being of providers and clinic operating room staff, including to reduce trauma); Justin Diedrich & Eleanor Drey, *Clinical Guidelines: Induction of Fetal Demise Before Abortion*, 81 *CONTRACEPTION* 462, 462, 464 (2010) (noting that “[i]nducing demise before induction terminations at near viable gestational ages to avoid signs of life at delivery is practiced widely” to avoid “the problem that faces the provider, the team of caregivers and the patient” should signs of life occur).

206. See *Stenberg v. Carhart*, 530 U.S. 914, 961 (2000) (Kennedy, J., dissenting) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992)).

207. *Id.*

208. See *id.* at 979.

weight,”²⁰⁹ its “substitut[ion of] its own judgment for the judgment of Nebraska” in an area of medical uncertainty,²¹⁰ and its application of heightened scrutiny²¹¹ all amounted to a “basic misunderstanding of *Casey*.”²¹² Yet, if his decision to join the *Whole Woman’s Health* majority provides any indication, Justice Kennedy may be retreating from the stance he took in *Stenberg*. And as Justice Thomas’s dissent notes and the Western District of Texas decision exemplifies, *Whole Woman’s Health’s* benefits-and-burdens approach seems to establish the “misinterpretation” of *Casey* as the proper framework for evaluating attempts to regulate abortion procedures.²¹³ Thus, *Whole Woman’s Health* and *Gonzales* appear to be on a collision course, leaving the proper interpretation of *Casey* an open question.

Fortunately, S.B. 8 serves as an apt vehicle for providing some much-needed clarity on this issue. It squarely implicates the same interests as *Stenberg* and *Gonzales*, relies upon very similar reasoning, and requires the Court to take a stand on the level of deference owed to state legislatures. Thus, it affords an opportunity for the Court either to overrule *Gonzales* outright or to provide further guidance regarding *Whole Woman’s Health*, particularly where states promulgate regulations for reasons other than protecting the health of pregnant women seeking abortions.

But perhaps most importantly, and aside from the practical, on-the-ground impact of any decision the Court might make, the challenge to S.B. 8 presents Justice Kennedy with the chance to opine again about which interpretation constitutes faithful adherence to *Casey*. Will *Casey* persist as an attempt at compromise in a pluralistic, civil society? Does “[t]he State’s constitutional authority” still remain “a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the

209. *Id.* at 956.

210. *See id.* at 979.

211. *See id.* at 960–61.

212. *Id.* at 964.

213. *See Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2326 (2016) (Thomas, J., dissenting).

attainment of some degree of consensus” about abortion?²¹⁴ One man’s answer to these questions, it seems, may make all the difference.

214. See *Gonzales v. Carhart*, 550 U.S. 114, 129 (2007) (“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.”); *Stenberg v. Carhart*, 530 U.S. 914, 957 (2000).

SURROGACY AND LIMITATIONS TO FREEDOM OF CONTRACT: TOWARD BEING MORE FULLY HUMAN

ADELINE A. ALLEN*

Gestational surrogacy, a contractual arrangement between commissioning parents and the woman who carries the baby in pregnancy (the birth mother), is big business. Yet it remains unregulated in the United States at the federal level. Popular and academic discourse often view surrogacy arrangements through the lens of freedom of contract. This Article will show that surrogacy does not properly belong in the realm of freedom of contract, but rather in the *limitation* to freedom of contract. Human flourishing and the common good require both the affirmation and limitation of that freedom, given that parties to a contract are rational beings, but imperfectly so. Although it is a deep-seated human desire to have a genetic child, the absence of whom can be deeply disappointing and painful, surrogacy contracts inherently dehumanize the birth mother and child. After weighing the competing interests and costs in surrogacy, this Article concludes that surrogacy should be prohibited in the United States as against public policy that is oriented toward human flourishing, or toward being more fully human.

INTRODUCTION	754
I. CONTRACTS AND PUBLIC POLICY	760
A. Tension Between Freedom of Contract and Public Policy	760
B. Contracts and Human Flourishing	761
II. WHAT IT MEANS TO BE HUMAN	769

* Associate Professor, Trinity Law School; 2017–18 Visiting Fellow, James Madison Program in American Ideals and Institutions, Princeton University. I thank Robert P. George, the James Madison Program, and Trinity Law School for the opportunity to develop this research as part of the Program. I thank Adam MacLeod, Jennifer Lahl, Paige Comstock Cunningham, C. Scott Pryor, Myron S. Steeves, Matthew J. Franck, Katy Doran, and the visiting fellows of the James Madison Program for their help with and feedback on the Article. I thank Duanyi Wang for her research assistance. The positions taken in this Article and any errors or omissions are mine alone.

III. SURROGACY AND DEHUMANIZATION	773
A. Surrogacy and the Birth Mother.....	774
1. Important Bonds Between Birth Mother and Child Are Trivialized.....	774
2. Inalienability of the Womb and Gestational Services.....	780
3. The Large Print Giveth Not, and the Small Print Taketh Away	782
4. Problems with Consent.....	784
5. Risks, Known and Unknown	786
6. Surrogacy Dehumanizes the Birth Mother	789
B. Surrogacy and the Child.....	789
1. Children, Manufactured	789
2. Consent? What Consent?	794
3. Risks, Known and Unknown	799
4. The “Right To Procreate” . . . For Whose Benefit?	800
5. Surrogacy Dehumanizes the Child	805
IV. CONCLUSION	806

INTRODUCTION

A gestational surrogacy contract is an arrangement between commissioning parents and the woman who carries the baby in pregnancy, the birth or gestational mother (sometimes called the surrogate mother).¹ The baby is conceived through in vitro fertilization (“IVF”) using the genetic material of the commissioning parents, a donor, or a combination thereof, and subsequently implanted in the birth mother’s womb.² She then carries the baby to term, gives birth to the baby, and, under the contract, hands over the baby to the commissioning parents,

1. See David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry’s Global Marketing of Children*, 43 PEPP. L. REV. 265, 283, 315 (2016).

2. See Emily Koert & Judith C. Daniluk, *Psychological and Interpersonal Factors in Gestational Surrogacy*, in HANDBOOK OF GESTATIONAL SURROGACY: INTERNATIONAL CLINICAL PRACTICE AND POLICY ISSUES 70 (E. Scott Sills ed., 2016).

having no right or responsibility to the child.³ In exchange, the birth mother is paid for her services.⁴

Such contracts are big business: an estimated \$6 billion global industry,⁵ \$4 billion in the United States alone.⁶ It is on the rise; sought by couples with infertility issues, singles,⁷ and same-sex couples⁸—especially in light of the redefinition of

3. See Smolin, *supra* note 1, at 283, 315; Wesley J. Smith, *A Right to the Baby We Want*, FIRST THINGS (Oct. 27, 2017), <https://www.firstthings.com/web-exclusives/2017/10/a-right-to-the-baby-we-want> [https://perma.cc/C5MD-PCW5].

4. See Anemona Hartocollis, *And Surrogacy Makes 3: In New York, A Push for Compensated Surrogacy*, N.Y. TIMES (Feb. 19, 2014), <https://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html> [https://perma.cc/3KW8-Q9R6].

5. Kathleen Sloan, *Surrogacy Reaches the Supreme Court*, PUB. DISCOURSE (Sept. 25, 2017), <http://www.thepublicdiscourse.com/2017/09/20130/> [https://perma.cc/CG25-WRJS].

6. See Kathleen Sloan, *Trading on the Female Body: Surrogacy, Exploitation, and Collusion by the US Government*, PUB. DISCOURSE (Apr. 24, 2017), <http://www.thepublicdiscourse.com/2017/04/19109/> [https://perma.cc/9M55-4MR2].

7. See I. Glenn Cohen & Katherine L. Kraschel, *Gestational Surrogacy Agreements: Enforcement and Breach*, in HANDBOOK OF GESTATIONAL SURROGACY, *supra* note 2, 85, 85; see also MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 106 (2001); BREEDERS: A SUBCLASS OF WOMEN? (Ctr. for Bioethics & Culture 2014) available at <https://vimeo.com/ondemand/breeders/852173> [https://perma.cc/8VXF-DFLK]; Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, ABA J. (Mar. 2011), http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate [https://perma.cc/G39F-J2EB].

8. One surrogacy agency used the term “surrogacy” in advertising its business to gay couples. See Leslie M. Whetstone & Bradley G. Beach, *Surrogacy’s Changing Social Profile*, in HANDBOOK OF GESTATIONAL SURROGACY, *supra* note 2, 33, 34; Tamara Audi & Arlene Chang, *Assembling the Global Baby*, WALL ST. J. (Dec. 10, 2010), <https://www.wsj.com/articles/SB10001424052748703493504576007774155273928> [https://perma.cc/7JYK-MEFC]; see also, e.g., Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come To Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 814 (2012); Cohen & Kraschel, *supra* note 7, at 85; Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 149–50 (2000); Eduardo Corral Garcia, *Saying No to Surrogacy: A European View*, in HANDBOOK OF GESTATIONAL SURROGACY, *supra* note 2, 78, 78–79; Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children’s Rights as Children*, 48 SANTA CLARA L. REV. 999, 1015 (2008).

marriage by the Supreme Court of the United States in *Obergefell v. Hodges*.⁹

Often, the arrangement is viewed through the lens of freedom of contract.¹⁰ Indeed, that is how California's highest court decided to interpret the gestational surrogacy arrangement at issue in *Johnson v. Calvert*¹¹: the parties' intent governed. The arrangement to which the commissioning parents and the birth mother consented before pregnancy and birth, in their freedom to contract with each other, controlled.¹²

The practice is unregulated at the federal level,¹³ and disagreement among the states has led to "jurisdictional chaos."¹⁴

9. 135 S.Ct. 2584 (2015); see also Jennifer Lahl, *Gestational Surrogacy Concerns: The American Landscape*, in HANDBOOK OF GESTATIONAL SURROGACY, *supra* note 2, 287, 287, 291; Hartocollis, *supra* note 4.

10. See SHANLEY, *supra* note 7, at 106–07; see also DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION xv, 77, 80 (2006); Arshagouni, *supra* note 8, at 837; Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interest of Children?*, 26 WHITTIER L. REV. 429, 468–72 (2004); April L. Cherry, *The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice*, 17 U. PA. J.L. & SOC. CHANGE 257, 258 (2014); Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423, 427, 429 (2014); BREEDERS, *supra* note 7; Hansen, *supra* note 7.

11. 851 P.2d 776, 782 (Cal. 1993); see also Stephanie M. Caballero, *Gestational Surrogacy in California*, in HANDBOOK OF GESTATIONAL SURROGACY, *supra* note 2, 296, 296–97; SPAR, *supra* note 10, at 85; Smolin, *supra* note 1, at 315.

12. See *Johnson*, 851 P.2d at 782–85; see also SPAR, *supra* note 10, at 84–85; see also Sarah Abramowicz, *Childhood and the Limits of Contract*, 21 YALE J. L. & HUMAN. 37, 40–47 (2009) (discussing freedom of contract); Nicholas C. Dranias, *Consideration as Contract: A Secular Natural Law of Contracts*, 12 TEX. REV. L. & POL. 267, 281–82 (2008) (discussing the role of parties' intent in freedom of contract); Smolin, *supra* note 1, at 315 (discussing the centrality of the parties' intent in a surrogacy contract to proponents of surrogacy); Jennifer Lahl, *Contract Pregnancies Exposed: Surrogacy Contracts Don't Protect Surrogate Mothers and Their Children*, PUB. DISCOURSE (Nov. 1, 2017), <http://www.thepublicdiscourse.com/2017/11/20390/> [<https://perma.cc/6YFN-2HEC>].

13. See Cohen & Kraschel, *supra* note 7, at 87; see also SPAR, *supra* note 10, at xviii, 71, 84; Emily Gelmann, *"I'm Just the Oven, It's Totally Their Bun": The Power and Necessity of the Federal Government To Regulate Commercial Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents*, 32 WOMEN'S RTS. L. REP. 159, 165 (2011); Michelle Elizabeth Holland, Note, *Forbidding Gestational Surrogacy: Impeding the Fundamental Right To Procreate*, 17 U.C. DAVIS J. JUV. L. & POL'Y 1, 4 (2013); BREEDERS, *supra* note 7; Sloan, *supra* note 5.

14. Katherine Drabiak et al., *Ethics, Law and Commercial Surrogacy: A Call for Uniformity*, 35 J. L. MED. & ETHICS 300, 302–03 (2007); see also SPAR, *supra* note 10, at 71, 84, 94; Arshagouni, *supra* note 8, at 800, 805–13, 844–46; Browne-Barbour, *supra*

Indeed, the surrogacy industry has been called the “Wild, Wild West” by a prominent surrogacy attorney, headed to a federal prison for her involvement in baby-selling schemes masquerading as legitimate surrogacy arrangements.¹⁵ The disbarred attorney said that she was but “the tip of the iceberg” with regard to the abuses of the surrogacy industry in the United States.¹⁶ She was not alone in the baby-selling ring: another high-profile surrogacy attorney and a surrogate mother were also part of the operation.¹⁷ A surrogacy agency owner, sentenced to imprisonment for fraud,¹⁸ put it this way: “Here is a little secret for all of you. There is a lot of treachery and deception in I.V.F./fertility/surrogacy because there is [sic] gobs of money to be made.”¹⁹

The current landscape of patchwork surrogacy laws across the states lends itself to jurisdiction-shopping for surrogacy.²⁰

note 10, at 443–60; Gelmann, *supra* note 13, at 160–62; Holland, *supra* note 13, at 4–5; Margalit, *supra* note 10, at 425, 439. For a list of treatment of surrogacy by state, see Alex Finkelstein et al., *Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking*, COLUM. L. SCH. SEXUALITY & GENDER L. CLINIC 8–11, 55–85 (May 2016), http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf [https://perma.cc/VB4N-KXJT]. Professors Cohen and Kraschel note six legal statuses of surrogacy contracts across the jurisdictions: “criminalize,” “void,” “voidable,” “enforceable,” “judicially preapproved,” and “legally valid to determine parentage.” Cohen & Kraschel, *supra* note 7, at 86–87.

15. See BREEDERS, *supra* note 7; see also Rory Devine & R. Stickney, *Convicted Surrogacy Attorney: I’m Tip of Iceberg*, NBC SAN DIEGO (Feb. 29, 2012), <http://www.nbcsandiego.com/news/local/Theresa-Erickson-Surrogacy-Abuse-Selling-Babies-140942313.html> [https://perma.cc/S86E-N23A].

16. Devine & Stickney, *supra* note 15.

17. See Smolin, *supra* note 1, at 330; see also Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT’L L. 412, 415–17 (2012); *Baby-Selling Ring Busted*, FBI (Aug. 9, 2011), <https://archives.fbi.gov/archives/sandiego/press-releases/2011/baby-selling-ring-busted> [https://perma.cc/KAN7-DVWB].

18. See *Surrogacy Agency Founder Gets Prison for Exploiting Desperate Parents*, FOX 5 SAN DIEGO (Aug. 7, 2017), <http://fox5sandiego.com/2017/08/07/surrogacy-agency-founder-gets-prison-for-exploiting-desperate-parents/> [https://perma.cc/AN6N-KF7L].

19. Tamar Lewin, *A Surrogacy Agency That Delivered Heartache*, N.Y. TIMES (July 27, 2014), <https://nyti.ms/1l5VkkC> [https://perma.cc/W6CN-MRL5].

20. See SPAR, *supra* note 10, at 71; see also Michelle Ford, Note, *Gestational Surrogacy Is Not Adultery: Fighting Against Religious Opposition To Procreate*, 10 BARRY L. REV. 81, 96 (2008); Hartocollis, *supra* note 4.

California, for example, is becoming the surrogacy capital of America due to its lax laws on surrogacy.²¹ Nationally, the United States is the number two destination for surrogacy worldwide, second only to India.²² Foreigners commission an estimated forty to fifty percent of surrogacy arrangements in the United States.²³

As society increasingly views consent as the ingredient that legitimizes all kinds of arrangements and relationships, be it for good or ill—indeed, much of the discourse in law journals argues *for* surrogacy based on the parties' consent in freedom of contract²⁴—a reasoned articulation as to why some arrangements are not proper and against public policy, regardless of consent, is called for.

This Article will show that commercial surrogacy arrangements do not properly belong in the realm of freedom of contract, but rather in the *limitation* to freedom of contract. Human flourishing and the common good require both the affirmation and limitation of that freedom, given that parties to a contract are rational beings, but imperfectly so. Specifically, with regard

21. See Caballero, *supra* note 11, at 296, 298; see also SPAR, *supra* note 10, at xiv, 85; Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1265 (2013); Smolin, *supra* note 1, at 325; Lahl, *supra* note 12; Tamar Lewin, *Coming to U.S. for Baby, and Womb To Carry It*, N.Y. TIMES (July 5, 2014), <https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html> [<https://perma.cc/KYJ5-CPPX>]; Andrew Vorzimer & David Randall, *California Passes the Most Progressive Surrogacy Bill in the World*, PATH2PARENTHOOD (Jan. 25, 2013), <http://www.path2parenthood.org/blog/california-passes-the-most-progressive-surrogacy-bill-in-the-world/> [<https://perma.cc/Y8Y9-GXYX>]; David Whiting, *Surrogate Mom Fears for Triplets After Allegations of Abuse by Father*, OC REG. (Sept. 20, 2017), <http://www.ocregister.com/2017/09/20/surrogate-mom-fears-for-triplets-after-allegations-of-abuse-by-father/> [<https://perma.cc/9TEQ-9TTH>].

22. Sloan, *supra* note 5; see also SPAR, *supra* note 10, at 85–86; Lewin, *supra* note 21.

23. Sloan, *supra* note 5; Lewin, *supra* note 21.

24. See, e.g., Arshagouni, *supra* note 8, at 847; Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2308 (1995); Gelmann, *supra* note 13, at 183; Nicole Miller Healy, *Beyond Surrogacy: Gestational Parenting Agreements Under California Law*, 1 UCLA WOMEN'S L.J. 89, 108–14 (1991); Holland, *supra* note 13, at 26–27; Jennifer Jackson, *California Egg Toss: The High Costs of Avoiding Unenforceable Surrogacy Contracts*, 15 J. HIGH TECH. L. 230, 256–60 (2015); Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 22 (1989); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 72 (1987); Peter H. Schuck, *Colloquy: Some Reflections on the Baby M Case*, 76 GEO. L.J. 1793, 1800 (1988).

to surrogacy, although it is a deep-seated human desire to have a genetic child, the absence of whom can be deeply disappointing and painful, surrogacy contracts inherently exploit the birth mother and the child. After weighing the competing interests and costs of surrogacy against each other, this Article concludes that surrogacy should be prohibited in the United States as against public policy that is oriented toward human flourishing, or toward being more fully human.

Part I of this Article explores the tension between freedom of contract and public policy and the relationship between contracts and human flourishing in the tradition of natural law. Part II examines what it means to be human in the context of surrogacy. Part III analyzes how surrogacy affects and dehumanizes the birth mother and the child. The Article concludes by situating surrogacy within the larger context of freedom of contract and its limitation in contract law, public policy, the common good, and human flourishing.

This Article is focused on commercial gestational surrogacy contracts in the United States,²⁵ wherein the birth mother is paid by the commissioning parents²⁶ to carry a child conceived using the genetic material of the commissioning parents, a donor, or a combination thereof²⁷ through the use of IVF,²⁸ as distinguished from traditional or complete surrogacy, wherein the birth mother is also the genetic mother of the child.²⁹

This Article does not focus on traditional surrogacy, as it is increasingly rare.³⁰ As far back as 2003, gestational surrogacy made up ninety-five percent of surrogacy arrangements in the

25. Surrogacy is nevertheless a booming international business. See, e.g., SPAR, *supra* note 10, at 86; Cherry, *supra* note 10, at 258–265; Lewin, *supra* note 21.

26. See SHANLEY, *supra* note 7, at 104; see also Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21, 22 (2005). For a thoughtful discussion on the different terminologies referring to the parties involved, see Smolin, *supra* note 1, at 284–87.

27. These were the facts of the landmark California case *Johnson v. Calvert*, 851 P.2d at 778; see also JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 130 (1994); SHANLEY, *supra* note 7, at 9; Browne-Barbour, *supra* note 10, at 434–35.

28. See SPAR, *supra* note 10, at 21–28, 78–82; Lahl, *supra* note 12.

29. These were the facts of the landmark New Jersey *Baby M* case. In re *Baby M*, 537 A.2d 1227, 1235–39 (N.J. 1988); see also Lahl, *supra* note 12.

30. See Hansen, *supra* note 7; see also SHANLEY, *supra* note 7, at 111; BREEDERS, *supra* note 7; Lahl, *supra* note 12.

United States.³¹ The focus on commercial surrogacy in this Article also excludes altruistic surrogacy, wherein the birth mother carries the child at no cost to the commissioning parents.³²

I. CONTRACTS AND PUBLIC POLICY

A. *Tension Between Freedom of Contract and Public Policy*

At the heart of the issues surrounding surrogacy is the tension between freedom of contract and public policy oriented toward human flourishing. People are free to enter into contracts, and generally speaking courts respect freedom of contract and enforce them.³³ People generally enter into a contract because the agreement improves life in some way; indeed, contracts are important to human flourishing.³⁴ Thus it is good for the state not to stand in the way of the fulfillment of such arrangements.

But the law has long recognized that certain contracts are unenforceable as against public policy; certain things are not properly predicated on the parties' consent in their freedom of contract.³⁵ An obvious example is contract killing.³⁶ Another more fact-specific example is a contract involving unconscionability.³⁷ The question of interest then is what makes certain

31. See JUDITH F. DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW 426 n.4 (2d ed. 2006); see also SHANLEY, *supra* note 7, at 130; Browne-Barbour, *supra* note 10, at 435–38; Smolin, *supra* note 1, at 311; David P. Hamilton, *She's Having Our Baby: Surrogacy Is on the Rise*, WALL ST. J. (Feb. 4, 2003), <https://www.wsj.com/articles/SB1044305510652776944> [<https://perma.cc/QH9B-K8E5>].

32. Browne-Barbour, *supra* note 10, at 439. For purposes of this Article, surrogacy arrangements in which the birth mother is paid for out-of-pocket expenses incurred during pregnancy and birth are considered altruistic. For concerns that such paid expenses constitute a loophole for altruistic surrogacy, see Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1932–34, 1934 n.291 (1987); Smolin, *supra* note 1, at 339; see also SHANLEY, *supra* note 7, at 110; Catherine Lynch, *Ethical Case for Abolishing All Forms of Surrogacy*, SUNDAY GUARDIAN LIVE (Oct. 28, 2017), <http://www.sundayguardianlive.com/lifestyle/11390-ethical-case-abolishing-all-forms-surrogacy> [<https://perma.cc/BX6F-U8Q4>].

33. *But see* RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

34. See Jennifer Roback Morse, Address at Acton University: The Economic Way of Thinking (June 18, 2014).

35. See RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 179 (AM. LAW INST. 1981); *cf.* 4 WILLIAM BLACKSTONE, COMMENTARIES *162.

36. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 192 (AM. LAW INST. 1981).

37. See *id.* § 208.

contracts belong not in the great open space of freedom of contract, but properly outside the boundaries to that freedom.

B. *Contracts and Human Flourishing*

Thomas Aquinas states that law is “an ordinance of reason for the common good of a [complete] community, promulgated by the person or body responsible for looking after that community.”³⁸ He adds that law “is simply a sort of prescription of practical reason *in the ruler* governing a complete . . . community.”³⁹ This Section will sketch the relationship between law (in particular, contract law), justice, the common good, and human flourishing in the tradition of natural law.

Human flourishing—the well-being of individuals and the communities they form—has to do with reasonableness, which Aquinas defines as doing and pursuing what is good and avoiding what is evil.⁴⁰ Indeed, for Aquinas, man’s *telos* is fulfilling the divine calling of flourishing (*beatitudo* or *felicitas*), by steps he has freely chosen for himself.⁴¹ Flourishing is the “fulfillment of the nature,” that is, the fulfillment of the capacity of reason and freedom with which each human being is created.⁴²

There are basic goods in life that contribute to human flourishing: life and health, marital-procreative union, friendship, knowledge, play, aesthetic appreciation, skillful performance, religion, and practical reasonableness.⁴³ Each good is basic in that it is common or universal (“good for any and every per-

38. John Finnis, *Aquinas and Natural Law Jurisprudence*, in THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE 17, 37 (George Duke & Robert P. George eds., 2017); see also THOMAS AQUINAS, TREATISE ON LAW: THE COMPLETE TEXT (SUMMA THEOLOGIAE I–II, QUESTIONS 90–108) 7 (Alfred J. Freddoso trans., St. Augustine’s Press 2009) (1265–1274) (I–II, q.90, a.4); JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 255–56 (2d. ed. 2004).

39. Finnis, *supra* note 38, at 37; see also AQUINAS, *supra* note 38, at 8 (I–II, q.91, a.1), 20 (I–II, q.92, a.1).

40. See AQUINAS, *supra* note 38, at 40 (I–II, q.94, a.2); see also Finnis, *supra* note 38, at 18–19; Robert P. George, *Natural Law, God and Human Dignity*, in THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE, *supra* note 38, at 57, 59.

41. See Finnis, *supra* note 38, at 19, 24, 34; see also Christopher Tollefsen, *Natural Law, Basic Goods and Practical Reason*, in THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE, *supra* note 38, at 133, 156.

42. Finnis, *supra* note 38, at 34.

43. See *id.* at 18–19; see also JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 86–90 (Paul Craig ed., 2011); George, *supra* note 40, at 59; Tollefsen, *supra* note 41, at 135–36.

son"⁴⁴), an intelligible end in and of itself, and intrinsically valuable,⁴⁵ or self-evidently known: "[I]t is better to be reasonable than to be unreasonable."⁴⁶ Aquinas calls basic goods *indemonstrabile* and *per se notum*, that is, "known in themselves and not through the mediation of some further proposition."⁴⁷ These basic goods are to be taken together or integrally, and they are incommensurable—not reducible to each other.⁴⁸

Private property is a basic human good through the architectonic, basic good of practical reasonableness (*bonum rationis, prudentia*).⁴⁹ It is "architectonic" in that it "orders the other goods and therefore plays a special role in shaping norms of morality and law"⁵⁰ and gives "supervision and structuring of deliberation and conscience."⁵¹ Legal philosopher and professor John Finnis calls practical reasonableness the "master virtue."⁵² Without it, the other virtues cannot be had—with one particular virtue of interest here: justice.⁵³

This basic good of practical reasonableness is the good of the capacity to deliberate about valuable possibilities and prudence in choosing well between those possibilities, that is, making choices that are *oriented toward* reasonableness.⁵⁴ It is uniquely human in that "the natural human capacities for reason and freedom are fundamental to the dignity of human beings."⁵⁵ This capacity for reason and freedom is "God-like (literally *awesome*)."⁵⁶ The Book of Genesis puts it as man bearing the

44. FINNIS, *supra* note 43, at 155.

45. See Finnis, *supra* note 38, at 20; see also George, *supra* note 40, at 57–58.

46. ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON 13 (2015).

47. Finnis, *supra* note 38, at 20; see also Tollefsen, *supra* note 41, at 135.

48. See George, *supra* note 40, at 59; see also MACLEOD, *supra* note 46, at 23, 217–18; Tollefsen, *supra* note 41, at 135–36.

49. See Finnis, *supra* note 38, at 20, see also MACLEOD, *supra* note 46, at 91.

50. MACLEOD, *supra* note 46, at 28.

51. Finnis, *supra* note 38, at 19.

52. *Id.* at 20.

53. See *id.* at 20–21.

54. See *id.* at 18; see also FINNIS, *supra* note 43, at 12; MACLEOD, *supra* note 46, at 28; Tollefsen, *supra* note 41, at 154.

55. George, *supra* note 40, at 63; see also Finnis, *supra* note 38, at 24–25.

56. Finnis, *supra* note 38, at 31; see also LEON R. KASS, LIFE, LIBERTY AND THE DEFENSE OF DIGNITY: THE CHALLENGE FOR BIOETHICS 241 (2002); George, *supra* note 40, at 67; Tollefsen, *supra* note 41, at 134.

very image of God.⁵⁷ Tellingly, for Aquinas, flourishing is a state of blessedness that is “a form of intellectual union with the Divine Creator.”⁵⁸ Practical reasonableness, then, is the guide for making choices that are consistent with justice, among other things.⁵⁹

Moral principles, in turn, are the product of the requirements of practical reasonableness.⁶⁰ Professor Finnis says morality is “another name for a fully reasonable concern for human flourishing in all its basic aspects, integrally considered.”⁶¹ Put another way, it is “integral, unfettered reasonableness.”⁶²

Choosing in accordance with practical reasonableness in turn leads to good habits, which engender character and virtues. These lead to the flourishing of both the individuals exercising choice and the communities they form, which constitutes the common good.⁶³ The common good “entails a reference to standards of fittingness or appropriateness relative to the basic aspects of human flourishing.”⁶⁴ In other words, practical reasonableness is oriented toward reasonableness⁶⁵ (again, good to be pursued and done, evil avoided⁶⁶), which then brings about basic human goods, which in turn advances the common good, which ultimately promotes human flourishing.

57. See *Genesis* 1:27; George, *supra* note 40, at 67.

58. Tollefsen, *supra* note 41, at 156.

59. See Finnis, *supra* note 38, at 51.

60. See FINNIS, *supra* note 43, at 103–27; MACLEOD, *supra* note 46, at 29–30.

61. John Finnis, *The Nature of Law*, in *THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW* (John Tasioulas ed., forthcoming 2018); see also 1 JOHN FINNIS, *Commensuration and Public Reason*, in *REASON IN ACTION* 233, 243 (2013); Finnis, *supra* note 38, at 19–20; George, *supra* note 40, at 59; Tollefsen, *supra* note 41, at 151, 153.

62. Finnis, *supra* note 61, at 249.

63. See Finnis, *supra* note 38, at 32–34; Finnis, *supra* note 61, at 239–40; George, *supra* note 40, at 74; Tollefsen, *supra* note 41, at 151. See generally George Duke, *The Common Good*, in *THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE*, *supra* note 38, at 369, 378–84 (analyzing different strands of conception of the common good in the natural law tradition). The common good is the good for each individual in the community and the community itself, not “the greatest good for the greatest number in the community.” FINNIS, *supra* note 43, at 168; MACLEOD, *supra* note 46, at 117.

64. FINNIS, *supra* note 43, at 164.

65. See Tollefsen, *supra* note 41, at 149 (“[T]he goodness of choice is to be found in its choosing in accordance with reason.”).

66. See AQUINAS, *supra* note 38, at 40 (I-II, q.94, a.2); see also Finnis, *supra* note 38, at 18–19; George, *supra* note 40, at 59.

If private property is a good according to practical reasonableness, contract, in turn, is one of the major means by which private property is shared and property rights are transferred.⁶⁷ In contracts, humans exercise dominion over private property,⁶⁸ manifested through the sharing of resources for the good of self and others.⁶⁹ Contract law is the legal means by which “at least one of the parties acquires a right in relation to some person, thing, act, or forbearance.”⁷⁰ In other words, “[c]ontract law ratifies and enforces our joint ventures” regarding possessions and personal services according to how we see fit.⁷¹ Private property and contract together have been identified as the “legal infrastructure of capitalism,” because there must be private entitlements to resources and a means to transfer those entitlements between private actors for the market system to function.⁷² John Stuart Mill understood property as inextricably bound up with contracts, as property constitutively assumes contracts.⁷³

Through contract, people deliberate about, choose for, and create a previously non-existent state of affairs relating to their resources in an exercise of their rational capacity.⁷⁴ Put another way, “[c]ontracts are a means of achieving the goal of practical reasonableness—the flourishing and the development of a ‘coherent plan of life.’”⁷⁵ Contract and freedom of contract are im-

67. See, e.g., *Ogden v. Saunders*, 25 U.S. 213, 346 (1827) (Marshall, J., dissenting) (asserting contract rights are derived from property rights); *id.* at 281–82 (Johnson, J. concurring).

68. See MACLEOD, *supra* note 46, at 2.

69. See *id.* at 79, 82.

70. REUBEN M. BENJAMIN, *GENERAL PRINCIPLES OF THE AMERICAN LAW OF CONTRACT* § 2 (2d. ed. 1907); see also Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 292 (1986) (“[C]ontract law deals with transfers of rights between rights holders.”); Nicholas C. Dranias, *Consideration as Contract: A Secular Natural Law of Contracts*, 12 TEX. REV. L. & POL. 267, 289 (2008).

71. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 1–2 (1981); see *id.* at 7.

72. Radin, *supra* note 32, at 1888.

73. See JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY* 218–20 (W. J. Ashley ed. 1909); see also RICHARD T. ELY, *PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH* 555 (1914); Radin, *supra* note 32, at 1889.

74. See Finnis, *supra* note 38, at 24; George, *supra* note 40, at 63; see also FRIED, *supra* note 71, at 7.

75. Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV.

portant to human flourishing because people generally enter into contracts to improve life in some way through the sharing of private property.⁷⁶ Freedom of contract is important to flourishing because no one but the individual should make the choice to enter into the contract freely for his own benefit, which is an exercise of the “requirements of practical reasonableness.”⁷⁷ Professor Adam J. MacLeod, in his work exploring the relationship of property to practical reasonableness, observes that “free choice is an essential ingredient of well-being.”⁷⁸ This is because one’s choices constitute oneself.⁷⁹ In

839, 891 (1999) (quoting FINNIS, *supra* note 43, at 103–05) (tracing the connection between contract law and Finnis’ practical reasonableness). This understanding has been present throughout the history of the church, which in turn informed the development and doctrines of contract law. See HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 190–208 (1993).

The Catholic Catechism states that God created the world in the beginning and entrusted its resources to the stewardship of humans. But as humans fell into sin and their stewardship was correspondingly marred by sin, “appropriation of property is legitimate for guaranteeing the freedom and dignity of persons and for helping each of them to meet his basic needs and the needs of those in his charge.” CATECHISM OF THE CATHOLIC CHURCH ¶ 2402 (1994). Moreover, “[a] significant part of economic and social life depends on the honoring of contracts between physical or moral persons—commercial contracts of purchase or sale, rental or labor contracts.” *Id.* ¶ 2410. “Contracts are subject to commutative justice which regulates exchanges between persons in accordance with a strict respect for their rights. Commutative justice obliges strictly; it requires *safeguarding property rights . . .*” *Id.* ¶ 2411 (emphasis added).

In the same vein, the Reformed view as stated by Philip Melancthon, one of the major figures of the Reformation and one of Martin Luther’s close associates, is that law recognizes that living life in society fundamentally requires humans to have some possessions. See PHILIP MELANCHTON, THE LOCI COMMUNES OF PHILIP MELANCHTON 113–16 (Charles Leander Hill trans., Boston Meador Publ’g Company 1944) (1521). It is best for things to be shared freely among friends, but because human greed does not always allow for this to happen, sharing of property must be governed by the principle of doing no harm to others. See *id.* Contract, then, is one of the ways for property to be shared, recognizing the reality of fallenness of human beings. See *id.*

Professor MacLeod has noted that arms-length resource-sharing creates a weaker moral connection than sharing with family members or sharing through charity because in an arms-length transaction such as the classic contract, each party looks out for his own interest, so each party must provide something of value to the other. See MACLEOD, *supra* note 46, at 82.

76. See MACLEOD, *supra* note 46, at 184–85; see also Morse, *supra* note 34.

77. See MACLEOD, *supra* note 46, at 24–25, 30, 107–10.

78. *Id.* at 157; see also JOSEPH RAZ, THE MORALITY OF FREEDOM 369, 370, 386–87, 390–95 (1986).

this way, free choice is freedom toward flourishing itself, or toward being fully human.⁸⁰ Thus it would be good for the state not to stand in the way of contracts but enforce them.

But boundaries in contract law are appropriate and, indeed, necessary. This is because humans, being rational (or having the capacity for reason) but imperfectly so, do not always enter into contracts consistent with the requirements of reason. In other words, they enter into contracts with non-rational motivations (“factors that . . . fetter reason”)⁸¹ or with practical *un*-reasonableness, which is inhospitable to the common good and thus inconsistent with human flourishing.⁸²

Property and contract law are for “ends that are objectively good” for the individual and those around him.⁸³ This reality, then, justifies both freedom of contract *and* limitation to that freedom.⁸⁴ If the ancient principle of loving one’s neighbor as oneself (that is, willing the good of that neighbor) underlies reasonableness, then contracting with non-rational motivations does not bring about the good of one’s neighbor.⁸⁵ Perhaps love of neighbor is worked out practically in the Golden Rule: do unto others what you want them to do unto you, which also entails not doing to others what you do not want them to do to you.⁸⁶ To that end, a few laws are moral absolutes, or exceptionless norms. They are derived from deductions from moral precepts and guard the boundaries of contract. Hence, the law

79. See FINNIS, *supra* note 61, at 239–40; MACLEOD, *supra* note 46, at 101; George, *supra* note 40, at 74.

80. See MACLEOD, *supra* note 46, at 33–34; Finnis, *supra* note 38, at 24.

81. Tollefsen, *supra* note 41, at 151. Compare Aristotle’s “*orthos logos*” with his students’ “*recta ratio*,” best understood as “unfettered reason.” 1 JOHN FINNIS, *Legal Reasoning as Practical Reason*, in REASON IN ACTION, *supra* note 61, 212, 215.

82. See FINNIS, *supra* note 81, at 215, 245; MACLEOD, *supra* note 46, at 27, 31, 32, 34–35, 55, 146, 160; George, *supra* note 40, at 66, 68; Tollefsen, *supra* note 41, at 151.

83. See MACLEOD, *supra* note 46, at 20.

84. See *id.* at 20, 33, 34–35.

85. See *Barger v. Barringer*, 66 S.E. 439, 442 (N.C. 1909); MACLEOD, *supra* note 46, at 151; see also Finnis, *supra* note 38, at 21, 39. The common law, of which contract law is a part, embodies this. The common law is rooted in reason: What was reasonable will typically always be reasonable, regardless of era. See ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* 9 (1966); MACLEOD, *supra* note 46, at 51. It was understood that common law judges patrol the boundaries of reason. See HOGUE, *supra*, at 9–10; MACLEOD, *supra* note 46, at 52.

86. See FINNIS, *supra* note 81, at 227.

recognizes no such thing as a contract to murder another or a contract to enslave oneself.⁸⁷ Freedom of contract would not be honored in these situations.

But many other laws, which Aquinas calls *determinatio*,⁸⁸ are not deductive and are thus more permissive than rationally compelling. They are still derived from natural law or the requirements of practical reason, but they require context-dependent judgment. These laws *still* justify boundaries. While these laws have a qualified nature, they are still appropriate and needed because of their “rational connection with some principle or precept of morality,”⁸⁹ when considered in their context.⁹⁰ In this way, these “[c]ontext-dependent norms guide deliberation toward more reasonable choices and actions and away from less reasonable choices.”⁹¹

One example of *determinatio* cited by Professor Finnis is traffic laws. Although a traffic law is in a sense authoritative, laid down as law by lawmakers, and in a sense arbitrary, because the law could have prescribed for driving on the left as opposed to the right side of the road, it is in another sense rooted in the good of practical reason: safety is a good thing, traffic can be dangerous, and traffic laws promote safety.⁹² Property law is another example. Laws regarding and protecting private property are justified and called for if material things are conducive to well-being.⁹³ But exactly what shape these laws take is not dictated by moral precepts. It is rather informed by the particular circumstances of a community—all still serving the good of practical reason.⁹⁴

Professor MacLeod poses an even more specific hypothetical with regard to use of one’s property and practical reason. Suppose a car wash business owner draws water for his business

87. See *id.* at 226–27, 246; see also FINNIS, *supra* note 43, at 283–84; MACLEOD, *supra* note 46, at 31, 169, 204; Finnis, *supra* note 38, at 43–44.

88. See AQUINAS, *supra* note 38, at 52 (I-II, q.95, a.2). The word could be translated as “implementation.” FINNIS, *supra* note 43, at 284 n.16.

89. FINNIS, *supra* note 38, at 267.

90. See FINNIS, *supra* note 43, at 284–89; MACLEOD, *supra* note 46, at 4, 7, 20, 21, 146, 158, 169, 205; RAZ, *supra* note 78, at 120, 381; Finnis, *supra* note 38, at 38.

91. MACLEOD, *supra* note 46, at 205.

92. See FINNIS, *supra* note 43, at 285.

93. See *id.* at 169–73; MACLEOD, *supra* note 46, at 12–13.

94. See FINNIS, *supra* note 43, at 285; see also MACLEOD, *supra* note 46, at 91.

from a stream on his property.⁹⁵ How should he draw water so that his business is provided for while leaving water for his downstream neighbors?⁹⁶ He needs the good of practical reasonableness to guide his decisions in acting reasonably toward his family, for whom he is providing through his business, as well as his customers, his employees, and his downstream riparian neighbors.⁹⁷ With regard to contract law, the common law doctrine of unconscionability has been a matter of *determinatio*. Through the unconscionability doctrine, the law has historically recognized that, having weighed the circumstances bearing on the facts of the case, certain things are not properly predicated on the parties' consent in their freedom of contract.⁹⁸

Ultimately, contract law is concerned about justice, and justice is a necessary component of the common good and flourishing.⁹⁹ To revisit, Aquinas says law is an ordinance of *reason* for the *common good* of a community, promulgated by the person responsible for looking after that community.¹⁰⁰ Additionally, he says "law is nothing other than a certain dictate (*dicatam*) of *practical reason* on the part of a ruler who governs some complete community."¹⁰¹ Indeed, Aristotle thought that without *justice* as a political good, there would be no *eudaimonia*, or flourishing of members of the polis (political community).¹⁰² Thus justice is constitutive of the common good because "[t]he requirements of justice . . . are the concrete implications of the basic requirement of practical reasonableness that one is to favour and foster the common good of one's communities."¹⁰³ It is an "other-directed virtue."¹⁰⁴

95. See MACLEOD, *supra* note 46, at 29–30.

96. See *id.*

97. See *id.*

98. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

99. See FINNIS, *supra* note 38, at 38, 41, 46, 51, 53.

100. AQUINAS, *supra* note 38, at 7 (I-II, q.90, a.4); see also FINNIS, *supra* note 38, at 255–56; FINNIS, *supra* note 38, at 37.

101. AQUINAS, *supra* note 38, at 8 (I-II, q.91, a.1), 20 (I-II, q.92, a.1) (emphasis added); see also FINNIS, *supra* note 38, at 37.

102. Duke, *supra* note 63, at 373.

103. FINNIS, *supra* note 43, at 164.

104. Duke, *supra* note 63, at 392.

Law fits into this as “the most effective instrument for achieving the morally obligatory goal of the common good.”¹⁰⁵ Law is the result of the lawmakers’ deliberations of the greater and lesser good (or evil), which involves weighing and *prioritizing* the available options before them.¹⁰⁶ In laws that are *determinatio*, these considerations include a host of principles fulfilling the requirements of practical reason, some of which are more intimate and some more remote to practical reason.¹⁰⁷ The standards by which lawmakers should weigh and prioritize options, in turn, are moral standards—the specification of what makes people flourish, with all the elements of flourishing and basic goods taken together.¹⁰⁸ On law, justice, the common good, and human flourishing, Professor Finnis remarks:

[W]hat is needed to attain great goods such as a community living in peace, *justice* and prosperity rather than in anarchy, general poverty, unchecked injustices, and/or tyranny[?] . . . [T]hose great goods cannot be had without *laws*, property, and *contracts*; so we need laws and fidelity to laws; and we need systems (legal or conventional) of allocating and upholding property rights, and of promising and respecting promises.¹⁰⁹

II. WHAT IT MEANS TO BE HUMAN

Interestingly, opposition to surrogacy makes for strange bedfellows: feminists;¹¹⁰ the Catholic Church;¹¹¹ bioethicists and

105. *Id.* at 390. This is due to its power in resolving coordination problems among members of a community. *See id.* at 383, 390 (discussing John Finnis’ view of the subject); *see also* FINNIS, *supra* note 81, at 219; FINNIS, *supra* note 43, at 232. Thus law enables the “fair and peaceful coordination which fully respects the rights of every member of the community.” Finnis, *supra* note 61, at 252.

106. Finnis, *supra* note 61, at 234, 243 (emphasis added).

107. FINNIS, *supra* note 43, at 286.

108. Finnis, *supra* note 61, at 243.

109. Finnis, *supra* note 38, at 39 (emphasis added).

110. *See* RENATE KLEIN, SURROGACY: A HUMAN RIGHTS VIOLATION i, 102–03 (2017); MARGARET JANE RADIN, CONTESTED COMMODITIES 150 (1996); Lahl, *supra* note 9, at 292; Hartocollis, *supra* note 4; Anna Momigliano, *When Left-Wing Feminists and Conservative Catholics Unite*, ATLANTIC (Mar. 28, 2017), <https://www.theatlantic.com/international/archive/2017/03/left-wing-feminists-conservative-catholics-unite/520968> [<https://perma.cc/M37F-HFK5>]; Sloan, *supra* note 5.

111. *See* CATECHISM, *supra* note 75, ¶ 2376; Momigliano, *supra* note 110.

medical professionals;¹¹² academics;¹¹³ progressive European nations such as France, Germany, Italy, Spain, Sweden, and Switzerland;¹¹⁴ and conservative nations such as Thailand and Cambodia.¹¹⁵ What unites these seemingly disparate groups? What common cause of humanity do they see? And of particular interest to this Article, what is the relationship between surrogacy contracts and justice, the common good, and human flourishing?

First, what does it mean to be more fully human, not less, in the context of the issue of surrogacy—that is, toward, and not away from, flourishing? Of the nature of human beings and procreation, ethicist and professor Oliver O'Donovan says,

Our offspring are human beings, who share with us one common human nature, one common human experience and one common human destiny But that which we make is *unlike* ourselves In that it has a human maker, it has come to existence as a human project, its being at the disposal of mankind. It is not fit to take its place alongside mankind in fellowship To speak of 'begetting' is to speak of . . . the possibility that one may form another being who will share one's own nature, and with whom one will enjoy a fellowship based on radical equality.¹¹⁶

112. Lahl, *supra* note 9, at 287; Lewin, *supra* note 21.

113. See, e.g., Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139, 148–49 (1990); Smolin, *supra* note 1, at 269; BREEDERS, *supra* note 7 (featuring Professor O. Carter Snead's concerns regarding surrogacy); Lewin, *supra* note 21 (quoting Professor Abby Lippman's concern about the modification of women and their bodies in surrogacy).

114. See, e.g., Finkelstein et al., *supra* note 14, at 86–87; Lewin, *supra* note 21; Momigliano, *supra* note 110; see also Garcia, *supra* note 8, at 79–83. The European Parliament called surrogacy "an exploitation of the female body and her reproductive organs." Resolution on Priorities and Outline of a New EU Policy Framework to Fight Violence Against Women, EUR. PARL. DOC. P7_TA0127 (2011). The Parliamentary Assembly of the Council of Europe also declined to legalize (or even allow with regulations) surrogacy across all member states. *Council of Europe Rejects Surrogacy*, ADF INT'L (Oct. 11, 2016), <http://adfinternational.org/detailspages/press-release-details/council-of-europe-bans-surrogacy> [https://perma.cc/R7FU-TH5A].

115. See Kajsa Ekis Ekman, *Cristiano Ronaldo: Women Are Not Your Baby Factories*, STOP SURROGACY NOW, <http://www.stopsurrogacynow.com/cristiano-ronaldo-a-woman-is-not-a-factory/> [https://perma.cc/C44G-TAF5].

116. OLIVER O'DONOVAN, BEGOTTEN OR MADE?: HUMAN PROCREATION AND MEDICAL TECHNIQUE 1–2 (1984); see also *id.* at 15.

If we are begotten and not made, what might be some boundaries as to what we should not do to ourselves and to our children in the realm of procreation? In the exploration that follows, this Article submits with Professor O'Donovan that human flourishing is found within, not without those boundaries.¹¹⁷ Physician and professor Leon R. Kass puts it this way in an analogy: it is the limitation of gravity that allows the dancer to dance.¹¹⁸

That there would be boundaries makes sense given the framework already laid out above. Practical reasonableness requires contract law, for example, to encompass *both* the boundaries around contract law *and* robust freedom of contract within it. These demarcations promote justice, a necessary component of the common good, which in turn leads to human flourishing.¹¹⁹ When we deny these boundaries, we actually become *less* of ourselves, *less* than fully human: We *dehumanize* ourselves—we “imperil[] what it is to be human.”¹²⁰ This, of course, does not contribute to the common good.¹²¹

The irony of justifying surrogacy arrangements on the basis of freedom of contract is that instead of becoming freer, we paradoxically become *less* free when proper boundaries are ignored. Professor O'Donovan remarks:

[T]o enjoy any freedom of spirit, to realize our possibilities for action of any kind, we must cherish nature in this place where we encounter it, we must defer to its immanent laws . . . Human freedom has a natural substrate, a presupposition. Before we can evoke and create new beings which conform to the laws we lay down for them by our making,

117. *See id.* at 5.

118. KASS, *supra* note 56, at 18.

119. *See* O'DONOVAN, *supra* note 116, at 28. In a chapter entitled “Sex by Artifice” and speaking particularly about transgenderism, Professor O'Donovan makes the following point, which is also applicable to surrogacy by way of parties' consent:

[T]he fact of the patient's voluntary co-operation in such a procedure, though important, is not all-important. Not everything to which people will consent, or which they will even demand, is the right thing for *medicine* to undertake. For Western medicine is premised on a principle of Western Christian culture, that bodily health is a good to be pursued and valued for its own sake.

Id.

120. *Id.* at 3.

121. *Id.* at 29.

we have to accept this being according to its own laws which we have not laid down. If, by refusing its laws and imposing our freedom wantonly upon it, we cause it to break down, *our freedom breaks down with it*.¹²²

How we naturally reproduce is “given to us in the structure of human nature as we have received it.”¹²³ But our technological culture has transformed human procreation,¹²⁴ and is itself wedded to the “abolition of limits which constrain and direct us.”¹²⁵ That is, when a culture understands human nature and human bodies as raw material or an artifice, out of which something is to be *made*, “there is no restraint in action which can preserve phenomena which are not artificial.”¹²⁶ This raw materialistic view has been extended to sexuality;¹²⁷ to the process of reproduction, through the use of IVF¹²⁸ and surrogate wombs;¹²⁹ and to the children who are made, not begotten.¹³⁰

Several aspects of surrogacy are of interest here. First, the procedures involved in surrogacy are categorized as medical procedures.¹³¹ But while medicine used to be about treating illness, biotechnology or medical technique within the context of the technological culture is now applied to healthy bodies, such

122. *Id.* at 5 (emphasis added).

123. *Id.* at 15.

124. *Id.* at 2.

125. *Id.* at 6; Professor O’Donovan goes on to identify the technological culture with the scientific culture:

To achieve the goal of freedom, we objectify ourselves; we take our biology from being that which we *live*, to be that which we *observe*, and so to be that which we *conquer*. This is the way of human self-transcendence that is proposed to us within a liberal scientific culture . . . In a scientific culture it is by making things the object of *experimental knowledge* that we assert our transcendence over them.

Id. at 62; see also KASS, *supra* note 56, at 32–33, 35, 134, 138.

126. O’DONOVAN, *supra* note 116, at 3; see also *id.* at 19.

127. See *id.* at 29.

128. For O’Donovan’s observations on IVF, see *id.* at 31–48.

129. See *id.* at 46.

130. *Id.* at 85–86.

131. See, e.g., *Medical Procedures*, SURROGACY EXPERIENCE, <http://www.thesurrogacyexperience.com/medical-procedures.html> [https://perma.cc/CLD2-KBUH]; *Surrogates: 8 Steps of the Surrogate Medical Process*, SURROGATE.COM, <https://surrogate.com/surrogates/pregnancy-and-health/medical-process-for-a-surrogate> [https://perma.cc/X2ZJ-DFD7].

as pregnancy.¹³² To the extent that surrogacy is used to overcome infertility for the commissioning parents, it is used not as a cure, but as a circumvention.¹³³ Scholars have questioned the propriety of using medicine and technology to encroach upon such matters, even when the circumstances involved are as heartbreaking as infertility.¹³⁴

A second aspect of surrogacy is the unlinking of marital intimacy and procreation. This has led to being *less* human and *less* free.¹³⁵ It has injured marriages;¹³⁶ artificialized sex;¹³⁷ set up “primal sexuality”¹³⁸ as its own “fully autonomous”¹³⁹ end; and furthered the pornographic culture that debases sexual intimacy.¹⁴⁰ Professor Finnis has remarked that the decoupling of intimacy and procreation reduces marital union to nothing more than “mutual masturbation.”¹⁴¹ If the birth-control pill has made possible sex without babies, IVF and surrogacy have made possible babies without sex.¹⁴²

III. SURROGACY AND DEHUMANIZATION

Although a deep desire for a genetic offspring is etched into our being, there are costs to surrogacy that must be weighed. Commissioning parents have a strong and innate desire to have a child of their own genetic make-up—and after the deep pain and devastation of infertility, the child obtained through surrogacy is very much wanted and loved.¹⁴³ But at what cost

132. See O'DONOVAN, *supra* note 116, at 6, 28.

133. *Id.* at 32, 68; see also KASS, *supra* note 56, at 109–10; Garcia, *supra* note 8, at 79; Smolin, *supra* note 1, at 288, 298 (referring to technology as a “double-edged sword”).

134. O'DONOVAN, *supra* note 116, at 69–70; see also KASS, *supra* note 56, at 109–10.

135. See O'DONOVAN, *supra* note 116, at 17; Smolin, *supra* note 1, at 281–82.

136. O'DONOVAN, *supra* note 116, at 17–18.

137. *Id.* at 19.

138. MARK REGNERUS, *CHEAP SEX: THE TRANSFORMATION OF MEN, MARRIAGE, AND MONOGAMY* 33 (2017) (internal quotation marks omitted).

139. ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY* 27 (1992).

140. O'DONOVAN, *supra* note 116, at 20, 74.

141. JOHN FINNIS, *C.S. Lewis and Test-Tube Babies*, in *HUMAN RIGHTS & COMMON GOOD* 273, 281 (2013).

142. See KASS, *supra* note 56, at 99 n.**.

143. See KASS, *supra* note 56, at 95–96; Sarah-Vaughan Brakman & Sally J. Scholz, *Adoption, ART, and a Re-Conception of the Maternal Body: Toward Embodied Maternity*, 21 *HYPATIA* 54, 60 (2006); see also ROBERTSON, *supra* note 27, at 24, 32, 98, 119,

to the individual and common good is the arrangement made? Put another way, against the worthy interest of one party to the surrogacy contract (the commissioning parents), how might surrogacy affect the other party to the contract (the birth mother)? Furthermore, how might it affect the resulting child, whom the contract brings into being and whose existence is affected greatly by the contract, but who is not a party to it?¹⁴⁴

A. Surrogacy and the Birth Mother

1. Important Bonds Between Birth Mother and Child Are Trivialized

Professor Margaret Jane Radin, in examining certain things that should be inalienable in the market, speaks of “a deep bond between a baby and the woman who carries it . . . created by shared life,” apart from DNA or genetic connection.¹⁴⁵ The birth mother is undeniably a mother to the child,¹⁴⁶ a “physiological” one,¹⁴⁷ and he is forever a part of her. Carrying a child and sustaining his life in the womb is an unseverable part of being a mother. But due to the surrogacy contract, the child is intentionally and contractually severed from a relationship with her.¹⁴⁸

To elaborate, although the baby is his own being,¹⁴⁹ he is both separate and not separate from the birth mother.¹⁵⁰ There is a “fluidity of the boundary between [mother] and [child]

137; Ford, *supra* note 20, at 81–82; Radin, *supra* note 32, at 1931; BREEDERS, *supra* note 7; Alex Kuczynski, *Her Body, My Baby*, N.Y. TIMES MAG. (Nov. 28, 2008), <https://nyti.ms/2jE7muq> [<https://perma.cc/WY28-Q6KG>]; Smith, *supra* note 3.

144. Lahl, *supra* note 9, at 289. With regard to focusing on birth mother and child, see, for example, SHANLEY, *supra* note 7, at 104. Far from being concerned with mere “notions of right behavior” in surrogacy contracts, as Professor Robertson suggests is the case with critics of surrogacy, ROBERTSON, *supra* note 27, at 41, this Article attempts to consider how surrogacy affects the birth mother and child.

145. Radin, *supra* note 32, at 1932 n.284; see also BREEDERS, *supra* note 7.

146. Smolin, *supra* note 1, at 309; see also Lahl, *supra* note 12.

147. O’DONOVAN, *supra* note 116, at 44.

148. See ROBERTSON, *supra* note 27, at 22, 32–33; see also BREEDERS, *supra* note 7.

149. See ROBERT P. GEORGE, CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM 196 (2013); ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE 27–56 (2008).

150. SHANLEY, *supra* note 7, at 112.

during the pregnancy.”¹⁵¹ This embodiment matters and ought to be gravely considered in the context of contracting away gestational services.¹⁵²

Medical sociologist Barbara Katz Rothman states:

If you are pregnant with a baby, you are the mother of the baby that you’re carrying. End of discussion. The nutrients, the blood supply, the sounds, the sweep of the body. That’s not somebody standing in for somebody else to that baby. That’s the only mother that baby has.¹⁵³

Although the child’s genetic make-up (often of the commissioning parents) is indisputably important and fundamental as a matter of identity, the growing science of epigenetics, sketched as follows, testifies to the biological parentage of the birth mother.

Oxytocin, a hormone present in higher quantities in pregnancy and released in labor and birth to promote bonding between mother and newborn child, “imprints the baby on the mother, and the mother on the baby.”¹⁵⁴ Fascinatingly, scientists have also found DNA from male babies on their mothers’ brains—potentially remaining there for life.¹⁵⁵ Other studies

151. *Id.*; see also ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 47 (1976); IRIS MARION YOUNG, *Pregnant Embodiment: Subjectivity and Alienation*, in *ON FEMALE BODY EXPERIENCE: “THROWING LIKE A GIRL” AND OTHER ESSAYS* 46, 49 (2005).

152. SHANLEY, *supra* note 7, at 123; see also Cherry, *supra* note 10, at 280.

153. Sloan, *supra* note 5. Catherine Lynch, an Australian attorney and scholar on surrogacy, agrees:

The gestational mother is the only person the child knows when [he is] born [T]he destruction of [the mother-child relationship] damages both mother and child. The gestational mother is the natural parent of her own child, whether or not she used her own eggs or implanted a donor embryo.

Lynch, *supra* note 32.

154. Paige Comstock Cunningham, *Taking Another Look at Surrogacy*, 21 *DIGNITAS* 2, 2 (2014); Ari Levine et al., *Oxytocin During Pregnancy and Early Postpartum: Individual Patterns and Maternal-Fetal Attachment*, 28 *PEPTIDES* 1162, 1167–68 (2007); Miho Nagasawa et al., *Oxytocin and Mutual Communication in Mother-Infant Bonding*, 6 *FRONTIERS HUMAN NEUROSCI.* 1, 5–6 (2012); Linda Palmer, *Bonding Matters . . . The Chemistry of Attachment*, *BABYREFERENCE.COM* (Aug. 6, 2013), <http://babyreference.com/bonding-matters-the-chemistry-of-attachment/> [https://perma.cc/D94Y-Q9KT].

155. Cunningham, *supra* note 154, at 2; Fred Hutchinson Cancer Research Ctr., *Male DNA Commonly Found in Women’s Brains, Likely from Prior Pregnancy with a*

have observed a similar phenomenon: the presence of male DNA in mothers' bloodstreams, as long as twenty-seven years after birth.¹⁵⁶ One science writer put it this way: "The connection between mother and child is ever deeper than thought."¹⁵⁷ These findings suggest that a child is, quite literally, a part of the mother long after she carries him in her womb and gives birth.

Dr. Ingrid Schneider of the University of Hamburg's Research Center for Biotechnology, Society and the Environment agrees.¹⁵⁸ Surrogacy has been made illegal in Germany for good reason:

[T]he bonding process between a mother and her child starts earlier than at the moment of giving birth. It is an ongoing process during pregnancy itself, in which an intense relationship is being built between a woman and her child-to-be. These bonds are essential for creating the grounds for a successful parenthood, and in our view, they protect both the mother and the child.¹⁵⁹

Indeed, science suggests that the term "biological parents" in surrogacy should include the birth mother as well as the genetic parents.

Relatedly, Harold J. Cassidy, the lead attorney who represented Mary Beth Whitehead, the birth mother in the Baby M case, stated: "The report [by the New Jersey Bioethics Commission] strongly condemned all forms of surrogacy, including so-called 'gestational carrier' arrangements It noted that *every evil associated with surrogacy where the birth mother is genetically related to the child is also present in gestational surrogacy, where she is not genetically related.*"¹⁶⁰

Male Fetus, SCI. DAILY (Sept. 26, 2012), <https://www.sciencedaily.com/releases/2012/09/120926213103.htm> [<https://perma.cc/V3H2-3JWR>]; Robert Martone, *Scientists Discover Children's Cells Living in Mothers' Brains*, SCI. AM. (Dec. 4, 2012), <http://www.scientificamerican.com/article/scientists-discover-childrens-cells-living-in-mothers-brain/> [<https://perma.cc/2UMJ-XQXN>].

156. See Diana W. Bianchi et al., *Male Fetal Progenitor Cells Persist in Maternal Blood for As Long As 27 Years Postpartum*, 93 PROCEEDINGS NAT'L ACAD. SCI. U.S. 705, 706–07 (1996); Vijayakrishna K. Gadi & J. Lee Nelson, *Fetal Microchimerism in Women with Breast Cancer*, 67 CANCER RES. 9035, 9037–38 (2007).

157. Martone, *supra* note 155.

158. See Lewin, *supra* note 21.

159. *Id.*

160. Lahl, *supra* note 9, at 290 (emphasis added); Harold Cassidy, *The Surrogate Uterus: Baby M and the Bioethics Commission Report*, PUB. DISCOURSE (Sept. 6, 2012),

Forfeiture of the powerful bonds between mother and child through surrogacy contracts constitutes extreme alienation—it is an “invasion of the market” in a deep, very private realm.¹⁶¹ This is so because the womb should not be thought of or treated as “raw material[].”¹⁶² Studies show many women would consider themselves to be a mother to a baby they carry in their wombs, even if the baby is not related to them genetically; in their minds, the gestational tie binds them to the baby as much as a genetic tie.¹⁶³ Certainly birth mother Anna Johnson felt that way in the *Johnson v. Calvert* case with regard to the baby she carried and gave birth to under contract with the Calverts.¹⁶⁴ The California Supreme Court did not disagree with her in holding that “two women each have presented acceptable proof of maternity,”¹⁶⁵ although it ultimately ruled that the genetic tie trumps the gestational tie.¹⁶⁶ The story of another birth mother, Diane, is illustrative: “Because she was [previously] a mother, she recognized that she had bonded as a mother with the child in her womb, and she felt responsible for him.”¹⁶⁷ Another birth mother, Heather Rice, gave birth to a child whose commissioning parents had asked to be aborted due to a cleft in the brain. She did not know what happened to the child after he was born;¹⁶⁸ it is possible that the commissioning parents ultimately gave up the child for adoption.¹⁶⁹ Ms. Rice’s sentiments were revealing. In her words: “I don’t know where he is, and it kills me every day.”¹⁷⁰ In yet another example, a woman recounts a birth mother’s experience: “What broke my heart was that she did not even know if she had given birth to a girl

<http://www.thepublicdiscourse.com/2012/09/6211/> [<https://perma.cc/YXA7-FY7J>] (emphasis added). Professor Smolin would agree with this. See Smolin, *supra* note 1, at 322–25. If that is the case, the objection to surrogacy due to baby-selling takes on greater significance. See *infra* notes 205, 326.

161. SHANLEY, *supra* note 7, at 113; see Elizabeth S. Anderson, *Is Women’s Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 75 (1990).

162. See SHANLEY, *supra* note 7, at 121.

163. See *id.* at 114; BREEDERS, *supra* note 7 (documenting birth mothers’ testimonies).

164. 851 P.2d 776, 781 (Cal. 1993); Lahl, *supra* note 9, at 290; Lahl, *supra* note 12.

165. *Johnson*, 851 P.2d at 782.

166. *Id.*; see also SHANLEY, *supra* note 7, at 115.

167. Lahl, *supra* note 9, at 288.

168. See Lewin, *supra* note 21.

169. See *id.*

170. *Id.*

or boy. They took the baby away before she was allowed to even catch a glimpse of her own child.”¹⁷¹

Perhaps it would be wise to heed the following from Jennifer Lahl, President of the Center for Bioethics and Culture Network: “Women aren’t just empty vessels. The womb isn’t arbitrary Women aren’t breeders.”¹⁷² Given the background understanding that human beings should be begotten, not made, and that how we procreate to that end matters very much,¹⁷³ the womb is not arbitrary indeed.

How do birth mothers fare after birth? There is, unfortunately, not an abundance of data, but the available evidence does not unequivocally affirm that birth mothers are doing well.¹⁷⁴ A longitudinal study from 2015 assessed birth mothers ten years after birth. It revealed mainly positive experiences reported by the birth mothers, albeit with methodological limitations.¹⁷⁵ The authors of the study concede that the study was disadvantaged by its small sample size and assert that it is unclear whether its generally positive findings should be applied to surrogacy arrangements beyond the United Kingdom.¹⁷⁶ The authors also underscore the need for more studies of commercial surrogacy arrangements, whose outcomes may be less beneficial than those of the altruistic arrangements on which the study was based.¹⁷⁷

171. Julie Bindel, *Women in India Suffer as They Serve as Surrogates*, STOP SURROGACY NOW, <http://www.stopsurrogacynow.com/women-in-india-suffer-as-they-serve-as-surrogates/> [https://perma.cc/3UC9-C2HL].

172. BREEDERS, *supra* note 7.

173. *See supra* Part II.

174. Studies and accounts of how birth mothers fare after birth often conflict. Compare Ciccarelli & Beckman, *supra* note 26, at 31–35 (2005), and Vasanti Jadva et al., *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUMAN REPROD. 2196, 2203–04 (2003) (documenting mainly positive overall experiences with surrogacy, though not categorically so), with BREEDERS, *supra* note 7 (documenting negative experiences in surrogacy). The authors of the studies that report overall positive experiences acknowledge that despite the generally positive findings, the studies are disadvantaged by limited data and various methodological problems, including small sample size, recall bias, and risk of social desirability bias. Ciccarelli & Beckman, *supra* note 26, at 24, 29; Jadva et al., *supra*, at 2203–04.

175. Jadva et al., *Surrogate Mothers 10 Years on: A Longitudinal Study of Psychological Well-Being and Relationships with the Parents and Child*, 30 HUM. REPROD. 373, 377–78 (2014).

176. *Id.* at 378.

177. *Id.*

IVF and surrogacy inevitably introduce the messy question of who ought to occupy parental roles.¹⁷⁸ Legal philosopher Anca Gheaus argues that if children are products of scientists' laboratory work,¹⁷⁹ then the person who has the strongest claim to parenthood is the one who has paid the greatest cost in bearing the child through pregnancy and who is, therefore, the most intimate with that child through the shared experiences of pregnancy, birth, and the post-partum process.¹⁸⁰ Gheaus traces the "uniquely privileged context for developing a bond" that is "rooted in bodily experiences" between birth mother and child—including pregnancy, labor, birth, and the post-partum process—leading to maternal instinct.¹⁸¹ Thus she asserts that the birth mother has a stronger claim to keep, raise, and parent the baby than the commissioning parents in gestational surrogacy, *despite* the commissioning parents' genetic relationship to the baby.¹⁸² It should be noted, though, that she remains "agnostic" about whether such a parental right can be alienable in a surrogacy contract.¹⁸³

And what of women who do *not* develop a bond with the baby they are carrying for the commissioning parents? Gheaus asserts that, because the intimate bond between the birth mother and the baby is the norm rather than the exception, that normative bond is sufficient as the basis of a right of the birth mother to keep and rear the baby.¹⁸⁴ She even goes a step further and asserts that if the birth mother, as an outlier, does *not* develop a bond with the baby *but the baby does* with her, it may

178. See O'DONOVAN, *supra* note 116, at 45, 48; see also SPAR, *supra* note 10, at 71

179. See *infra* Section III.B.1.

180. See Anca Gheaus, *The Right to Parent One's Biological Baby*, 20 J. POL. PHIL. 432, 446–51 (2012).

181. See *id.* at 449–50.

182. See *id.* at 446–51. This weakens the argument made by some that the birth mother is not a mother to the child she is carrying. That argument is also reductionistic in that it devalues her as no more than an incubator. See Arshagouni, *supra* note 8, at 814; BREEDERS, *supra* note 7. The argument that gestating a child for someone else is a mere difference of degree from, say, babysitting for or being in charge of someone else's child at a boarding school, see Arshagouni, *supra* note 8, at 831–32, is unpersuasive. Being a gestational or birth mother is different in *kind* from the aforementioned hypotheticals.

183. Gheaus, *supra* note 180, at 454.

184. See *id.* at 450–52.

be sufficient to give rise to the right of the birth mother to be the one who raises the child.¹⁸⁵

Given the above, is it right to contract away one of the parents of the child? A child is fragmented and damaged by not being raised, known, and loved by his biological parents (that is, his genetic parents¹⁸⁶ and his birth mother) in the practice of surrogacy. A birth mother loses a part of herself as well when her intimate connection with the child is severed. These are strong reasons to favor prohibition of commercial surrogacy.

2. *Inalienability of the Womb and Gestational Services*

The popular 1990's sitcom *Friends* put it this way when Phoebe, one of the characters in the show, became a surrogate for her half-brother and his wife: "I'm just the oven; it's totally their bun."¹⁸⁷ But certain things are not appropriate to be contracted away—they are too sacred.¹⁸⁸ The womb and gestational services ought not be alienable,¹⁸⁹ because pregnancy or gestating is unlike other kinds of labor that women do which they may offer in a contract.¹⁹⁰ It is part of who the woman is, down to her core.¹⁹¹ It is not and should not be thought of as an em-

185. See *id.* at 452 n.46.

186. Professor Melissa Moschella has argued compellingly that children have a fundamental right to their genetic parents. See Melissa Moschella, *Rethinking the Moral Possibility of Gamete Donation*, 35 THEORETICAL MEDICINE & BIOETHICS 421, 433–37 (2014) [hereinafter Moschella, *Rethinking*]; Melissa Moschella, *The Wrongness of Third-Party Assisted Reproduction: A Natural Law Account*, 22 CHRISTIAN BIOETHICS 104, 105 (2016) [hereinafter Moschella, *Wrongness*]; Melissa Moschella, *The Rights of Children: Biology Matters*, PUB. DISCOURSE (Feb. 20, 2014), <http://www.thepublicdiscourse.com/2014/02/11620/> [<https://perma.cc/2UL2-VP4K>] [hereinafter Moschella, *The Rights of Children*].

187. *Friends: The One with Phoebe's Uterus* (NBC television broadcast Jan. 8, 1998); see Gelmann, *supra* note 13, at 159.

188. See Lahl, *supra* note 9, at 292.

189. See KASS, *supra* note 56, at 114 (in the context of bioethics in general, including the practice of surrogacy), 190 (in the related context of thinking of the body in a proprietary sense with regard to organ sale); Browne-Barbour, *supra* note 10, at 475–80; Radin, *supra* note 32, at 1933; Lahl, *supra* note 9, at 292.

190. See SHANLEY, *supra* note 7, at 108, 111–13; Healy, *supra* note 24, at 114. This is especially true as a response to the feminist position of "her body, her right." See SHANLEY, *supra* note 7, at 105–07; see also ROBERTSON, *supra* note 27, at 141.

191. See KASS, *supra* note 56, at 190 (in the related context of thinking of the body in a proprietary sense with regard to organ sale).

ployment contract.¹⁹² Those who argue that a surrogacy arrangement is nothing other than a service contract miss this point.¹⁹³ Indeed, the human body is not appropriately thought of in quantitative measures.¹⁹⁴ Surrogacy, by contrast, treats the birth mother's womb as the object with which to "maximize monetizable wealth."¹⁹⁵ Surrogacy "employs women to produce children"¹⁹⁶ and creates a market in womb-renting.¹⁹⁷ Professor Mary Lyndon Shanley, writing from a feminist perspective, asserts that the objectification and alienation of the woman in selling gestational services are so extreme that the contract is by nature illegitimate.¹⁹⁸ In a surrogacy contract, it is motherhood itself that is exchanged for money.¹⁹⁹ Thus the birth mother's contractual arrangement in surrogacy exploits her by objectifying and commodifying her. She is reduced from a whole person to a commodity: a rent-a-womb, raw material.²⁰⁰

That the birth mother is reduced to a rent-a-womb is evidenced by how her lifestyle and health are of interest only to

192. SHANLEY, *supra* note 7, at 121.

193. See, e.g., Arshagouni, *supra* note 8, at 822–26, 843.

194. See KASS, *supra* note 56, at 194. It is worthwhile to contrast that while organ-selling is illegal, commercial surrogacy is not. See Lahl, *supra* note 12. Womb-renting is arguably even more objectionable than organ-selling, see KASS, *supra* note 56, at 190–96, as gestational services are intrinsic to matters of genesis and identity of the persons involved. See RADIN, *supra* note 110, at 161; *supra* Section III.B.2.

195. Radin, *supra* note 32, at 1885–86, 1928–36 (analyzing surrogacy and other related matters through the lens of universal market rhetoric).

196. SPAR, *supra* note 10, at 94. A U.K. couple said the following about two Indian women who were each pregnant with twins for them in a commercial surrogacy arrangement: "She's doing a job for us[;] how often do you communicate with your builder or your gardener?" Poonam Taneja, *The Couple Having Four Babies by Two Surrogates*, BBC (Oct. 28, 2013), <http://www.bbc.com/news/uk-24670212> [<https://perma.cc/5HKV-BV5Q>]. It should be noted that commercial surrogacy is prohibited in the U.K., which is why the couple went outside the country for these commercial surrogacy arrangements. See *id.* With regard to how the birth mother is treated in the industry, a feminist who is critical of surrogacy says, "She is not the appendage of the machine, she *is* the machine." Ekman, *supra* note 115.

197. See SPAR, *supra* note 10, at xv.

198. See SHANLEY, *supra* note 7, at 113–14.

199. Even proponents of surrogacy recognize the motherhood of the birth mother. See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993); SPAR, *supra* note 10, at 93; Margalit, *supra* note 10, at 426.

200. See KASS, *supra* note 56, at 100, 101. One reason that such a view is reductionistic is that it is the woman's entire body that is working to sustain the pregnancy, not just the womb. See Lahl, *supra* note 9, at 293; see also BREEDERS, *supra* note 7.

the extent that they affect the baby that she is supposed to gestate per the contract.²⁰¹ One birth mother, being interviewed about her experience, said that she had been “classified as an incubator” and discussed not as a person with a name, but simply as a surrogate uterus.²⁰²

Scholars have noted the similarities between surrogacy and prostitution,²⁰³ slavery,²⁰⁴ and baby-selling.²⁰⁵ The argument advanced by proponents of surrogacy that a surrogacy contract is not slavery or baby-selling, but merely the contract for *services* of a woman to gestate, is disturbingly similar to the argument made by nineteenth-century proponents of slavery: they were not in the business of buying and selling human beings, but rather the *labor* of those human beings.²⁰⁶ Speaking in the context of the ancient practice of surrogacy in the story of Abraham and Hagar told in the book of Genesis, Professor O’Donovan aptly remarks:

If we have doubts about the possibility of personal representation in the work of procreation, are our doubts not precisely the same doubts that we have about the institution of slavery itself—namely a repugnance at the thought that the personal powers of any human being, such as the power to beget children, could come to be regarded as the property of another?²⁰⁷

3. *The Large Print Giveth Not, and the Small Print Taketh Away*

Contrary to how some characterize the birth mother as nothing more than a gestational carrier who was never a mother to begin with,²⁰⁸ even proponents of surrogacy recognize that it is

201. See SPAR, *supra* note 10, at xvi, 81; Lahl, *supra* note 12.

202. See BREEDERS, *supra* note 7 (documenting the experience of a birth mother named Gail).

203. See, e.g., RADIN, *supra* note 110, at 140; SPAR, *supra* note 10, at 82–83; Radin, *supra* note 32, at 1921, 1925, 1934–35 (in the context of traditional surrogacy); Smolin, *supra* note 1, at 282–83; Lewin, *supra* note 21.

204. See, e.g., O’DONOVAN, *supra* note 116, at 42; Allen, *supra* note 113, at 141–46; Smolin, *supra* note 1, at 283, 318–22.

205. See, e.g., SPAR, *supra* note 10, at xix, 71, 82–83; Smolin, *supra* note 1, at 268; see also *infra* notes 325–26 and accompanying text. For a compelling response to the argument that surrogacy is not baby-selling because you cannot buy what is already yours, see Smolin, *supra* note 1, at 322–25.

206. See Smolin, *supra* note 1, at 322.

207. O’DONOVAN, *supra* note 116, at 42.

208. See Smolin, *supra* note 1, at 311–15.

the contract that strips the birth mother of her natural, intrinsic parental status and right to the child—otherwise, her status and right as mother to the child is inherent as the one who gave birth to the child.²⁰⁹ Attorney Jeff Shafer puts it this way: “The *contract* is the decisive consideration, not genetics.”²¹⁰

This is true of the foundational case on surrogacy arrangements and freedom of contract.²¹¹ In *Johnson*, the California Supreme Court did not take it as a given that genetic tie automatically trumped gestational tie as status of parenthood.²¹² It was rather the *parties’ intent* in their freedom to contract that was the key for the court in awarding the status and right of parenthood to the Calverts, denying Anna Johnson of hers.²¹³ Thus even in California, the United States’ surrogacy capital, the birth mother is presumed to be the mother of the child.²¹⁴

Professor David M. Smolin, in investigating the practice of surrogacy as the sale of children, has strong words for laws in jurisdictions that allow for surrogacy based on freedom of contract: “[T]he *law becomes a means by which human beings are bartered and sold, rather than a remedy against such evils.*”²¹⁵ He likens it to the Supreme Court’s grotesque use of “raw power” in *Plessy v. Ferguson*.²¹⁶ Does the birth mother’s consent in the exercise of her freedom of contract negate the demeaning aspect of the contract? Professor O’Donovan suggests the answer is no. Again, in the context of the surrogacy account recorded in the ancient book of Genesis, he says, “The issue, as with slavery

209. See *id.* at 310, 314–15, 325–28, 331–34; see also *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993); Yasmine Ergas, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 EMORY INT’L L. REV. 117, 170 (2013); see also Caballero, *supra* note 11, at 296.

210. Jeff Shafer, *Babies for Sale, in a Market Near You*, FEDERALIST (Oct. 6, 2015), <http://thefederalist.com/2015/10/06/babies-for-sale-in-a-market-near-you/> [http://perma.cc/YT2W-LNU5].

211. See *Johnson*, 851 P.2d 776. For the proposition that *Johnson* is a foundational case in this area of law, see Smolin, *supra* note 1, at 326–28.

212. *Johnson*, 851 P.2d at 782; see also Smolin, *supra* note 1, at 326–28, 332–33.

213. See Smolin, *supra* note 1, at 326–28; see also *Johnson*, 851 P.2d at 782–83; Lahl, *supra* note 12.

214. See Smolin, *supra* note 1, at 328, 334, 336. This is true even according to the new surrogacy statute in California. See CAL. FAM. CODE §§ 7960–7962 (2017).

215. Smolin, *supra* note 1, at 334.

216. 163 U.S. 537 (1896) (using a hypothetical and sheer conjecture to dismiss the argument that segregation is inherently unequal); see Smolin, *supra* note 1, at 334.

itself, is not primarily the issue of whether this alienation [from her being a mother to the child] is voluntary or involuntary; it is whether it can happen at all, or be conceived to happen without a debasing and demeaning of the human person."²¹⁷

4. Problems with Consent

The birth mother finds herself in a situation in which the almost always wealthier commissioning parents exercise their freedom of contract to reproduce by contracting with her. But *her* consent to the contract in such a case may be clouded by exploitation and is vulnerable to abuse.²¹⁸ Surrogacy disproportionately involves poorer, less educated women signing up to be birth mothers.²¹⁹ A good portion of women who sign up to be birth mothers in the United States are military wives (estimated to be between twenty and fifty percent) needing extra income.²²⁰ Most are of modest income,²²¹ between \$16,000 and \$30,000 a year.²²² Payment to the birth mother for the surrogacy

217. O'DONOVAN, *supra* note 116, at 42–43.

218. See Lahl, *supra* note 9, at 289; Glenda Labadie-Jackson, *The Reproductive Rights of Latinas and Commercial Surrogacy Contracts—English Translation*, 14 TEX. HISP. J.L. & POL'Y 49, 64 (2008).

219. See KASS, *supra* note 56, at 188; ROBERTSON, *supra* note 27, at 139, 226; SHANLEY, *supra* note 7, at 115; SPAR, *supra* note 10, at 72, 87, 93–94; Browne-Barbour, *supra* note 10, at 475–80; Labadie-Jackson, *supra* note 218, at 60–66; Lahl, *supra* note 9, at 287–8; Radin, *supra* note 32, at 1930; see also RADIN, *supra* note 110, at 142; Whetstine & Beach, *supra* note 8, at 34 (comparing the education level of the birth mother with those of the commissioning parents in the *Baby M* case).

220. BREEDERS, *supra* note 7; Sloan, *supra* note 6; see also Sloan, *supra* note 5. Although the international surrogacy industry is beyond the scope of this Article, it is worth noting that it similarly employs poorer women as birth mothers. “In the Third World, they call this . . . baby farming; in the First World, they call it surrogacy.” JANICE G. RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM at xxii (1993); SPAR, *supra* note 10, at 86–87; Bindel, *supra* note 172; Erica Tempesta, ‘They Tried To Sell Us a Baby over Dinner’: American Journalist Reveals Heartbreaking Details About the ‘Dark Underbelly’ of India’s ‘Embryo Outsourcing’ Industry, DAILY MAIL (Apr. 7, 2015), <http://www.dailymail.co.uk/femail/article-3028043/American-journalist-reveals-heartbreaking-details-dark-underbelly-India-s-embryo-outsourcing-industry.html> [<http://perma.cc/MPD8-P8EP>]. Relatedly, see Ekman, *supra* note 115, for how involuntary surrogacy, which involves abducting young women and holding them hostage as breeders, has been co-opted by Asian mafias as a money-making enterprise.

221. Lahl, *supra* note 9, at 288; Ciccarelli & Beckman, *supra* note 26, at 21, 30–31; BREEDERS, *supra* note 7.

222. Sloan, *supra* note 6; see also Whetstine & Beach, *supra* note 8, at 34.

contract tends to be around \$20,000 to \$30,000.²²³ Meanwhile, the whole process costs about \$90,000 to \$150,000 for the commissioning parents.²²⁴ At this price point, commissioning parents tend to be wealthy.²²⁵ Indeed, surrogacy has been the reproductive route of choice for many celebrities, possibly filtering down to the upper-middle class.²²⁶

The reality is few women would agree to offer their gestational services purely from altruistic motives, even though a desire to help may be mixed in with pecuniary interests.²²⁷ It is estimated that altruistic surrogacy makes up less than two percent of all surrogacy arrangements.²²⁸ Professor Debora L. Spar, writing about market forces on the reproductive industry, says “neither the rhetoric nor the motive,” however altruistic, changes the manufacturing and transacting reality of the “commerce of conception.”²²⁹ Other issues that implicate unequal bargaining power between commissioning parents and birth mother include disparity in social class, ethnicity, gender hierarchy, politics, and women’s derivation of fulfillment from pregnancy.²³⁰

223. SPAR, *supra* note 10, at 82, 87; Whetstine & Beach, *supra* note 8, at 37; Sloan, *supra* note 6. This income works out to be around \$3 per hour at the high end. By comparison, the federal minimum wage is \$7.25 per hour. See *Minimum Wage*, U.S. DEP’T LAB., <https://www.dol.gov/general/topic/wages/minimumwage> [<https://perma.cc/VV8Z-8VA7>].

224. Sloan, *supra* note 5; *Surrogate Mother Costs*, WEST COAST SURROGACY, <https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost> [<https://perma.cc/JPY5-JYDA>].

225. Hartocollis, *supra* note 4; Lewin, *supra* note 21; see Lahl, *supra* note 12. The assertion that some women who agree to be birth mothers are not in poverty does not invalidate the statistic that they are generally less well off than the commissioning parents. Ciccarelli & Beckman, *supra* note 26, at 30–31; Hartocollis, *supra* note 4.

226. Whetstine & Beach, *supra* note 8, at 37; see Jen Juneau, *Kim Kardashian West, Jimmy Fallon and 29 More Famous Families Who’ve Welcomed Children Through Surrogacy*, PEOPLE (Sept. 6, 2017), <http://people.com/babies/celebrities-who-have-used-surrogates/kanye-and-kim-kardashian-west> [perma.cc/66VJ-QJ7J].

227. See Lahl, *supra* note 9, at 288; ROBERTSON, *supra* note 27, at 140–41; Browne-Barbour, *supra* note 10, at 477–78, 480; see also Ciccarelli & Beckman, *supra* note 26, at 30–31; BREEDERS, *supra* note 7.

228. See Ekman, *supra* note 115.

229. SPAR, *supra* note 10, at xi, 2; see also BREEDERS, *supra* note 7.

230. See SHANLEY, *supra* note 7, at 115–16, 121; see also RADIN, *supra* note 110, at 142, 151; SPAR, *supra* note 10, at 82; Allen, *supra* note 113, at 139; Browne-Barbour, *supra* note 10, at 475–80; Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACK-LETTER J. 17, 29 (1991); Ciccarelli & Beckman, *supra* note 26, at 30–31; Labadie-Jackson, *supra* note 218, at 60–63, 64–66. In December 2017, U.S. Con-

With that background, disparity in bargaining power between the contracting parties is a procedural concern that could invalidate the transaction.²³¹ Insofar as surrogacy contracts use boilerplate agreements drafted by the surrogacy agency, which is common,²³² consent problems on the part of the birth mothers remain.²³³ Additionally, surrogacy contracts are often very long—a fifty-page contract is not outside the norm.²³⁴

It does not help that surrogacy agencies have been plagued with conflicts of interest injurious to the birth mother. Legal, medical, or psychological representation for the birth mother are at times chosen and provided by the surrogacy agency.²³⁵ Worse yet, some surrogacy agencies conduct unsavory business practices—from deception, to fraud, to outright baby-selling.²³⁶

With such consent problems, is it fair to say that it is her *freedom* of contract that the birth mother exercises when she enters into the surrogacy contract? Although one can say that the commissioning parents exercise *their* freedom of contract in consenting to the contract, the case for the birth mother is less clear.

5. Risks, Known and Unknown

The surrogacy procedure necessitates implanting the embryo in the birth mother's uterus through IVF.²³⁷ Implantation presents risks to the birth mother, some of which are known²³⁸ and

gressman Trent Franks resigned from office after reports surfaced of his having asked two female staffers to carry his child in surrogacy. Katie Rogers, *Trent Franks, Accused of Offering \$5 Million To Aide for Surrogacy, Resigns*, N.Y. TIMES (Dec. 8, 2017), <https://nyti.ms/2kGaOay> [<https://perma.cc/29PX-QEND>].

231. See Nathan B. Oman, *Markets as a Moral Foundation for Contract Law*, 98 IOWA L. REV. 183, 226 (2012).

232. See BREEDERS, *supra* note 7; see also Lahl, *supra* note 12.

233. See Browne-Barbour, *supra* note 10, at 483–84; Margalit, *supra* note 10, at 464–65; see also SPAR, *supra* note 10, at 80. See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013).

234. See SPAR, *supra* note 10, at 80; see also BREEDERS, *supra* note 7.

235. See Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 513 (1996); Margalit, *supra* note 10, at 450; Sloan, *supra* note 5.

236. See Devine & Stickney, *supra* note 15; Lewin, *supra* note 21.

237. See SPAR, *supra* note 10, at 78, 79–80; Caballero, *supra* note 11, at 302.

238. See *Drugs Commonly Used for Women in Gestational Surrogacy Pregnancies*, CTR. FOR BIOETHICS & CULTURE NETWORK, <http://breeders.cbc-network.org/wp-content/uploads/2013/12/Drugs-Commonly-Used-for-Women-in-Gestational-Surrogacy-Pregnancies.pdf> [<https://perma.cc/VMH7-AADP>].

others yet unknown.²³⁹ Known risks include multiple gestation,²⁴⁰ a fourfold increase in caesarean sections,²⁴¹ long-term hospitalizations,²⁴² gestational diabetes,²⁴³ and stroke.²⁴⁴

Among the drugs and hormones administered to the birth mother as part of the preparation for IVF are Lupron, a drug needed to time embryo transfer, which has so many adverse effects that it is unapproved by the Food and Drug Administration for purposes of pregnancy.²⁴⁵ Estrogen is needed to thicken the uterine lining, with side effects that include depression and cancer.²⁴⁶ Steroids are needed for implantation of the embryo, which weaken the birth mother's immune system.²⁴⁷ Furthermore, when the embryo implanted in the birth mother's uterus comes from a foreign egg, either from the commissioning mother or an egg donor, additional risks include a threefold risk of pregnancy-induced hypertension and pre-eclampsia.²⁴⁸

Once the baby is born, not being able to breastfeed the baby (since the baby is required by contract to be handed over to the commissioning parents) makes it harder for the birth mother's

239. Lahl, *supra* note 9, at 287, 289.

240. See Caballero, *supra* note 11, at 302; Lahl, *supra* note 9, at 293; T.A. Merritt et al., *Impact of ART on pregnancies in California: an analysis of maternity outcomes and insights into the added burden of neonatal intensive care*, 34 J. PERINATOLOGY 345, 348–49 (2014).

241. See Lahl, *supra* note 9, at 293; Merritt et al., *supra* note 240, at 348–49.

242. Merritt et al., *supra* note 240, at 348–49.

243. See Lahl, *supra* note 9, at 294; Esme I. Kamphuis et al., *Are we overusing IVF?*, 348 BRIT. MED. J. 252, 253 (2014).

244. See Lahl, *supra* note 9, at 294.

245. See *id.* at 294; Joshua Alexander & Leah Levi, *Intracranial Hypertension in a Patient Preparing for Gestational Surrogacy with Leuprolide Acetate and Estrogen*, 33 J. NEURO-OPHTHALMOLOGY 310, 310 (2013); CTR. FOR BIOETHICS & CULTURE, *Public Policy and the Health of Young Mothers*, <http://us7.campaign-archive2.com/?u=854a02957234313d134e9865d&id=1d59d6544c&e=f54339cbeb> [https://perma.cc/ZUC3-ERVE].

246. See Lahl, *supra* note 9, at 294; CTR. FOR BIOETHICS & CULTURE, *supra* note 245.

247. See CTR. FOR BIOETHICS & CULTURE, *supra* note 245.

248. Lahl, *supra* note 9, at 294; Kamphuis et al., *supra* note 243, at 253; Ulrich Pecks et al., *Oocyte Donation: A Risk Factor for Pregnancy-Induced Hypertension: A Meta-Analysis and Case Series*, 108 DEUTSCHES AERZTEBLATT INT'L 23, 28–30 (2011); *Pregnancies following egg donation associated with more than 3-fold higher risk of hypertension*, SCI. DAILY (July 1, 2014), <https://www.sciencedaily.com/releases/2014/07/140701091446.htm> [https://perma.cc/N9D6-F6VK].

body to heal and recover from pregnancy and birth.²⁴⁹ Being unable to breastfeed also introduces an elevated risk of hemorrhage and metabolic syndrome for the birth mother, putting her at an increased risk of heart disease and diabetes.²⁵⁰ Denying breastfeeding to the birth mother keeps her from the benefits of doing so, which include a decreased long-term risk of breast cancer, cervical cancer, uterine cancer, and osteoporosis.²⁵¹

Risk of a sense of deep loss after the baby is born is also present.²⁵² One birth mother puts it this way with regard to the grief she underwent after the baby was born: “She wasn’t an idea anymore that we could . . . write out on paper She was a real baby.”²⁵³ This sense of deep loss is not surprising, given the deep bond between mother and child further revealed by the growing science of epigenetics—for example, how the child is quite literally a part of the birth mother long after she carried him in her womb and gave birth to him.²⁵⁴

One of the risks above, multiple gestation, increases risk of maternal death.²⁵⁵ A notable case is that of Brooke Brown. The Idaho woman was a gestational mother who was pregnant with twins for commissioning parents from Spain, where surrogacy had been made illegal.²⁵⁶ She was also reportedly a five-time gestational mother.²⁵⁷ Brooke died from complications of the surrogacy pregnancy days before she was scheduled to deliver the twins.²⁵⁸ Her death in 2015 is notable as the first re-

249. See DIANE WIESSINGER ET AL., *THE WOMANLY ART OF BREASTFEEDING* 5, 8 (8th ed. 2010); CTR. FOR BIOETHICS & CULTURE, *supra* note 245. One way to mitigate this is for the birth mother to try to pump breastmilk. See WIESSINGER ET AL., *supra*, at 340–43.

250. See WIESSINGER ET AL., *supra* note 249, at 5, 8.

251. See *id.*

252. See BREEDERS, *supra* note 7.

253. *Id.* (quoting a birth mother named Tanya).

254. See *supra* Section III.A.1.

255. See *id.*

256. Mirah Riben, *American Surrogate Death: NOT the First*, HUFFINGTON POST (Oct. 15, 2015), https://www.huffingtonpost.com/mirah-riben/american-surrogate-death-_b_8298930.html [<https://perma.cc/CNE5-6ZDS>].

257. Maggie Gallagher, *Death and Other Scandals of Surrogate-Mother Contracts*, NAT’L REV. (Oct. 16, 2015), <http://www.nationalreview.com/article/425710/surrogate-mothers-death-health-risks> [<https://perma.cc/7YYY-FSE8>].

258. See Riben, *supra* note 257.

ported gestational mother death in the United States.²⁵⁹ She was thirty-four years old.²⁶⁰ She is survived by her husband and their three sons.²⁶¹

6. *Surrogacy Dehumanizes the Birth Mother*

Concern that women are exploited in surrogacy arrangements drives public policy considerations against them. If things in life are measured by their worth and monetized, it is supposed to be toward “the full flowering of human possibility,” or toward human flourishing.²⁶² But commoditizing the womb, and hence the woman’s body, leads to exactly the opposite of human flourishing.²⁶³ It trivializes important, powerful bonds between the birth mother and child; treats the womb as no more than an artifice; makes motherhood transactional and alienable, even in the face of dubious consent in what is supposed to be the context of freedom of contract; and knowingly introduces risks to the birth mother related to surrogacy. These costs to surrogacy stand without supposing or requiring that commissioning parents think about the birth mother in such severe terms. They are, rather, intrinsic to the surrogacy contract. Certain things are not appropriate to be contracted away; they are too sacred. Because embodiment matters and is constitutive of our humanness, when we sell our bodies, we sell who we are: we sell our souls.²⁶⁴

B. *Surrogacy and the Child*

1. *Children, Manufactured*

When children are put together by scientists in a laboratory through IVF, a procedure necessary in surrogacy, it reduces

259. *See id.*

260. *Obituary: Brooke Lee Brown*, MAGICVALLEY.COM (Oct. 10, 2015), http://magicvalley.com/print-specific/obituary/obituary-brooke-lee-brown/article_4eb16ee6-7794-56ac-81ca-afb6b5af7817.html [https://perma.cc/P9SV-SJLM].

261. *Id.*

262. KASS, *supra* note 56, at 194.

263. *See id.*

264. *See id.* at 195.

them to “the status of a product” at conception.²⁶⁵ These children are “*manu-factured*”—quite literally, “handmade.”²⁶⁶ As Professor O’Donovan similarly noted,²⁶⁷ Professor Finnis remarks that “the relationship of product to maker is a relationship of radical inequality, of profound subordination.”²⁶⁸ This is not unlike the relationship of dominion between master and slave.²⁶⁹ Contrast this with the child of a sexual union: he has “the status of radical equality with parents,” which in turn is “a great good for any child.”²⁷⁰ It is thus a “grave injustice” for children to be manufactured through the use of a gestational mother, along with other make-a-baby components such as donor eggs or sperm.²⁷¹

If children are products, they are also more “subject to quality control, utilization, and discard.”²⁷² This explains how our society tends to treat frozen embryos related to the procedure of IVF: endangering, damaging, or destroying embryos for research, as well as active selection for implantation.²⁷³ The most desirable embryos are used for implantation in the birth mother while the others are discarded, destroyed, or indefinitely frozen without concrete plans of transferring them for eventual implantation.²⁷⁴

265. John Finnis, *The Priority of Persons Revisited*, 58 AM. J. JURIS. 45, 56 (2013); see also FINNIS, *supra* note 141, at 276–79, 281; SPAR, *supra* note 10, at 78, 79–80; Cabalero, *supra* note 11, at 302; BREEDERS, *supra* note 7.

266. See KASS, *supra* note 56, at 103.

267. See O’DONOVAN, *supra* note 116.

268. FINNIS, *supra* note 141, at 276–79.

269. *Id.* at 279, 281.

270. *Id.* at 276–77.

271. See Finnis, *supra* note 265, at 56.

272. FINNIS, *supra* note 141, at 278–79.

273. *Id.* at 278–80; Smith, *supra* note 3.

274. See FINNIS, *supra* note 141, at 280. See, for example, the case involving actress Sofia Vergara regarding the indeterminate future of the frozen embryos created from her eggs and her then-fiancé Nick Loeb’s sperm through IVF. Christina Cauterucci, *Sofia Vergara’s Ex Might Finally Be Out of Luck in His Battle for Custody of Their Frozen Embryos*, SLATE (Aug. 31, 2017), http://www.slate.com/blogs/xx_factor/2017/08/31/sof_a_vergara_s_ex_might_finally_be_out_of_luck_in_his_battle_for_custody.html [https://perma.cc/6FZ7-H5ED]. See generally GEORGE, *supra* note 149, at 196–97, 200–02 (explaining and tracing how each human being’s life begins at conception and how human embryos are embryonic humans, along with the ethical implications).

These procedures treat the tiny human beings, the embryos, as a means to an end (although a worthy end of having one's own genetic children).²⁷⁵ But both ends and means have to satisfy the requirements of practical reasonableness for justice to be achieved, and hence for the common good to be achieved.²⁷⁶ In other words, good ends, even if they are very good, do not justify the means. The strong, innate, and legitimate desire of having one's own genetic children, however worthy, does not justify the stripping of another's basic dignity as a human being.²⁷⁷ To justify it would be to affirm what is unjust.²⁷⁸

Furthermore, when children are put together the way products are manufactured, it is a slippery slope toward eugenics. Professor Radin notes that "[w]hen the baby becomes a commodity, all of its personal attributes—sex, eye color, predicted IQ, predicted height, and the like—become commodified as well."²⁷⁹ If children are already manufactured anyway, why not manufacture them with desirable characteristics and specifications? Why not produce children who are more, not less, perfect?²⁸⁰ The "quality control" aspect inevitably rears its ugly head once children are commoditized.²⁸¹

Indeed, U.S. scientists are reported to have successfully modified the genetic code of human embryos in July 2017, using embryos from IVF specifically created for the purpose.²⁸² One commentator hailed this as "a milestone on what may prove to be an inevitable journey toward the birth of the first genetically modified humans."²⁸³ The technology is usually presented as one developed for genetic disease prevention, but it is frankly

275. See FINNIS, *supra* note 141, at 280–81.

276. See *id.*

277. See *id.*

278. See *id.*

279. Radin, *supra* note 32, at 1925 (discussing the commodification effects of baby-selling in particular); see also Browne-Barbour, *supra* note 10, at 480–85.

280. GILBERT MEILAENDER, *BIOETHICS: A PRIMER FOR CHRISTIANS* 16 (3d. ed. 2013); Smith, *supra* note 3; see also Leon Kass, *Address at the United States Holocaust Memorial Museum: A More Perfect Human: The Promise and Peril of Modern Science* (Mar. 17, 2005).

281. See FINNIS, *supra* note 141, at 278–79; MEILAENDER, *supra* note 280, at 16.

282. See Steve Connor, *First Human Embryos Edited in U.S.*, MIT TECH. REV. (July 26, 2017), <https://www.technologyreview.com/s/608350/first-human-embryos-edited-in-us/> [<https://perma.cc/DV8V-ZJ5P>].

283. *Id.*

equally available as one for the manufacturing of designer babies.²⁸⁴ The market to manufacture perfect new children is not just coming—it is already here.²⁸⁵ The baby, like the womb, is a commodity,²⁸⁶ and surrogacy a market, a “commercial realm.”²⁸⁷

The drive for perfect children is apparent in the case of birth mother Heather Rice. In Rice’s case, the commissioning parents demanded that she have an abortion when the baby in her uterus was diagnosed with a cleft in his brain.²⁸⁸ When she would not abort the baby, the commissioning father told her that “God was going to punish [her] for disobeying them.”²⁸⁹ In another case involving a birth mother named Melissa Cook, the commissioning father not only ordered that the baby produced be male, but he also demanded an abortion for one of the babies when the implantation procedure resulted in triplets—two more babies than he desired.²⁹⁰ He said the third baby should be put up for adoption.²⁹¹ Similarly, although the famous Baby Gammy case took place outside the United States,²⁹² its facts are instructive. The Australian commissioning parents, having contracted with a Thai woman who became pregnant with twins for them, reportedly asked the birth mother to abort one of the twins when tests revealed that the baby had Down syndrome.²⁹³ After the twins were born, the couple took the healthy baby girl to Australia and left behind Gammy, the baby boy with Down syndrome (and congenital heart defect), with the

284. See Smith, *supra* note 3.

285. See SPAR, *supra* note 10, at xiii.

286. See *id.* at 71.

287. *Id.* at 92; BREEDERS, *supra* note 7.

288. See BREEDERS, *supra* note 7; Lewin, *supra* note 21.

289. BREEDERS, *supra* note 7; Lewin, *supra* note 21.

290. See Sloan, *supra* note 5.

291. See *id.*

292. Heather Saul, ‘Hope for Gammy’ fund set up after Australian couple ‘refuse to take Down’s Syndrome baby’ from Thai surrogate mother, INDEPENDENT (Aug. 2, 2014), <http://www.independent.co.uk/news/world/australasia/hope-for-gammy-fund-set-up-after-australian-couple-refuse-to-take-downs-syndrome-baby-from-thai-9642364.html> [<https://perma.cc/LL5Q-FBVS>].

293. *Id.*; see also Jonathan Pearlman, ‘Baby Gammy’ was not abandoned in Thailand, court rules, TELEGRAPH (Apr. 14, 2016), <http://www.telegraph.co.uk/news/2016/04/14/baby-gammy-was-not-abandoned-in-thailand-court-rules/> [<https://perma.cc/YJP8-ULZF>].

Thai birth mother,²⁹⁴ with whose family he has since remained.²⁹⁵

The commodification and manufacturing of children is also apparent in the price differential for different eggs, which is of interest because surrogacy sometimes involves the use of donor gametes.²⁹⁶ The eggs of an Ivy League-educated donor would command more money in the market—as would eggs of a blonde woman, or one who plays the cello, or one with a graduate degree, or a model who also does calligraphy.²⁹⁷ The age of eugenics, manufacturing children with choose-your-own-desirable-traits infused in surrogacy, is already here. Is this an age when parents and the fertility industry behind them say, “We can pay, and here’s what we want?”²⁹⁸ Professor Kass remarks:

The pursuit of these perfections, scientifically defined and technically advanced, not only threatens to make us more intolerant of imperfection. It threatens to sell short the true possibilities of human flourishing Lacking any rich

294. Pearlman, *supra* note 293; Saul, *supra* note 292.

295. Brianne Tolj, *Baby Gammy's Thai mother forced to leave her Down Syndrome son as she flees from loan sharks who 'have threatened her with bodily harm'*, DAILY MAIL (Sept. 24, 2016), <http://www.dailymail.co.uk/news/article-3805891/Baby-Gammys-Thai-mother-forced-leave-syndrome-son-flees-loan-sharks-threatened-bodily-harm.html> [https://perma.cc/EL4E-38XH]. It is worth noting that after the surrogacy contract was drawn up, the twins were born, baby Gammy was left in Thailand, and the case proceeded to court, the following came to light: The commissioning mother did not provide the egg for the procedure after all; the Australian couple had used an anonymous donor egg. The commissioning father, on his part, was found to be a convicted child sex offender. A judge ordered that Pipah, the twin sister brought back to Australia, never be left alone with her commissioning father. See *Baby Gammy's parents could face jail for lying about their egg donor*, NEWS.COM.AU (Apr. 29, 2016), <http://www.news.com.au/national/courts-law/baby-gammys-parents-could-face-jail-for-lying-about-their-egg-donor/news-story/a456bc988225546e82abfc71d2d6ae8a> [https://perma.cc/M7R5-XWE6]; Smith, *supra* note 3; Paige Taylor, *Gammy's dad sex offender David Farnell granted custody*, AUSTRALIAN (Apr. 15, 2016), <http://www.theaustralian.com.au/news/nation/gammys-dad-sex-offender-david-farnell-granted-custody/news-story/11bda4f050f12da08aade51f4c613b4b>. For a discussion of how the surrogacy industry does not prioritize children and their best interest, see *infra* Section III.B.4.

296. See Elizabeth F. Schwartz, *LGBT Issues in Surrogacy: Present and Future Challenges*, in HANDBOOK OF GESTATIONAL SURROGACY, *supra* note 2, 55, 56–57; Smith, *supra* note 3.

297. SPAR, *supra* note 10, at 81; Smith, *supra* note 3.

298. Smith, *supra* note 3.

view of human flourishing, ou[r] pursuit of a more perfect human is at best chimerical . . . A dehumanizing account of human life can all by itself produce a holocaust of the human spirit.²⁹⁹

The domino effect of the commoditization of children is a cost we ought to consider. Commoditizing *some* children dehumanizes *all* children, not just those particular children affected by the transaction. This is so because the commoditization of *some* children inevitably shapes society in thinking about and treating *all* children as commodities, or what Professor Radin calls “measuring the dollar value of our children.”³⁰⁰ Thus when children are viewed as “raw material for manipulation,” we dehumanize them.³⁰¹ In this way, the non-rational motivations underlying certain individual choices ultimately shape our society. Such choices, which are contrary to practical reasonableness, harm the common good and limit human flourishing.³⁰² The rationale that “if the technology exists, then it should be pursued” should be carefully scrutinized.³⁰³

2. Consent? What Consent?

As surrogacy trivializes the importance of the child to the birth mother,³⁰⁴ so too with the importance of the birth mother to the child. The research on fetal origins, how the mother powerfully and deeply influences the growing baby in her womb, has been gaining momentum in recent years. Scientists are discovering that what the mother experiences—the diet she

299. Kass, *supra* note 280 (exploring “how modern science’s pursuit of ‘human perfection’ paved the way for Nazi programs to eliminate the ‘unfit’” in an address at the United States Holocaust Memorial Museum, related to museum exhibit “Deadly Medicine: Creating the Master Race”).

300. RADIN, *supra* note 110, at 138; Radin, *supra* note 32, at 1926 (discussing the commodification effects of baby-selling in particular). It should be noted that Professor Radin thinks the danger of commodification of children is less urgent in traditional surrogacy than in the case of baby-selling. Having said that, Professor Radin thinks it is prudent to make surrogacy inalienable in the market. *See id.* at 1927–28, 1933; *see also* Oman, *supra* note 231, at 225.

301. Kass, *supra* note 280; *see also* Lahl, *supra* note 9, at 293; *supra* Part II.

302. *See supra* Section I.B; *see also* Radin, *supra* note 32, at 1927 (discussing human flourishing from the perspective of market inalienability). For background on market inalienability, *see, for example, id.* at 1851, 1937.

303. *See* KASS, *supra* note 56, at 38–40, 48–49.

304. *See supra* Section III.A.1.

has, the toxins to which she is exposed, the stress and emotions she goes through—are shared in some fashion with her fetus.”³⁰⁵ If science has confirmed that the child is imprinted on the birth mother,³⁰⁶ it has also confirmed that the birth mother is imprinted on the child.³⁰⁷ This in utero bonding is an “important and necessary good.”³⁰⁸ What, then, might the effect on the baby be if the birth mother emotionally distances herself from him even from pregnancy,³⁰⁹ knowing that she will have to surrender him to the commissioning parents at birth?³¹⁰

One author asserts that part of our humanity is that “we can situate ourselves in time” and, specifically, “the human being is [made of] memory— affective memory, genetic memory, epigenetic memory, [and] historical memory.”³¹¹ Against that backdrop, surrogacy, in denying the birth mother’s biological parenthood of the child, “knowingly deprive[s] a human being of what makes [him] human—genealogy.”³¹² The child’s navel is forever a reminder that he owed his early life to his birth mother who, by design, is permanently a stranger to him.³¹³

Professor Smolin notes that the commercial surrogacy industry is actively pushing for laws that would deny children born

305. Annie Murphy Paul, *What babies learn before they’re born*, CNN (Dec. 11, 2011), <http://www.cnn.com/2011/12/11/opinion/paul-ted-talk/> [https://perma.cc/BRA8-SUP9]; see also Douglas Almond & Janet Currie, *Killing Me Softly: The Fetal Origins Hypothesis*, 25 J. ECON. PERSP. 153, 154 (2011); Cunningham, *supra* note 154, at 2; Johan G. Eriksson, *The fetal origins hypothesis—10 years on*, 330 BRIT. MED. J. 1096, 1096 (2005); *Evidence of Learning and Memory in Fetuses Six Weeks Prior to Birth*, NEUROSCI. NEWS (July 8, 2015), <http://neurosciencenews.com/fetus-memory-learning-2211/> [https://perma.cc/J93Y-2Z48]; Soc’y for Research in Child Dev., *Fetal Short-term Memory Found in 30-week-old Fetuses*, SCI. DAILY (July 15, 2009), <http://www.sciencedaily.com/releases/2009/07/090715074924.htm> [https://perma.cc/4VEF-H4PX].

306. See *supra* Section III.A.1.

307. See Sean Maloney et al., *Microchimerism of maternal origin persists into adult life*, 104 J. CLINICAL INVESTIGATIONS 41, 46–47 (1999) (finding that birth mother’s cells are present in the child’s blood well into adulthood); Bharath Srivatsa et al., *Maternal Cell Microchimerism in Newborn Tissues*, 142 J. PEDIATRICS 31, 34 (2003).

308. Lahl, *supra* note 9, at 294.

309. See Jadva et al., *supra* note 174, at 2203.

310. See Lahl, *supra* note 9, at 294; Cunningham, *supra* note 154, at 3; see also BREEDERS, *supra* note 7; Hartocollis, *supra* note 4.

311. Momigliano, *supra* note 110.

312. *Id.*; see also Lynch, *supra* note 32.

313. See KASS, *supra* note 56, at 182–83.

of surrogacy the ability to investigate questions and longings regarding their identity and genesis through legal documents and other information.³¹⁴ So not only does the surrogacy contract inform the child that it matters not whose womb sustained and nourished him early in life, but the laws and circumstances of his genesis increasingly insist that he does not even have a reasonable claim to know her.³¹⁵ The problem is only compounded with the use of donor eggs or donor sperm in surrogacy, as the child is then intentionally deprived of his genetic parents *and* his birth mother—all of whom are his biological parents.³¹⁶ Especially to the extent that the identities of these parents are anonymous to the child, it leads to the further fragmentation of the child's identity.³¹⁷

Moreover, in a surrogacy contract, it is by design that the newborn baby is separated from the birth mother, handed over to the commissioning parents.³¹⁸ But a newborn baby's need for his birth mother is instinctive and innate:³¹⁹ “[S]urrogacy demands the removal of the neonate from her or his gestational

314. See Smolin, *supra* note 1, at 338.

315. See G. Shane Morris, *On Surrogacy, IVF, Evangelicals Are Dropping the Ball Again*, PATHEOS (June 19, 2017), <http://www.patheos.com/blogs/troubleroofisrael/2017/06/on-surrogacy-ivf-evangelicals-are-dropping-the-ball-again/> [<https://perma.cc/WQ8P-KTGR>].

316. See Lynch, *supra* note 32. For the importance of genetic parents and the fundamental right of children to them, see Moschella, *Rethinking*, *supra* note 186, at 433–37; Moschella, *Wrongness*, *supra* note 186, at 105; Moschella, *The Rights of Children*, *supra* note 186.

317. Catherine Lynch remarks:

When the commissioning parent is not the donor, this causes yet another fracturing in the child's identity between its genetic, gestational and legal parents. Such surrogate children are biologically unrelated in any way to their legal parents. With this comes the loss of identity: the forced ignorance of the self and of basic kinship and ancestral structures. This self-knowledge—so important and so intrinsic to self-identity—creates a sense of belonging and meaningful living within the fabric of kinship/familial connection and has been central to human culture for millennia.

Lynch, *supra* note 32; see also Katy Faust, *Don't Ignore The Child's Perspective On Gay Couples Commissioning Babies*, FEDERALIST (Jan. 30, 2017), <http://thefederalist.com/2017/01/30/the-childs-side-of-the-story-when-gay-couples-commission-babies/> [<https://perma.cc/2T3D-4VNQ>]. See generally ALANA NEWMAN, ANONYMOUS US: 100+ STORIES FROM THE FRONT LINES OF THIRD PARTY REPRODUCTION (2016).

318. See Lahl, *supra* note 9, at 294; Smolin, *supra* note 1, at 283, 315.

319. Lahl, *supra* note 9, at 294.

mother when every aspect, every cell, every desire of that neonate, is geared toward being on the body of the gestational mother, to suckle and seek comfort and safety.”³²⁰ What, then, is the effect on the baby if skin-to-skin bonding at birth between birth mother and the baby, the benefits of which are well documented,³²¹ is denied?³²² As the birth mother is unable to breastfeed him, the baby is denied the nutrient- and antibody-rich colostrum and breastmilk, exposing him to an elevated risk of a whole host of illnesses and developmental problems including ear infection, jaw development problems, low IQ, diabetes, and heart disease.³²³ In surrogacy, the earliest and most powerful bonds formed between a child and his birth mother are, by design and contract, severed, disregarded, and rendered irrelevant.³²⁴ These are matters of the child’s identity and genesis—they ought not be intentionally discarded.

Many have argued that the practice of surrogacy is akin to baby-selling, while proponents of surrogacy have sought to distinguish it.³²⁵ To some, gestational surrogacy (as distinguished from traditional surrogacy) is even further removed

320. Lynch, *supra* note 32 (internal quotation marks omitted).

321. See Lahl, *supra* note 9, at 294. Catherine Lynch, herself separated from her birth mother at birth, testifies:

I was removed at birth from my gestational mother, her breasts bound for three days in another room while I screamed for her, and my hospital records record my growing distress. Adoptees around the world testify to their battles with depression and rage, difficulties in trusting and attachment, and a profound sense of loss and grief caused by the loss of their mothers at birth. Scientific studies prove that maternal-neonate separation in the crucial months after birth disturbs the baby’s heart rate and sleep and other biological systems, predisposing the child to difficulties later in life which can include relationship and emotional difficulties, mental disorders and illnesses.

Lynch, *supra* note 32.

322. See Cunningham, *supra* note 154, at 3; see also BREEDERS, *supra* note 7.

323. See WIESSINGER ET AL., *supra* note 249, at 5–8; CTR. FOR BIOETHICS & CULTURE, *supra* note 245. That is, unless the commissioning mother decides to take up induced lactation to try to breastfeed the baby. See WIESSINGER ET AL., *supra* note 249, at 358–61. Not having been pregnant with the baby herself, this is not an easy task. See *id.* Another way to mitigate is to feed the baby donated breastmilk. See, e.g., MOTHERS’ MILK BANK, *Milk Banking FAQs*, <https://www.milkbank.org/milk-banking/milk-banking-faqs> (last visited Oct. 24, 2017) [<https://perma.cc/AY7U-4GBJ>].

324. See generally BREEDERS, *supra* note 7.

325. See SHANLEY, *supra* note 7, at 107; see also Smolin *supra* note 1, at 322.

from the objection of baby-selling.³²⁶ But consider the following poignant and unsettling account:

In 1980 a New Jersey couple tried to exchange their baby for a secondhand Corvette worth \$8,000. The used-car dealer (who had been tempted into the deal after the loss of his own family in a fire) later told the newspapers why he changed his mind: "My first impression was to swap the car for the kid. I knew moments later that it would be wrong—not so much wrong for me or the expense of it, but what would this baby do when he's not a baby anymore? How could this boy cope with life knowing he was traded for a car?"³²⁷

While some argue that gestational surrogacy is different than an express contract for baby-selling, the car salesman's point is well-taken regarding questions of identity, how one came into being, and money changing hands to bring one into existence through a surrogacy arrangement. While parties' consent in freedom of contract is the framework of the surrogacy arrangement, the child may well wonder to himself, "Consent in freedom of contract? What consent?" That is, while the parties in the contract consented to the arrangement that produced the child—with a whole host of consequences unique to surrogacy outlined above—the child has consented to none of these things, fragmentation in personhood and all.³²⁸

What of the objection that *no* child ever consents to having been born and come into existence at all?³²⁹ The intentionality of the fragmentation of identity in a surrogacy contract is not erased or minimized by the fact that the child would not have existed without the contract; it is still wrong that surrogacy

326. See SHANLEY, *supra* note 7, at 110–11. But see Devine & Stickney, *supra* note 15 (describing hidden practices of surrogacy that can result and have resulted in baby-selling); Smolin, *supra* note 1, at 316–22 (arguing that surrogacy constitutes sale of children); *id.* at 322–25 (arguing that parties are involved in the buying and selling of children even when the child is the genetic child of the commissioning parents); *supra* note 162. Even for those who do not categorize gestational surrogacy as baby-selling, concern over the birth mother's renting her womb as a service is as strong as it is in traditional surrogacy. See SHANLEY, *supra* note 7, at 111–13; *supra* Section III.A.2.

327. LEWIS HYDE, THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY 96 n.* (1983).

328. See Smolin, *supra* note 1, at 283.

329. See ROBERTSON, *supra* note 27, at 122.

brings a child into the world in a way that by nature fragments who he is as a person. Put another way, it is not inconsistent for a child *both* to be happy to have been born and to exist, *and* to grieve that the manner into which he came into existence wronged him.

3. Risks, Known and Unknown

Just as the surrogacy procedure introduces risks to the birth mother, so it does to the child, both known and unknown.³³⁰ The procedure necessitates implantation of the embryo in the uterus by IVF, which carries risks to the child.³³¹ These risks include a four-to-fivefold increase in stillbirths,³³² near fourfold increase in premature births,³³³ low or very low birth weights,³³⁴ fetal growth restriction,³³⁵ pre-eclampsia,³³⁶ gestational diabetes,³³⁷ a fourfold increase in caesarean sections,³³⁸ and increase in NICU admission and prolonged hospital stay.³³⁹

Knowingly introducing a child to additional risks via IVF is an ethical matter not to be taken lightly.³⁴⁰ Thus Professor O'Donovan says:

God has evils at his disposal which he does not put at ours. Though he works good through war, death, disease, famine, and cruelty, it is not given to us to deploy these mysterious alchemies in the hope that we may bring forth good from them. There is the world of difference between accepting the

330. See Lahl, *supra* note 9, at 287.

331. See BREEDERS, *supra* note 7 (documenting Professor O. Carter Snead's concern).

332. Lahl, *supra* note 9, at 293; Merritt et al., *supra* note 240, at 348–49; *see also* Kamphuis et al., *supra* note 243, at 253.

333. Lahl, *supra* note 9, at 293; Merritt et al., *supra* note 240, at 348–49; *see also* Caballero, *supra* note 11, at 302; Kamphuis et al., *supra* note 243, at 253.

334. Laura A. Schieve et al., *Low and Very Low Birth Weight in Infants Conceived with Use of Assisted Reproductive Technology*, 346 NEW ENG. J. MED. 731, 734–36 (2002).

335. Kamphuis et al., *supra* note 243, at 253.

336. *Id.*

337. Lahl, *supra* note 9, at 294; Kamphuis et al., *supra* note 243, at 253.

338. Lahl, *supra* note 9, at 293; Merritt et al., *supra* note 240, at 348–49.

339. Caballero, *supra* note 11, at 302; Merritt et al., *supra* note 240, at 348–49; Yona Nicolau et al., *Outcomes of Surrogate Pregnancies in California and Hospital Economics of Surrogate Maternity and Newborn Care*, 4 WORLD J. OBSTETRICS & GYNECOLOGY 4 (2015).

340. See O'DONOVAN, *supra* note 116, at 80–84, 85–86.

risk of a disabled child (where that risk is imposed upon us by nature) and ourselves imposing that risk in pursuit of our own purposes.³⁴¹

4. *The “Right To Procreate” . . . For Whose Benefit?*

In recounting some of the risks of surrogacy, Paige Comstock Cunningham, Executive Director of the Center for Bioethics & Human Dignity, asks, “For whose benefit is this being done?” Indeed. Much of the discourse on surrogacy centers around the commissioning parents’ wishes and desires, at times cast in the very language of the “right to procreate.”³⁴² The focus there is inevitably not on the child and what is owed to him.³⁴³ It is important to put the worthy and deep-seated longing for a child of one’s own genetic make-up in perspective: it is one thing to desire a child, but it is another thing to elevate that desire to a right, as a “right to procreate.” CanaVox, an organization dedicated to promoting marriage,³⁴⁴ puts it this way: “Every child has a right to a mother and a father; no one has a right to a child.”³⁴⁵

341. *Id.* at 83.

342. See, e.g., Holland, *supra* note 13, at 4, 26–27; Lahl, *supra* note 9, at 289, 291; BREEDERS, *supra* note 7; Lahl, *supra* note 12; cf. ROBERTSON, *supra* note 27, at 16, 40, 42 (“procreative liberty”). In Professor Paul G. Arshagouni’s criticism of Professor Vanessa S. Browne-Barbour’s opposition to surrogacy, he asserts that she does not provide sufficient justification as to the reason the best interest of the child should take precedence over other interests involved. See Arshagouni, *supra* note 8, at 837; see also Browne-Barbour, *supra* note 10, at 439–43. But these other interests, of course, center around the commissioning parents’ interests and intent in entering into the contract for the child’s existence in the first place. See Arshagouni, *supra* note 8, at 821–44.

343. See KLEIN, *supra* note 110, at 34; SPAR, *supra* note 10, at 208; Lahl, *supra* note 9, at 289, 291; BREEDERS, *supra* note 7; Katy Doran & Chaney Mullins, *Ethics and Infertility*, JOHN JAY INST. (Feb. 9, 2017), <https://www.johnjayfellows.com/news/2017/2/9/ethics-and-infertility> [<https://perma.cc/CBK7-BDF8>].

344. *Who We Are*, CANAVOX, <https://canavox.com/who-we-are/> (last visited Oct. 20, 2017) [<https://perma.cc/3HJC-N292>].

345. *What We Cheer For*, CANAVOX, <https://canavox.com/what-we-cheer-for/a-deeper-look/#child> [<https://perma.cc/7X7D-K2CP>]. The organization elaborates:

[C]hildren are a blessing and a privilege, not something owed to us adults. As adults, we must be careful not to seek fulfillment through a child, but rather adjust our desires to meet the objective needs of children. This allows us to treat children as unique individuals, not as instruments of our own dreams or pursuits, to be bought or (have their genetic material) sold according to our purposes.

Canadian professor Abby Lippman comments on what she views as the difference between Canadian and American surrogacy practices: "There's a very general consensus that paying surrogates would commodify women and their bodies. I think in the United States, it's so consumer-oriented, so commercially oriented, so caught up in this 'It's my right to have a baby' approach, that people gloss over some big issues."³⁴⁶ (Commercial surrogacy is prohibited in Canada.)³⁴⁷ Professor Spar, examining the practice of surrogacy from the perspective of market forces, recognizes this too; there is tension between the good of the drive to have one's own genetic offspring and the less-than-virtuous means to procure them.³⁴⁸

Professor Smolin treats this tension well. The claimed right to procreate was established in the context and era of child-bearing and child-rearing within a man-woman conjugal marital union, wherein there was unity of marital intimacy and procreation.³⁴⁹ Such a right *in that context* promotes, rather than harms, human dignity and flourishing.³⁵⁰ Would such a claimed right apply to procuring a child through surrogacy? Professor Smolin says no: "[M]aintaining the core legal norm [in surrogacy] requires rejecting claims of a right to procreate through surrogacy."³⁵¹ The costs of surrogacy examined in this Article suggest that surrogacy undermines human dignity and flourishing.³⁵²

Anca Gheaus argues that a child-centered concern would lead to the birth mother having a stronger claim to parenthood than the commissioning parents.³⁵³ This is because the child has

Id. See also KLEIN, *supra* note 110, at 69; RADIN, *supra* note 110, at 144 ("[M]any people seem to believe that they need genetic offspring in order to fulfill themselves.").

346. Lewin, *supra* note 21; see also Smith, *supra* note 3.

347. See Lewin, *supra* note 21.

348. SPAR, *supra* note 10, at 196; see also Smith, *supra* note 3. It should be noted that Professor Spar draws a different conclusion than this Article; she thinks given an existing market for womb-renting and children through surrogacy, among other related practices, the practice should be accepted, and the market for it should be made better. See *id.* at 96, 197, 200, 217–33.

349. Smolin, *supra* note 1, at 268.

350. *Id.* at 281–82.

351. *Id.* at 265 (specifically in examining the relationship between surrogacy and the sale of children).

352. See *id.* at 265, 269, 281–82.

353. Gheaus, *supra* note 180, at 449–51.

an interest in being raised by his birth mother, due to the embodiment and shared experiences of pregnancy, birth, and post-partum process between the birth mother and baby.³⁵⁴ Having gone through all of it together, the birth mother emerges as the most prepared and best parent to care for and raise him, and the child has an interest in being and staying with her.³⁵⁵ She even goes further to argue that if the birth mother lacks an emotional bond with the baby, *but the baby bonds anyway* with her, the child-centered concern may make it sufficient for the birth mother to be the one who rightfully raises the child.³⁵⁶ Thus, any right to procreate does not fit well in a situation as vulnerable to the fragmentation of the child as surrogacy is.³⁵⁷ Attorney Jeffrey Shafer of Alliance Defending Freedom, a non-profit legal organization, says,

The surrogacy industry exists to decouple child-creation from conjugal relations, to separate gestation from enduring motherhood, and to make biological ties irrelevant to legal child custody. *Fragmenting persons, parts, and relations—submitting each to commercial negotiation—is its entrepreneurial essence . . .* The tenets interior to this venture are wholly . . . non-relational, parts-assembly technique.³⁵⁸

As mentioned earlier, Germany bans surrogacy entirely.³⁵⁹ Dr. Schneider places a high importance on maternal-fetal bonding during pregnancy and considers it necessary to successful parenthood.³⁶⁰ Because of this, Dr. Schneider believes that it is “in children’s best interest to know that they have just one mother.”³⁶¹ IVF and surrogacy introduce what has never been done before: “splitting [the child’s] ‘biological mother’ in two” between the genetic mother and the birth mother.³⁶² This fragmentation harms the child—he cannot be raised, known, and

354. *Id.*

355. *Id.* at 448–51; see also Cunningham, *supra* note 154, at 2–3.

356. Gheaus, *supra* note 180, at 452 n.46.

357. See *id.* at 446–51; see also Moschella, *Rethinking*, *supra* note 186, at 433–37; Moschella, *Wrongness*, *supra* note 186, at 105; Smolin, *supra* note 1, at 268–69; Moschella, *The Rights of Children*, *supra* note 186; *supra* Section III.B.

358. Shafer, *supra* note 210 (emphasis added).

359. See *supra* note 159 and accompanying text.

360. Lewin, *supra* note 21.

361. *Id.*

362. Lynch, *supra* note 32.

loved by his biological parents (his genetic parents *and* birth mother³⁶³). Because of the harm that these non-rational choices impose on children, the practice of commercial surrogacy should be prohibited.

The children's best interest was expressly ignored in Melissa Cook's case, wherein the commissioning father was a fifty-one-year-old deaf and mute single man, earning \$750 a week as a postal worker.³⁶⁴ He and the resulting triplets from the surrogacy contract live in the basement of his elderly, disabled parents' home. One of the parents is a heavy smoker, filling the first floor of the house with thick smoke.³⁶⁵ A nephew also frequently lives in the same house—while addicted to and using heroin.³⁶⁶ The sister of the commissioning father, out of concern for the triplets, filed an affidavit against him.³⁶⁷ Among the allegations is that the triplets are forced to eat off the basement floor and that their diapers are changed so rarely that they have been taken to the hospital for extreme diaper rashes.³⁶⁸ When the attorney for the birth mother, asking for custody of the children, asked Judge Amy Pellman of the Superior Court of Los Angeles County whether the court was going to consider the well-being of the triplets in the case, the judge flatly said, "What is going to happen to these children once they are handed over to [the commissioning father], that's none of my business."³⁶⁹ In the court's eyes, this was a contract case, after all. Once the birth mother, Melissa, and the commissioning father signed the surrogacy contract, Melissa was deemed not to be the mother to the children—end of discussion.³⁷⁰

363. For the importance of genetic parents and the fundamental right of children to them, Moschella, *Rethinking*, *supra* note 186, at 433–37; Moschella, *Wrongness*, *supra* note 186, at 105; Moschella, *The Rights of Children*, *supra* note 186.

364. Whiting, *supra* note 21.

365. See Sloan, *supra* note 5; Whiting, *supra* note 21.

366. Whiting, *supra* note 21.

367. *Id.*

368. *Id.*

369. Sloan, *supra* note 5.

370. See *supra* note 11; *supra* Section III.A.3.

If the birth mother is a part of the child for life,³⁷¹ what is the effect of severing the bond between the child and his birth mother—by design, at that? Research has shown that children who learn that they were conceived using surrogacy often start showing adjustment problems around the age of seven.³⁷² While the problems have not been characterized as a psychological disorder, the onset of adjustment problems at the age of seven is interesting as it coincides with the age at which children begin to make sense of the concept of biological inheritance.³⁷³ The findings suggest that the absence of a gestational tie between commissioning mother and child is injurious to the child.³⁷⁴ The thinking that the bond between birth mother and child matters little or that the embodiment of pregnancy matters little is reductionistic and materialistic.³⁷⁵

It is worth noting that criticism against surrogacy is not to be confused with criticism against adoption. In adoption, the biological parents are replaced by the adopted parents to redeem what is an already broken situation; the loss of the biological parents is not sought out.³⁷⁶ In surrogacy, by contrast, the loss of the birth mother (and depending on the procedure and whether it utilizes a donor egg, sperm, or both, the loss of one or both of the genetic parents as well) is the very design and nature of the arrangement. Whereas adoption serves the child, surrogacy serves only the commissioning parents.³⁷⁷

371. For example, research has found birth mother's cells present in the child's blood well into adulthood. See Maloney et al., *supra* note 307, at 46–47; Srivatsa et al., *supra* note 307, at 34.

372. Susan Golombok et al., *Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment*, 54 J. CHILD PSYCHOL. & PSYCHIATRY 653, 657 (2013).

373. *Id.*; Gregg E. A. Solomon et al., *Like Father, Like Son: Young Children's Understanding of How and Why Offspring Resemble Their Parents*, 67 CHILD DEV. 151, 167–68 (1996); Joanne M. Williams & Lesley A. Smith, *Concepts of Kinship Relations and Inheritance in Childhood and Adolescence*, 28 BRIT. J. DEV. PSYCHOL. 523 (2010).

374. Golombok et al., *supra* note 372, at 657.

375. See Kass, *supra* note 280.

376. See O'DONOVAN, *supra* note 116, at 35–38, 40.

377. See KASS, *supra* note 56, at 698. In the related context of artificial insemination, Professor O'Donovan writes:

[C]hildren are not property to be conveyed . . . [W]e do not have to introduce the notion of payment to make it repugnant. The suggestion of a commercial transaction merely underlines what is already present in the

Finally, what would be a logical next step for such a right to procreate? Much of the discourse in the reproductive industry has been on the pain of infertility and the longing for a child. But a twist on the motivations of commissioning parents in surrogacy and their right to procreate is this new trend: *social* surrogacy. That is, commissioning parents now can and do choose surrogacy so as not to disrupt their career—or figure.³⁷⁸ Actress Lucy Liu, for example, revealed her rationale for choosing surrogacy: “It just seemed like the right option for me because I was working and I didn’t know when I was going to be able to stop.”³⁷⁹ From the standpoint of market forces, it makes sense for a surrogacy agency to state expressly that it would not be the arbiter of the validity of commissioning parents’ motivation to choose surrogacy.³⁸⁰ After all, the surrogacy industry has been driven by the commissioning parents’ wishes and desires. Social surrogacy only makes that all too clear.

5. *Surrogacy Dehumanizes the Child*

Thus, concerns that surrogacy exploits the child should drive considerations of public policy against surrogacy arrangements. The commodification of the child leads to dehumanization and the opposite of human flourishing: in reducing children to manufactured products in the processes and procedures inherent in surrogacy; in intentionally severing important, powerful bonds between the child and the birth mother; in fragmenting the child in matters of identity and personhood by design; in knowingly introducing risks to the child through the procedures in surrogacy; and in disregarding the

deliberate purpose of incurring a parental relation in order to alienate it

They do not act for adoptive parents; adoptive parents act for them.

O’DONOVAN, *supra* note 116, at 37; *see also id.* at 40.

378. *See* Whetstine & Beach, *supra* note 8, at 37–38; Lewin, *supra* note 21; *Too Posh To Push?: Breaking the Silence on Vanity Surrogacy*, SURROGACY L. CTR., <https://www.surrogacy-lawyer.com/assisted-reproduction/too-posh-to-push-breaking-the-silence-on-vanity-surrogacy/> [https://perma.cc/UA3F-6YDA].

379. Mollie Cahillane, *Why Lucy Liu Chose Gestational Surrogacy: It Was the ‘Best Solution for Me,’* PEOPLE (May 6, 2016), <http://celebritybabies.people.com/2016/05/06/lucy-liu-gestational-surrogate-son-rockwell/> [https://perma.cc/W9ZE-8LKY]. Recall also the earlier discussion of a possible filter-down effect of surrogacy to the upper-middle class. *See supra* note 226; *see also* Whetstine & Beach, *supra* note 8, at 37.

380. *See* Lewin, *supra* note 21.

child's needs and best interest, while putting ahead the adults' wishes and desires instead—*all without the child's consent*—ironically within the very framework of consent in freedom of contract. These costs to the child in surrogacy stand without supposing or requiring that commissioning parents think about the child in such stark terms. These concerns are, rather, intrinsic to the kind of contract that surrogacy is.

IV. CONCLUSION

Professor O'Donovan, more than three decades ago, prophetically wrote:

[T]he tragic situation is that unless some rule . . . is adopted, we shall be left with an inevitable and highly distressing outcome. *Parental ownership will be determined simply on the basis of contract.* The same practices will then yield different results for parental ownership depending on the terms of the contract in each case [T]he last shreds of a connection between procreation and being will be torn asunder. *Humanity will be made under contract, with all the component parts legally conveyable.* There will then be no reason to insist that parental ownership should reside in a person who had any physical stake in the child at all

[B]y the time we get there we may have lost the humane sensibilities which make us so distressed to contemplate them now Where natural constraints are removed, more is left open to human decision; and in a liberal society, . . . that decision . . . will probably be left in private hands, which means, to individual contractual arrangements.³⁸¹

In response to Professor O'Donovan's remarks, this Article proposes that the rule to be adopted in surrogacy is to prohibit it as against public policy. Contract is not appropriate as a framework of a relationship of procreation³⁸² as procreation has to do with the core of identity, origin, lineage, belongingness, loving, and longing; indeed, with the heart of what it means to

381. O'DONOVAN, *supra* note 116, at 47–48 (emphasis added).

382. See KASS, *supra* note 56, at 62 (asserting that the view of surrogacy as merely a contract issue is reductionistic); O'DONOVAN, *supra* note 116, at 42–43, 47–48.

be human.³⁸³ When freedom of contract is applied to surrogacy contract such that the parties' consent and intent govern, "[b]irth becomes the subject of negotiation, and motherhood is exchanged in the market."³⁸⁴ When birth mothers and children are thought of as raw material, they are reduced from whole beings to commodities. This coarsens us and dehumanizes us. As Professor Smolin has explained, it is the contract that strips the birth mother of her otherwise natural, intrinsic parental status and right to the child.³⁸⁵ Should the parties' freedom of contract obliterate and rewrite the deep bond, longing, and humanness of both birth mother and child? If so, where might such a legal commitment lead us?

Proponents of surrogacy contracts have framed the issue from the perspective of freedom of contract and a claimed right to procreate.³⁸⁶ But given the costs to birth mother and child outlined above—not to mention the *lack of* consent of the child within the framework of consent in freedom of contract—and given that desire for genetic offspring should not be elevated to a right to procreate, justifying surrogacy is not appropriate.

A weighing of the competing interest of the commissioning parents against the costs of surrogacy to the birth mother and child demonstrates that surrogacy leads not to human flourishing, but to dehumanization. The costs to both the birth mother and the child outlined above³⁸⁷ are not consistent with the requirement of practical reasonableness because they are not oriented toward reasonableness: They are not oriented toward the good of birth mothers and children, and by extension, the common good. Put another way, these heavy costs to birth mothers and children make it inhospitable to human flourish-

383. See Oman, *supra* note 231, at 225; Radin, *supra* note 32, at 1850, 1928–36; see also O'DONOVAN, *supra* note 116, at 48 ("In the natural order we were given to know what a parent was. The bond of natural necessity which tied sexual union to engendering children, engendering to pregnancy, pregnancy to a relationship with the child, gave us the foundation of our *knowledge* of human relationships in this area. Now that we have successfully attacked the bond of necessity . . . we have destroyed the ground of our knowledge of the humane. From now on there is no knowing what a parent is.").

384. SPAR, *supra* note 10, at 93.

385. Smolin, *supra* note 1, at 310, 314–15, 325–26.

386. See, e.g., ROBERTSON, *supra* note 27, at 16–17, 24, 30, 42, 119, 126, 131, 221, 227.

387. See *supra* Section II.B.

ing—to being more fully human. Thus, surrogacy contracts do not properly belong within the great open space of freedom of contract, but rather in the *limitation* to that freedom. It is this limitation, given the reality of the imperfect nature of humans' power to reason, that safeguards human flourishing.

Public policy should weigh the costs and interests involved in deliberation of the greater and lesser good, as Aquinas' *determinatio* law requires.³⁸⁸ When weighed against the commissioning parents' worthy interest of having a genetic child of their own, the costs of surrogacy exacted of the birth mother and child should lead to prohibition of surrogacy as against public policy.

If this is the case, then proposing to permit surrogacy, albeit with regulations, is not appropriate. Surrogacy is inherently wrong, and as such it is wrong even in the "best-case scenario"—when there is no breakdown in the relationship between the birth mother and the commissioning parents, no felt bonding or regret on the part of the birth mother, nor any perceivable adjustment problems on the part of the child. Surrogacy is *inherently* dehumanizing to both birth mother and child by *fundamentally* reducing them to commodities and denying them what makes them flourish as humans *by design*—even in the best of intentions and circumstances.

Regulations would not be enough to address the inherent wrongs in surrogacy.³⁸⁹ Where there *are* laws governing surrogacy, loopholes, abuse, and enforcement problems remain.³⁹⁰ Rather, surrogacy contracts should be entirely prohibited as against public policy.³⁹¹ This is the path that the Parliamentary

388. See John Finnis, *Natural Law Theories*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. 2016) <https://plato.stanford.edu/entries/natural-law-theories/> [<https://perma.cc/HG7K-PRG3>].

389. KLEIN, *supra* note 110, at 69–71; Lahl, *supra* note 9, at 287, 292; Lahl, *supra* note 12. Professor Smolin notes that more than seeking legitimacy for the newer reproductive practices, the commercial surrogacy industry is at this point actively pushing for nothing short of a legal regime that champions the wants and desires of the moneyed and powerful parties, the commissioning parents, at the expense of the more vulnerable parties, the birth mothers and the resulting children. Smolin, *supra* note 1, at 337–38.

390. See KLEIN, *supra* note 110, at 71, 97; Cohen & Kraschel, *supra* note 7, at 89–91; Lahl, *supra* note 12; Sloan, *supra* note 6.

391. Lahl, *supra* note 9, at 295.

Assembly of the Council of Europe took in 2016. It refused to legalize surrogacy across all member states, and refused even to compromise by allowing for legalization with regulations.³⁹²

In taking the position that surrogacy should be prohibited entirely, this Article comes to a different conclusion than that taken by some other scholars. Professor Spar, for example, thinks that given an existing market for womb-renting and children through surrogacy, among other related practices, there should be national laws regulating surrogacy.³⁹³ This Article also takes a different position than Professor Shanley, who thinks freedom of contract should not be used as a trump card in surrogacy contracts, but nevertheless believes the contracts should be legal but unenforceable.³⁹⁴ One issue that would be difficult to resolve given these two positions, aside from abuse and enforcement issues mentioned above, would be how to fashion an appropriate remedy in the case of breach of contract. Damage remedies are not appropriate, but neither is specific performance.³⁹⁵ An interesting hypothetical is to ponder what would happen not only when the birth mother wants out, but also what would happen to the baby and birth mother if the commissioning parents back out after the birth mother becomes pregnant.³⁹⁶ The hypotheticals are not far-fetched, considering the cases such as Heather Rice³⁹⁷ or Baby Gammy,³⁹⁸ often involving demands for abortion.³⁹⁹ At other times, commissioning parents back out due to a change of

392. ADF INT'L, *supra* note 114.

393. SPAR, *supra* note 10, at 96, 197, 200, 217–33. This Article takes the position that acceptance of the market does not preclude limitation to freedom of contract. Cf. SHANLEY, *supra* note 7, at 123; Oman, *supra* note 231, at 188.

394. SHANLEY, *supra* note 7, at 104, 120; *see also* MARTHA A. FIELD, SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES 75–150 (1990) (taking the position that surrogacy contracts should not be enforceable, and a birth mother who wants custody of the child despite the contractual terms should have custody of him).

395. *See* Lahl, *supra* note 9, at 292; *see also* RADIN, *supra* note 110, at 146–47; Radin, *supra* note 32, at 1935 n.294; Lahl, *supra* note 12.

396. *See* RADIN, *supra* note 110, at 146–47.

397. *See supra* note 288 and accompanying text.

398. *See supra* notes 292–95 and accompanying text.

399. Lewin, *supra* note 21; Smith, *supra* note 3.

mind⁴⁰⁰ or simply never retrieve the baby they have commissioned into being.⁴⁰¹

Thus, despite the worthy desire of having one's genetic offspring, surrogacy comes at too great of a cost of dehumanization of both birth mother and child by commoditizing them. These costs stand without supposing or requiring that every commissioning parent thinks about the birth mother and child in such severe terms. *De*-humanizing them strips birth mother and child of their dignity; it leads us as a society to precisely the opposite of what makes us human—it makes us *less*, not more fully human.⁴⁰² Surrogacy contracts are antithetical to the good of birth mothers and children, and thus antithetical to the common good and human flourishing.⁴⁰³

Applying practical reasonableness to surrogacy and contract, surrogacy arrangements then properly belong on the outside of the boundaries of contract law. Freedom of contract is found within the space of those boundaries, but what is not properly contracted for (even when based on consent) is on the outside. Practical reasonableness necessitates limitation to freedom of contract in surrogacy, even as it affirms that freedom generally. It is this limitation that safeguards flourishing,

400. Lewin, *supra* note 21.

401. Shafer, *supra* note 210; Tempesta, *supra* note 220.

402. KASS, *supra* note 56, at 100; Lahl, *supra* note 9, at 292. For a thorough and thoughtful account of why even the ancient surrogacy practice, understood in the context of its era, was more humane than the commercial industry today, see Smolin, *supra* note 1, at 289–302.

403. Professor Kass asserts that freedom of contract without the necessary underpinning of mediating and religious institutions can be corrosive to who we are as humans, thus leading us to become less human. KASS, *supra* note 56, at 92 (in the related context of thinking of the body in a proprietary sense with regard to organ sale); see also *id.* at 12, 18 (in the context of bioethics in general, including the practice of surrogacy). Professor Kass, a critic of surrogacy, called the practice “worrisome,” and even “deplorable” and “repugnant,” among other things. *Id.* at 66, 100. He thought the practice should not be encouraged, but nevertheless thought it may be foolish to prohibit it. He unfortunately did not elaborate on this position. *Id.* at 100.

Professor Radin discusses surrogacy and other related matters such as baby-selling and prostitution in light of human flourishing from the perspective of market inalienability. See, e.g., Radin, *supra* note 32, at 1851, 1937; see also ROBERTSON, *supra* note 27, at 141–42. Professor Radin further writes about her understanding of the relationship of human flourishing and market rhetoric elsewhere. RADIN, *supra* note 110, at 79–101.

given that human beings are imperfectly rational beings. Practical reasonableness guides a community toward justice, toward the common good, and toward being more fully human—indeed, toward human flourishing itself.⁴⁰⁴

404. In this way, it is not quite accurate to say that introducing limitation to surrogacy contract would allow the state to define what counts as legitimate reproduction, as some opponents of limitation to surrogacy contracts may say. See CARMEL SHALEV, *BIRTH POWER: THE CASE FOR SURROGACY* 94, 157 (1989); see also SHANLEY, *supra* note 7, at 109. Rather, the law should guard the common good, and the state enforces the law. The common good, rooted in basic human goods, precedes the law.

**UNASHAMED OF THE GOSPEL OF JESUS CHRIST:
ON PUBLIC POLICY AND PUBLIC SERVICE
BY EVANGELICALS**

JOHNNY REX BUCKLES*

INTRODUCTION	814
I. THE CONSTITUTIONALITY OF RELIGIOUSLY MOTIVATED VOTING BY INDIVIDUAL CONGRESSIONAL ACTORS	825
A. The Religious Test Clause	825
B. Tests for Determining Violations of the Religion Clauses, their Underlying Norms, and their Application to Faith-Based Conditions to Public Service	831
1. Doctrinal Tests and Frameworks.....	832
a. Establishment Clause Doctrine	832
b. Free Exercise Doctrine	837
2. Foundational Norms of the Religion Clauses.....	839
a. Neutrality	840
b. Separation.....	842
c. Promotion of Religious Liberty	845
3. Application to Faith-Based Conditions on Public Service	847
C. The Speech or Debate Clause.....	851
D. Application of Constitutional Authorities to the Sanders-Vought Matter and Similar Scenarios	857
II. EVANGELICALS AND PUBLIC SERVICE.....	864

* Law Foundation Professor of Law, University of Houston Law Center. I thank the following for helpful comments to prior drafts of this article: Professors George Dent, Paul Horwitz, Blake Hudson, James Nelson, and Dru Stevenson; Dr. Jeremy Evans; Lael Weinberger; and the participants in the 20th Annual Federalist Society Faculty Conference. I thank Christopher Dykes for valuable assistance in obtaining sources; the University of Houston for funding the research of this Paper; and my wife, Tami Buckles, for her constant support.

A. Evangelicalism and Basic Soteriological Concepts in Evangelical Theology	866
B. Implications of Evangelicalism for Public Servants.....	877
1. The Question of Mutual Exclusivity	878
2. The Question of Tolerance.....	881
3. The Question of Offensiveness	890
III. CONCLUSION	897

INTRODUCTION

Picture this scene: The year is 2025, and the occasion, judicial confirmation hearings by the United States Senate's Committee on the Judiciary. A newly elected president has just nominated an accomplished, mid-career law professor to serve as the next Associate Justice of the United States Supreme Court. The nominee is brilliant. He is also Muslim. After responding to a predictable line of questioning from several stoic United States senators, the nominee faces the following inquisition from a brash, politically ambitious senator from Texas:

Professor, I have letters from the Independent-Fundamentalist-Triple Predestination-Post-Millennial Churches of America and the Greater Zionist-Expansionist-Ultra-Orthodox Cooperation of Jewish Congregations of the United States opposing your nomination to serve on the Supreme Court. The organizations take exception to your recent blog post directed towards the governing board of a private Muslim school reevaluating its statement of faith, a blog post in which you insist upon adherence to what you describe as historic Islamic belief. In particular, you state in the blog entry that you fully embrace the first pillar of Islam, that "there is no god but Allah, and Muhammad is his prophet." You further affirm the Quranic assertion that Jesus Christ actually did not die from crucifixion, let alone bodily rise from the dead. Your blog urges the Muslim school to strictly teach this traditional Islamic doctrine and tolerate no faculty dissent from it. Professor, do you understand that your public views have marginalized the millions of Americans, both Jews and Christians, who worship not Allah but YHWH? And do you appreciate, professor, that in the minds of a great number of Christian Americans, if Jesus did not die for the sins of the world and arise in victory over sin and

death, their faith is utterly pointless? Do you, sir, maintain that Jews and Christians lack an accurate knowledge of God and how to worship God? And would you still today denigrate the most fundamental beliefs of millions of our citizens? Fellow members of the committee, I do not believe that this law professor represents what this country is supposed to be about. Therefore, I oppose his nomination.

Until recent days, this account of anti-religious acerbity by a United States senator would have sounded like the fanciful tale of a political satirist rather than a bona fide journalistic report.¹ But on June 7, 2017, fiction became fact. Only the minor details of the historic exchange differ from those of the hypothetical narrative. The real hearing occurred before the United States Senate Committee on the Budget.² The business before the committee was the nomination of Russell Vought for Deputy Director of the White House Office of Management and Budget (“OMB”).³ The nominee’s religious beliefs on trial were not Islamic, but Christian. And leading the charge against the nominee was a senator who hails not from Texas, but from Vermont—former presidential candidate Bernie Sanders.

Senator Sanders began his interrogation of Mr. Vought by reading into the record a letter from three organizations expressing concerns over Mr. Vought’s religious views.⁴ After

1. This observation does not ignore that a judicial nominee’s religious beliefs have garnered at least some attention in the history of judicial confirmation hearings. For a discussion, see Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations*, 15 WM. & MARY BILL RTS. J. 75, 79–95 (2006).

2. See *Nomination of Russell T. Vought, of Virginia, To Be Deputy Director of the Office of Management and Budget: Hearing Before the S. Comm. on the Budget*, 115th Cong. (2017) [hereinafter *Hearing*]. A video recording of the hearing is available at https://www.budget.senate.gov/nomination-hearing-for-deputy-director_of-white-house-budget-office [https://perma.cc/A7V4-MD7R].

3. Vought’s nomination was approved by the Senate Budget Committee shortly after the hearing. See *Budget Committee Approves Vought as Deputy Director of White House Budget Office*, U.S. SENATE COMM. ON THE BUDGET (June 14, 2017), <https://www.budget.senate.gov/chairman/newsroom/press/budget-committee-approves-vought-as-deputy-director-of-white-house-budget-office> [https://perma.cc/4UUT-XK32].

4. *Hearing*, *supra* note 2, at 12–13 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget). The letter, written by the Arab American Institute, Bend the ARC Jewish Action, and Muslim Advocates, reads as follows:

We write to express our deep concerns about the nomination of Russell Vought to the position of Deputy Director of the White House Office of

briefly questioning Mr. Vought on what were characterized as “budget matters,”⁵ Senator Sanders extensively probed the theological views that Vought had advanced in an opinion piece concerning an episode at Wheaton College. The full exchange⁶ between Sanders and Vought on the latter’s theology is as follows:

Senator SANDERS. Let me get to this issue that has bothered me and bothered many other people, and that is in the piece that I referred to that you wrote for a publication called *Resurgent*. You wrote: “Muslims do not simply have a deficient theology. They do not know God because they have rejected Jesus Christ, His Son, and they stand condemned.”

Do you believe that that statement is Islamophobic?

Mr. VOUGHT. Absolutely not, Senator. I am a Christian, and I believe in a Christian set of principles based on my faith. That post, as I stated in the questionnaire to this committee, was to defend my alma mater, Wheaton College, a Christian school that has a statement of faith that includes the centrality of Jesus Christ for salvation, and—

Senator SANDERS. Again, I apologize. Forgive me. We just do not have a lot of time. Do you believe that people in the Muslim religion stand condemned? Is that your view?

Mr. VOUGHT. Again, Senator, I am a Christian, and I wrote that piece—

Senator SANDERS. Well, what does that say—

Mr. VOUGHT [continuing]. In accordance with the statement of faith of Wheaton College.

Senator SANDERS. I understand that. I do not know how many Muslims there are in America. I really do not know, probably a couple million. Are you suggesting that all of those people stand condemned? What about Jews? Do they stand condemned, too?

Management and Budget. Mr. Vought has denigrated American Muslims and the Muslim faith. His writings demonstrate a clear hostility to religious pluralism and freedom that disqualify him for any appointment, including that of deputy director of the OMB.

Id. at 13.

5. *Hearing, supra* note 2, at 14 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).

6. I reproduce the full exchange to ensure that the comments of Vought and Senator Sanders are taken in context.

Mr. VOUGHT. Senator, I'm a Christian. I—

Senator SANDERS: I understand you are a Christian, but this country is made up of people who are not just—I understand that Christianity is the majority religion, but there are other people of different religions in this country and around the world. In your judgment, do you think that people who are not Christians are going to be condemned?

Mr. VOUGHT: Thank you for probing on that question. As a Christian, I believe that all individuals are made in the image of God and are worthy of dignity and respect regardless of their religious beliefs. I believe that as a Christian that is how I should treat all individuals—

Senator SANDERS. And do you think your statement that you put into that publication, “they do not know God because they rejected Jesus Christ, His Son, and that they stand condemned,” do you think that’s respectful of other religions?

Mr. VOUGHT. Senator, I wrote a post based on being a Christian and attending a Christian school that has a statement of faith that speaks clearly with regard to the centrality of Jesus Christ in salvation.

Senator SANDERS: I would simply say, Mr. Chairman, that this nominee is really not someone who is what this country is supposed to be about. I will vote no.⁷

Senator Sanders’s interrogation of Mr. Vought followed the former’s opening statement to the committee, in which he opined that Vought’s expressed theological position “is indefensible, it is hateful, it is Islamophobic, and it is an insult to over a billion Muslims throughout the world.”⁸ He again characterized Vought’s defense of Wheaton as containing “strong Islamophobic language,” and remarked that “racism and bigotry cannot be part of any public policy” in a democracy.⁹

After Senator Sanders questioned and denounced Mr. Vought, Senator Cory Gardner cautioned, “I hope that we are not questioning the faith of others and how they interpret their

7. *Hearing, supra* note 2, at 15–16 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).

8. *Id.* at 4 (statement of Sen. Bernard Sanders, Ranking Member, S. Comm. on the Budget).

9. *Id.*

faith to themselves.”¹⁰ In response to Gardner’s concern, Senator Chris Van Hollen opined, “I don’t think anybody was questioning anybody’s faith here. I think the issue that Senator Sanders was raising was whether the nominee was questioning the faith of others.”¹¹ Senator Van Hollen then suggested that there was some (unstated) link between the “public trust for the whole country” and Vought’s theology.¹² Van Hollen interjected his personal theological views into the committee’s deliberations before referring again to the “public trust”:

I am a Christian, but part of being a Christian, in my view, is recognizing that there are lots of ways that people can pursue their God. So no one is questioning your faith, Mr. Chairman. It is your comments that suggest a violation of the public trust in what will be a very important position.¹³

The context of Mr. Vought’s expression of religious belief that so plainly offended Senator Sanders was his defense of Wheaton College, his alma mater. Like Vought, Wheaton College embraces evangelical theology. Considered by some to be the “Harvard of evangelicalism,”¹⁴ Wheaton College has adopted a Statement of Faith that begins as follows:

The doctrinal statement of Wheaton College, reaffirmed annually by its Board of Trustees, faculty, and staff, provides a summary of biblical doctrine that is consonant with evangelical Christianity. The statement accordingly reaffirms salient

10. *Id.* at 16 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).

11. *Id.* at 17.

12. *Id.* Senator Van Hollen spoke as follows:

So nobody is questioning [Vought’s] faith. The issue is you are now moving from a position where you were a staff member in the Republican Study Committee to somebody who is supposed to uphold the public trust for the whole country. And I think it’s irrefutable that these kind of comments suggest to a whole lot of Americans that, No. 1, their religious philosophy is deficient, and in condemning them because they have rejected Jesus Christ, His Son, you are condemning people of all faiths other than Christians.

Id.

13. *Hearing, supra* note 2, at 17 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).

14. *See, e.g.,* Jonathan Merritt, *Can Wheaton College Still Claim to Be the “Harvard of Evangelicalism”?*, SOJOURNERS (Dec. 18, 2015), <https://sojo.net/articles/can-wheaton-college-still-claim-be-harvard-evangelicalism> [<https://perma.cc/H8MB-P9VU>].

features of the historic Christian creeds, thereby identifying the College not only with the Scriptures but also with the reformers and the evangelical movement of recent years. The statement also defines the biblical perspective which informs a Wheaton education. These doctrines of the church cast light on the study of nature and man, as well as on man's culture.¹⁵

In an effort to remain true to its institutional mission and Statement of Faith, Wheaton suspended a Christian political science professor, Dr. Larycia Hawkins, who had publicly opined that Christians and Muslims worship the same God.¹⁶ Vought wrote to support the college in its response to the matter.¹⁷ In an article that appeared in *The Resurgent*, Vought wrote, "I am proud of the school and hope they stand their ground."¹⁸ He then offered three major reasons for his support of Wheaton's decision to place the professor on leave.¹⁹ As ex-

15. *Statement of Faith and Educational Purpose*, WHEATON COLL. [hereinafter *Wheaton Statement of Faith*], <http://www.wheaton.edu/About-Wheaton/Statement-of-Faith-and-Educational-Purpose> [<https://perma.cc/49U6-3LYC>] (last visited Mar. 19, 2018).

16. For a more complete account of the saga at Wheaton, see Ruth Graham, *The Professor Suspended for Saying Muslims and Christians Worship One God*, ATLANTIC (Dec. 17, 2015), <https://www.theatlantic.com/politics/archive/2015/12/christian-college-suspend-professor/421029/> [<https://perma.cc/8T6S-L7GQ>].

17. The college placed the associate professor on administrative leave "in response to significant questions regarding the theological implications" of her statements "about the relationship of Christianity to Islam," statements that appeared incongruous with the school's Statement of Faith. *Wheaton College Statement Regarding Dr. Larycia Hawkins*, WHEATON COLL. (Dec. 11, 2015), <http://web.archive.org/web/20151216161646/http://www.wheaton.edu/Media-Center/Media-Relations/Statements/Wheaton-College-Statement-Regarding-Dr-Hawkins>. This Statement of Faith is reproduced in full, *infra* note 271. Additional background appears in Senator Sanders's opening statement at the committee hearing:

Apparently, the crime that Mr. Vought found so objectionable was a 2015 Facebook post that Miss Hawkins wrote stating, and I quote—this is from Miss Hawkins, the professor of political science: "I stand in religious solidarity with Muslims because they, like me, a Christian, are people of the Book. And, as Pope Francis stated, we worship the same God."

Hearing, supra note 2, at 4 (statement of Sen. Bernard Sanders, Ranking Member, S. Comm. on the Budget).

18. Russ Vought, *Wheaton College and the Preservation of Theological Clarity*, RESURGENT (Jan. 17, 2016), <http://theresurgent.com/wheaton-college-and-the-preservation-of-theological-clarity/> [<https://perma.cc/V3XA-3FMP>].

19. "First, the theological issue at stake is very important, as it pertains to what we believe about our savior and Lord, Jesus Christ," wrote Vought. *Id.* Christian belief in the deity and humanity of Jesus "matters immensely for our salvation,"

plained more thoroughly below, the evangelical theological foundation for Vought's perspective on salvation is reflected in various sections of Wheaton College's Statement of Faith.²⁰

What is most problematic about the Sanders-Vought exchange is not that Senator Sanders raised the issue of whether a nominee's religious beliefs might affect the nominee's understanding and execution of his public duties. One can imagine any number of situations in which a nominee's religious perspectives are potentially relevant, and a persuasive argument exists that an open-minded, respectful public dialogue in these situations about a nominee's values, including those that are religiously based, is constitutionally permissible, and even politically productive.²¹

for "[i]f Christ is not God, he cannot be the necessary substitute on our behalf for the divine retribution that we deserve." *Id.* Vought also responded to Dr. John Stackhouse, on whom Dr. Hawkins relied in defense of her statement about worship. See, e.g., John Stackhouse, *Allah and Yhwh . . . and Tash and Aslan*, JOHN STACKHOUSE: WEBLOG (Dec. 17, 2015) [hereinafter Stackhouse, *Allah and Yhwh*], <http://www.johnstackhouse.com/2015/12/17/allah-and-yhwh-and-tash-and-aslan/> [https://perma.cc/U3R3-WY34]; John Stackhouse, *Do Muslims and Christians Worship the same God?*, JOHN STACKHOUSE: WEBLOG (Dec. 16, 2015) [hereinafter Stackhouse, *Worship*], <http://www.johnstackhouse.com/2015/12/16/do-muslims-and-christians-worship-the-same-god/> [https://perma.cc/MG2K-AZBZ]. Dr. Stackhouse acknowledged that "[d]eficient theologies impede our relationship with God and with the world," but cautioned against condemning "their piety as aimed at a completely different deity just because it doesn't include even wonderful and crucial ideas such as the Trinity or the deity of Jesus." Stackhouse, *Allah and Yhwh*, *supra*. Vought responded,

This is the fundamental problem. Muslims do not simply have a deficient theology. They do not know God because they have rejected Jesus Christ his Son, and they stand condemned. In John 8:19, "Jesus answered, 'You know neither me nor my Father. If you knew me, you would know my Father also.[]'" In Luke 10:16, Jesus says, "The one who rejects me rejects him who sent me." And in John 3:18, Jesus says, "Whoever believes in [the Son] is not condemned, but whoever does not believe is condemned already, because he has not believed in the name of the only Son of God."

Vought, *supra* note 18.

Mr. Vought's second major point in his article was that "Wheaton College has every right to insist that academic freedom be enjoyed within the broad parameters of their Statement of Faith" and a "Biblical responsibility to ensure that students are not being taught error." *Id.*

Thirdly, Mr. Vought critiqued "the manner and rhetoric of Dr. Hawkins's response to Wheaton" for a variety of reasons. *Id.*

20. See *infra* Part II.

21. See Horwitz, *supra* note 1, at 133–46.

But the Sanders line of questioning fostered no such dialogue or quest for real understanding. Its tone was hostile and its phrasing was conclusory. It followed Sanders's introductory remarks that painted Vought's words as "indefensible," "hateful," and "Islamophobic."²² And Sanders's interrogation was unnecessary to determine the simple question of whether Vought would follow the law in performing his public duties. Sanders did not conduct himself in the manner expected of a statesman seeking to understand whether Vought would faithfully serve the country; he conducted himself as one would expect of a partisan executioner handing Vought his own noose. The most plausible interpretation of Senator Sanders's words is that he opposed Vought's nomination primarily because Vought, in solidarity with Wheaton College, had dared to publicly express his theological conviction that salvation from sin is available only through faith in the Lord Jesus Christ. And Senator Van Hollen had Sanders's back. Apparently for Senator Sanders, a condition for serving as Deputy Director of the OMB is either rejecting or not publicly affirming the proclamation of Christ that "I am the way, and the truth, and the life; no one comes to the Father but through Me."²³

Unfortunately, the Sanders-Vought exchange is not unique, although it is the most poignant case in point. Recent hearings considering judicial nominations to the federal bench have featured similar scrutiny of the views of devout believers, especially those who are historically orthodox within their denominations. To illustrate, while questioning then Notre Dame law professor Amy Coney Barrett, nominee for judge for the United States Court of Appeals for the Seventh Circuit, United States Senator Dianne Feinstein remarked that "the dogma lives loudly within you, and that's of concern when you come to big issues that large numbers of people have fought for years in this

22. *Hearing, supra* note 2, at 4 (statement of Sen. Bernard Sanders, Ranking Member, S. Comm. on the Budget).

23. *John* 14:6. All biblical quotations in this Article are drawn from the New American Standard Bible. Perhaps it is more precise to say that Senator Sanders apparently objected to the traditional understanding within the church of Christ's proclamation in *John* 14:6, and certainly the interpretation of that proclamation that prevails within evangelicalism.

country.”²⁴ Apparently concerned about how the Catholic convictions of now Judge (then Professor) Barrett would influence her resolution of cases involving the regulation of abortion,²⁵ Senator Feinstein further remarked, “Dogma and law are two different things. I think whatever a religion is, it has its own dogma. The law is totally different.”²⁶ Other senators also questioned the degree to which Barrett’s faith would affect her discharge of judicial duties, and they “seemed troubled by Barrett’s Catholic convictions, particularly on the issues of abortion and same-sex marriage.”²⁷ When Judge Barrett assured these senators that she would honor the rule of law, they appeared incredulous.²⁸

Similarly, when the United States Senate Committee on the Judiciary was considering the nomination of then United States Department of Justice Deputy Assistant Attorney General Trevor McFadden for judge of the United States District Court for the District of Columbia,²⁹ Senator Sheldon Whitehouse submitted multiple questions for the record³⁰ to now Judge

24. See Aaron Blake, *Did Dianne Feinstein accuse a judicial nominee of being too Christian?*, WASH. POST (Sept. 7, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/09/07/did-a-democratic-senator-just-accuse-a-judicial-nominee-of-being-too-christian/> [<https://perma.cc/FQT7-FQ5A>]. Professor Barrett, a Catholic, was later confirmed by the Senate. See Brent Kendall, *Divided Senate Confirms Notre Dame Professor to U.S. Appeals Court*, WALL. ST. J. (Oct. 31, 2017), <https://www.wsj.com/articles/divided-senate-confirms-notre-dame-professor-to-u-s-appeals-court-1509490943> [<https://perma.cc/UFJ8-7SUM>].

25. See Emma Green, *Should a Judge’s Nomination Be Derailed by Her Faith?*, ATLANTIC (Sept. 8, 2017), <https://www.theatlantic.com/politics/archive/2017/09/catholics-senate-amy-barrett/539124/> [<https://perma.cc/9MSP-MFH5>]. (“Feinstein was not convinced that Barrett would uphold *Roe v. Wade* given her traditional Catholic beliefs.”).

26. *Id.* (quoting Senator Feinstein).

27. *Id.*

28. See *id.* (“But when Barrett repeatedly stated that she would uphold the law, regardless of her personal beliefs, they didn’t seem to believe her.”).

29. Now-Judge McFadden was confirmed in late October of 2017. See Tim Ryan, *Nominee for D.C. Federal Breezes Through Confirmation*, COURTHOUSE NEWS SERV. (Oct. 30, 2017), <https://www.courthousenews.com/nominee-dc-federal-breezes-confirmation/> [<https://perma.cc/CXK2-92B9>].

30. See *Nomination of Trevor Neil McFadden: Nominee to the United States District Court for the District of Columbia: Questions for the Record*, 115th Cong. (2017) [hereinafter *Whitehouse Questions*], <https://www.judiciary.senate.gov/imo/media/doc/McFadden%20Responses%20to%20QFRs.pdf> [<https://perma.cc/9ZDV-N3D9>] (questions from Sen. Sheldon Whitehouse, Member, Sen. Judiciary Comm.).

McFadden concerning *Obergefell v. Hodges*.³¹ The questions began with the following paragraph:

You are an elected member (until 2020) of the Falls Church Anglican, which broke away from the Episcopal Church largely due to the denomination's consecration of an openly gay bishop. The Falls Church Anglican considers "marriage to be a life-long union of husband and wife" intended for "the procreation and nurture of godly children" and entailing "God-given" "roles of father and mother." In 2015, the associate pastor of the Falls Church Anglican agreed that "if the U.S. Supreme Court decision includes a redefinition of marriage, this will constitute an intrusion of the state on God's institution of marriage 'from the beginning.'"³²

Senator Whitehouse proceeded to ask McFadden if he believed that the holding of *Obergefell* "constitute[d] an intrusion of the state on God's institution of marriage 'from the beginning.'"³³ Apparently, the mere membership of Judge McFadden in a theologically conservative church was the catalyst for this line of questioning. And somehow, Senator Whitehouse seemingly thought that Judge McFadden's view of whether the result in *Obergefell* is consistent with God's design for marriage bears upon his fitness for judicial service.

These interrogations of the religiously orthodox raise important questions of law, public policy, and religion in our constitutional democracy. The Sanders-Vought exchange is especially instructive, for it demonstrates a degree of religious intolerance, and even hostility, unmatched in other Senate confirmation proceedings. This Article thus focuses on this exchange for the purposes of analyzing its constitutional implications, as well as its more general public policy implications for evangelicals in public service. But it should not be overlooked

31. 135 S. Ct. 2584, 2597–609 (2015) (holding that the right to marry is a fundamental right inherent in the liberty of a person, and that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment same-sex couples may exercise this fundamental right). For a discussion of *Obergefell* and its implications for the continuing federal income tax exemption of private schools that maintain sexual conduct policies, see Johnny Rex Buckles, *The Sexual Integrity of Religious Schools and Tax Exemption*, 40 HARV. J.L. & PUB. POL'Y 255 (2017).

32. *Whitehouse Questions*, *supra* note 30.

33. *Id.* The letter also asked how "ideas about 'God-given' 'roles of father and mother' accord with the legal precedent." *Id.*

that the issues raised by the Sanders-Vought exchange are recurring, and they potentially affect not just evangelical nominees, but also an untold number of historically orthodox believers, in general.

At an intuitive level, Senator Sanders's questions appear suspect under Article VI and under the Religion Clauses of the First Amendment to the United States Constitution. Does not Article VI prohibit government from conditioning federal public service on formal adherence to a religious view (such as universalism)? Does not the Free Exercise Clause of the First Amendment protect citizens from religiously based targeting by government actors? Does not the Establishment Clause prevent government from favoring one religious perspective (for example, some version of universalism) over another (for example, traditional Reformed theology and its understanding of the eternal damnation of the unredeemed)? Part I of this Article evaluates the constitutionality of discharging one's legislative office as Senator Sanders did. This Part concludes that lawmakers who inquire in the manner of Senator Sanders do not violate constitutional rights, at least not in a manner that is remediable, but that they do plainly offend constitutional norms.

Having established the practical constitutional permissibility—but normative constitutional impropriety—of the Sanders interrogation, this Article argues in Part II that his opposition to Vought is unjustified under a sensible public policy analysis. But rather than belabor the obvious objection to Senator Sanders's interrogation—that it violated constitutional norms and exhibited a religious intolerance that should have no place in American democracy—Part II opens a dialogue that is sorely needed in contemporary public policy discourse. It explores in some detail the evangelical claims that Sanders apparently found so objectionable, and how they do and do not bear upon one's capacity for public service. This theological-political analysis is necessary to challenge biases that (unlike Senator Sanders's) may be unspoken but nonetheless operative in the process of governing, and to enhance understanding by government actors of the fitness of evangelicals for public service in the pluralistic United States of America.

I. THE CONSTITUTIONALITY OF RELIGIOUSLY MOTIVATED
VOTING BY INDIVIDUAL CONGRESSIONAL ACTORS

The interrogation of Russell Vought by Senator Sanders likely strikes many at a visceral level as deeply offensive under constitutional norms,³⁴ and perhaps even suspect under commonly articulated tests for determining whether state action violates the Constitution.³⁵ This Part first reviews and analyzes the Religious Test Clause of Article VI of the United States Constitution. This Part then discusses the tests for determining whether a violation of the Establishment Clause or Free Exercise Clause has occurred, the norms that underlie these clauses, and the application of these tests and norms to attempts to disqualify persons from public office on the basis of their faith. Next, this Part surveys Supreme Court decisions interpreting the Speech or Debate Clause of the Constitution, a key to analyzing the constitutional implications of the Vought hearing. This Part concludes that, although the Sanders interrogation contravened commonly accepted constitutional norms, his inquisition, judgmental remarks, and adverse vote are not in technical violation of the Constitution, and in any case are beyond judicial scrutiny.

A. *The Religious Test Clause*

Article VI of the United States Constitution states that “no religious Test shall ever be required as a Qualification to any Of-

34. See, e.g., Steven Nelson, *Experts: Bernie Sanders Can Vote Against Nominee Based on Christian Beliefs*, U.S. NEWS & WORLD REP. (June 8, 2017), <https://www.usnews.com/news/national-news/articles/2017-06-08/experts-bernie-sanders-can-vote-against-nominee-based-on-christian-beliefs> [https://perma.cc/4C3T-7WSJ] (quoting Professor Michael McConnell as stating “[n]o senator should vote against a nominee based on his or her religion”); *id.* (quoting Professor Richard Epstein for the principle that courts cannot probe legislators’ motives, in part because of the difficulty of establishing the motives of those “who are less explicit than Sanders but harbor these biases”).

35. See, e.g., David French, *Watch Bernie Sanders Attack a Christian Nominee and Impose an Unconstitutional Religious Test for Public Office*, NAT’L REV.: THE CORNER (June 7, 2017, 11:36 PM), <https://www.nationalreview.com/corner/watch-bernie-sanders-unconstitutionally-impose-religious-test-public-office/> [https://perma.cc/48M3-E6NZ] (opining that Sanders engaged in “a disgraceful and unconstitutional line of questioning”).

office or public Trust under the United States.”³⁶ Very little judicial interpretation of this Religious Test Clause exists,³⁷ and no court has decided a case under it. Indeed, according to one prominent scholar of constitutional law, Supreme Court precedent under the Free Exercise Clause leaves “little independent significance” for the Religious Test Clause.³⁸ Still, in part because some commentators have raised the clause in questioning the constitutionality of probing the religious views of nominees for public office,³⁹ no examination of the Sanders interrogation of Vought would be complete without exploring the meaning of the Religious Test Clause.⁴⁰

A textual analysis of the Religious Test Clause suggests that it forbids the government from requiring prospective federal office holders and other senior government employees,⁴¹ as a

36. U.S. CONST. art. VI, cl. 3.

37. In *Torcaso v. Watkins*, 367 U.S. 488 (1961), the Court observed:

When our Constitution was adopted, the desire to put the people “securely beyond the reach” of religious test oaths brought about the inclusion in Article VI of that document of a provision that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”

Id. at 491 (first quoting THOMAS O’BRIEN HANLEY, *THEIR RIGHTS AND LIBERTIES: THE BEGINNINGS OF RELIGIOUS AND POLITICAL FREEDOM IN MARYLAND* 65 (1959); then quoting U.S. CONST. art. VI, cl. 3). The *Torcaso* Court did not directly apply the Religious Test Clause, however, but instead the Establishment Clause. *See id.* at 492–96.

38. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-2, at 1155 n.1 (2d ed. 1988).

39. *See, e.g.,* French, *supra* note 35.

40. For scholarly commentary on the Religious Test Clause, see ALBERT J. MENENDEZ, *NO RELIGIOUS TEST: THE STORY OF OUR CONSTITUTION’S FORGOTTEN ARTICLE* (1987); Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 *CASE W. RES. L. REV.* 674 (1986); Daniel L. Dreisbach, *The Constitution’s Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban*, 38 *J. CHURCH & ST.* 261 (1996); Horwitz, *supra* note 1; J. Gregory Sidak, *True God of the Next Justice*, 18 *CONST. COMMENT.* 9 (2001); James E. Wood, Jr., Editorial, “No Religious Test Shall Ever Be Required”: *Reflections on the Bicentennial of the U.S. Constitution*, 29 *J. CHURCH & ST.* 199 (1987); Winston E. Calvert, Note, *Judicial Selection and the Religious Test Clause*, 82 *WASH. U. L.Q.* 1129 (2004).

41. The level of seniority of the prospective federal employee that is required to trigger the protection of the Religious Test Clause is unclear. Its terms apply to “a qualification to any office or public trust under the United States.” U.S. CONST. art. VI, cl. 3. Given the broader context in which the clause appears, “any office” or position of “public trust” within the federal government arguably includes a great number of elective and appointive positions.

condition of public service, to formally affirm a religious belief, practice or affiliation.⁴² A responsible textual analysis must place the clause within the broader clause of which it is a part.⁴³ Article VI contains both the Oaths Clause and the Religious Test Clause. The relevant text reads as follows:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.⁴⁴

The primary force of Article VI, Clause 3 is to require federal and state lawmakers, executive officers, and judicial officers to support the United States Constitution by binding themselves through the formal mechanism of an “oath or affirmation.” There is textual and conceptual continuity between the Religious Test Clause and the Oaths Clause, and this continuity informs the meaning of the Religious Test Clause.

The continuity of the Religious Test Clause with the Oaths Clause is suggested by several textual features. First, the Religious Test Clause includes within its scope “any office or public trust” in the federal government, thereby apparently expanding coverage beyond the legislators, executive officers, and judicial officers identified in the Oaths Clause. The Religious Test Clause thus extends a conceptual thread dealing with government officials. Secondly, the Religious Test Clause extends the concept of “qualification” for public office originating in the Oaths Clause.⁴⁵ Third, the Religious Test Clause contrasts the imposition of an office-holding qualification in the Oaths Clause (that is, an oath or affirmation to support the Constitution) with the prohibition of a religious test. The con-

42. See Horwitz, *supra* note 1, at 116 (stating that Article VI, Clause 3 “deals with the single subject of oaths, and it is precisely with oaths, or their equivalent, that the Religious Test Clause is concerned”).

43. See *id.* at 115–16.

44. U.S. CONST. art. VI, cl. 3.

45. Although the Oaths Clause does not use the term “qualification,” its requirement that the named government officials “be bound by oath or affirmation, to support this Constitution” plainly sets forth a qualification for their service.

trast is made explicit by the conjunction “but,” which functions to join the two clauses for the purpose of contrasting the two. Finally, the text employs a semicolon between the Oaths Clause and the Religious Test Clause. The semicolon signals continuity in the two clauses.

Because of the conceptual and grammatical continuity of the Oaths Clause and the Religious Test Clause, it is sensible, at least as a working hypothesis, to interpret the latter clause as speaking to the same general practice identified in the Oaths Clause.⁴⁶ The Oaths Clause plainly addresses qualifications for public office in the form of a binding oath or affirmation to support the Constitution. It essentially requires formal affirmation of loyalty, albeit to the Constitution. Introducing the Religious Test Clause with the conjunction “but” signifies contrast with this formal affirmation of loyalty. The contrast seems to be based on conceptual parallelism; certain federal and state government officials can (and will) be required to formally affirm loyalty to the Constitution, “but” federal officials cannot be compelled to formally affirm loyalty to religion.⁴⁷

This tentative textual interpretation of the Religious Test Clause is not dispositive of the clause’s meaning, nor does it specify precisely what affirmations of loyalty to religion cannot be compelled. The tentative textual interpretation should be scrutinized and informed by other factors, including the clause’s historical context, the sources informing how it was understood at and near the framing of the Constitution, and how the clause functions within the broader constitutional scheme.

Existing scholarship persuasively documents that the historical practice providing the occasion for the Religious Test

46. See Horwitz, *supra* note 1, at 116 (“In short, it is no accident that the Religious Test Clause was a part of Article VI, clause 3. That clause deals with the single subject of oaths, and it is precisely with oaths, or their equivalent, that the Religious Test Clause is concerned.”).

47. Of course, another possible interpretation of the relationship between the two clauses is that an even greater contrast is intended. For example, one could conceivably argue that the sense of the two clauses is that, whereas certain federal and state government officials can (and will) be required formally to affirm loyalty to the Constitution, federal officials cannot even be pressed upon to explain how their religious views might bear upon the discharge of their duties. Such an expansive interpretation of the Religious Test Clause cuts against the continuity of the two clauses suggested by their common concepts and grammatical links.

Clause was the religious test oaths of England and the rest of Europe.⁴⁸ Under the laws requiring these oaths and certain religious practices as a condition for holding public office, would-be public servants were compelled to swear to their positions on specified theological issues to reflect ecclesial loyalty (such as to the Church of England).⁴⁹ The use of these oaths “was the historical example that many of the defenders of the Constitution had in mind” in arguing against religious tests.⁵⁰ In other words, the historical evil the Framers sought to avoid by the Religious Test Clause was a state-imposed requirement that prospective public servants formally affirm (and, in some cases, ritually adhere to) official church dogma, not a more general inquiry into how one’s religious beliefs might bear upon one’s public service.⁵¹ The historical occasion thus tends to support the tentative, textually based interpretation of the Religious Test Clause previously proffered.

The drafting and ratification history of the Constitution also lends modest credence to the tentative textual interpretation of the Religious Test Clause. Others have ably examined the drafting and ratification history of the clause in greater detail than is necessary here.⁵² In brief, the drafting history of the clause is quite minimal.⁵³ At the Constitutional Convention, the language of the Religious Test Clause was added to the remainder of what would become Article VI, Clause 3 after delegates approved with little discussion a motion made by Charles Pinckney to include the same.⁵⁴ This addition followed earlier proposals by Pinckney, including one stating “[n]o religious test or qualification shall ever be annexed to any oath of office under

48. See, e.g., Dreisbach, *supra* note 40, at 263 & n.8, 264; Horwitz, *supra* note 1, at 104–06; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2176 (2003).

49. The Supreme Court has recognized the burden of these test oaths. See, e.g., *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961) (“[I]t was largely to escape religious test oaths and declarations that a great many of the early colonists left Europe and came here hoping to worship in their own way.”).

50. Horwitz, *supra* note 1, at 105.

51. See *id.* at 104–06.

52. See, e.g., Bradley, *supra* note 40, at 687–711; Dreisbach, *supra* note 40, at 269–71, 273–84; Horwitz, *supra* note 1, at 100–13.

53. See Bradley, *supra* note 40, at 691–92; Horwitz, *supra* note 1, at 100–01.

54. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 468 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS].

the authority of the United States.”⁵⁵ Perhaps the most that can be said, then, is that there is at least some evidence that the type of “religious test” prohibited by Article VI is one that otherwise could be imagined to be “annexed” to an oath of office. Such evidence suggests the plausibility of the textual reading that the clause is designed to prohibit some type of formal affirmation of religion as a condition to federal public service.

The state ratification debates on the Constitution, as well as the contemporaneous and prevailing use of religious tests in the individual states, also tend to support the tentative textual interpretation of the Religious Test Clause. At the time of the Constitution’s ratification, most states used (and continued to use) religious tests for public office.⁵⁶ These tests were generally drafted in terms that made compliance objectively determinable (at least superficially), and it appears that the tests were formulated in such a way that they generally could be administered by requiring formal affirmations or affiliations.⁵⁷ Further, from the ratification debates, there is considerable evidence that the type of religious test commonly in view was that in the nature of oaths, affirmations, affiliations, or ritualistic conformity.⁵⁸ This evidence further suggests that the generation that ratified the Constitution likely understood the Religious Test Clause to prohibit the government from conditioning federal office-holding upon one’s affirmation of a religious creed or affiliation, or perhaps even on one’s participation in certain religious rites. What the ratification debates do not support is the notion that general inquiries by the electorate and their representatives into the overall religious and moral fitness of would-be public office holders were out of bounds; to the contrary, a number of those who debated the Constitution evinced profound interest in continuing the tradition of selecting only moral,

55. *Id.* at 335. For a discussion, see Horwitz, *supra* note 1, at 101.

56. See Horwitz, *supra* note 1, at 108–10.

57. To illustrate, states required public office holders to profess belief in Protestantism, hold membership in a Protestant denomination, or (in more liberal states) to profess basic Christian belief. See *id.* at 108–09 (discussing various state requirements). The degree to which these tests were in fact administered in the states by requiring formal religious affirmations or religious affiliations is a separate issue.

58. See *id.* at 113–14.

religious people to public office, and proponents of the Religious Test Clause generally did not argue against this desire.⁵⁹

The final factor that this Article considers in determining the essential meaning of the Religious Test Clause is how it fits within the broader constitutional scheme. Most relevant is how the Speech or Debate Clause informs a proper understanding of the Religious Test Clause. Also important is how the Supreme Court has interpreted the Religion Clauses to essentially eclipse the Religious Test Clause. The final analysis of the essential meaning and effect of the Religious Test Clause must therefore be deferred until Section I.D, which follows an analysis of other constitutional provisions.

B. Tests for Determining Violations of the Religion Clauses, their Underlying Norms, and their Application to Faith-Based Conditions to Public Service

Under the First Amendment to the United States Constitution, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁶⁰ The Supreme Court’s doctrinal approach for determining violations of the first clause, the Establishment Clause, is discussed in Section B.1.a. The Court’s modern jurisprudence addressing the second clause, the Free Exercise Clause, is surveyed in Section B.1.b. Section B.2 then explains the norms that courts and commentators have understood to underlie one or both Religion Clauses. Section B.3 analyzes the application of these tests and norms to efforts to disqualify candidates from public service on the basis of their religious faith.

A preliminary word about analytical method is in order. Whereas a textual analysis provides decent clues as to the scope of the Religious Test Clause, a textual analysis of the Religion Clauses probably raises as many questions as answers. Further, although the historical occasion and understanding of the meaning of the Religion Clauses are immensely important in informing how the Court should interpret them,⁶¹ I am not

59. *See id.* at 111–13, 115.

60. U.S. CONST. amend. I.

61. For an exacting study of the historical meaning of, and occasion for, the Establishment Clause, see McConnell, *supra* note 48. For a similar study of the Free

now writing on a blank slate. Although it has scarcely dealt with the Religious Test Clause, the Supreme Court's jurisprudence under the Religion Clauses is vast. The sensible approach for examining the constitutionality of those who interrogate nominees in the manner of Senator Sanders is thus to focus on the substantial body of constitutional law that now exists and to explain it in view of its historical grounding.

1. *Doctrinal Tests and Frameworks*

a. *Establishment Clause Doctrine*

The Supreme Court does not uniformly apply any single test to determine whether a law violates the Establishment Clause.⁶² This Section briefly reviews the major tests and doctrinal approaches that the Court has employed in recent years to determine whether state action offends the Establishment Clause.

For a period of over thirty years beginning in 1971, the Court most frequently decided Establishment Clause controversies by applying the three-pronged test of *Lemon v. Kurtzman*.⁶³ First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion. The *Lemon* test has been applied to invalidate numerous state policies and practices.⁶⁴

Lemon has drawn severe criticism,⁶⁵ and recent opinions of the Court illustrate its receding influence. For example, in up-

Exercise Clause, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

62. See *Van Orden v. Perry*, 545 U.S. 677, 685–86 (2005) (plurality opinion) (observing that many recent decisions of the Court do not apply the *Lemon* test).

63. 403 U.S. 602, 612–14 (1971) (finding state financial assistance programs primarily benefitting sectarian schools violated the Establishment Clause because they caused excessive entanglement between the state and religion).

64. Such practices include setting aside periods of silent prayer in public schools, see, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 55–61 (1985), and displaying the Ten Commandments in public schools, see, e.g., *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

65. The late Chief Justice Rehnquist and the late Justice Scalia were notable critics of *Lemon*. For example, Chief Justice Rehnquist emphasized the Court's unwillingness to apply *Lemon* uniformly and *Lemon's* faulty doctrinal basis. See, e.g.,

holding the constitutionality of a town board's practice of beginning its meetings with a prayer offered by community clergy, the Court in *Town of Greece v. Galloway*⁶⁶ approached the Establishment Clause inquiry from the perspective of history and tradition, rather than through the lens of any formal Establishment Clause test. Characterizing *Marsh v. Chambers*⁶⁷ as "[finding] those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause,"⁶⁸ the *Town of Greece* Court opined that "to define the precise boundary of the Establishment Clause" is unnecessary when history supports the permissibility of the specific practice under examination.⁶⁹ The Court framed its inquiry as "whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures,"⁷⁰ and cited the nation's history of supporting legislative prayer, even those offered in sectarian terms.⁷¹ The Court then stated that "legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' at the opening of this Court's sessions."⁷²

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318, 319–20 (2000) (Rehnquist, C.J., dissenting). Justice Scalia famously likened *Lemon* to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried," and observed that "five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in judgment). For academic critiques of *Lemon*, see Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CALIF. L. REV. 5 (1987); Hal Culbertson, *Religion in the Political Process: A Critique of Lemon's Purpose Test*, 1990 U. ILL. L. REV. 915; Philip B. Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U. L. REV. 1 (1984); William P. Marshall, "We Know It When We See It": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Michael McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

66. 134 S. Ct. 1811, 1828 (2014).

67. 463 U.S. 783, 793–95 (1983) (holding the practice of the Nebraska legislature in opening each day of its session with prayer by a publicly funded chaplain did not violate the Establishment Clause).

68. *Town of Greece*, 134 S. Ct. at 1818.

69. *Id.* at 1819.

70. *Id.*

71. See *id.* at 1820–24.

72. *Id.* at 1825.

Although *Town of Greece* did not frame its analysis under the *Lemon* test, vestiges of *Lemon* remain in the opinion. Rejecting the argument that the town's practice was coercive to the public attending the meetings,⁷³ the Court concluded that including "a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers."⁷⁴ This "purpose and effect" language is, of course, the substance of the first two prongs of *Lemon*. *Town of Greece* may thus be understood as evaluating the permissible purpose and effect of governmental action through the lens of our nation's history and tradition.

The waning influence of *Lemon* is further illustrated in Chief Justice Rehnquist's plurality opinion in *Van Orden v. Perry*.⁷⁵ Having declined to apply the *Lemon* test,⁷⁶ the *Van Orden* plurality found no constitutional impediment to exhibiting a monument inscribed with the Ten Commandments on the Texas State Capitol grounds (which featured seventeen monuments and twenty-one historical markers on twenty-two acres of land).⁷⁷ Chief Justice Rehnquist (joined by Justices Scalia, Kennedy and Thomas) focused on "the nature of the monument and . . . our Nation's history."⁷⁸ The plurality observed the pervasive governmental acknowledgment of the role of God and religion generally, and the Ten Commandments specifically, in our nation's heritage,⁷⁹ and concluded that the monument was

73. *See id.* at 1824-28.

74. *Id.* at 1827. Similarly, the Court opined as follows:

Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. The prayer in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion.

Id. at 1827-28.

75. 545 U.S. 677 (2005).

76. *See id.* at 685-86 (plurality opinion).

77. *Id.* at 691-92.

78. *Id.* at 686.

79. *See id.* at 686-90.

a “passive use” of the religious text used by Texas (with other monuments) to represent several strands in the state’s political and legal history.⁸⁰ However, in the same term that gave us *Van Orden v. Perry*, *Lemon* commanded a majority of the Court in *McCreary County v. ACLU of Kentucky*.⁸¹ In *McCreary County*, the Court struck down two county courthouse exhibits that prominently displayed the Ten Commandments (along with other historic documents indicating the country’s religious heritage). The Court found that the counties had acted with the unlawful purpose of advancing religion, thereby transgressing the first prong of the *Lemon* test.⁸² Far from ignoring *Lemon*, the Court applied it expansively, for the Court interpreted its requirement of “a” valid secular purpose to mean one that is “not merely secondary to a religious objective.”⁸³

Related to the *Lemon* test is the “endorsement” test first articulated by Justice O’Connor in her concurrence in *Lynch v. Donnelly*.⁸⁴ In this case, the Court held that a city’s Christmas display, which included a variety of secular symbols of Christmas in addition to a nativity scene, did not violate the Establishment Clause.⁸⁵ The Court reasoned that the city’s intentions to celebrate the holiday and depict its origins were legitimate secular purposes,⁸⁶ and that any benefit to religion was “indirect, remote, and incidental.”⁸⁷ Justice O’Connor concurred, writing separately “to suggest a clarification of [the Court’s] Establishment Clause doctrine.”⁸⁸ She began her analysis by stating that the “Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.”⁸⁹ Justice O’Connor then recast *Lemon* as follows:

80. *Id.* at 691–92.

81. 545 U.S. 844 (2005).

82. *See id.* at 864, 867–74.

83. *Id.* at 864.

84. 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

85. *See id.* at 687 (majority opinion).

86. *See id.* at 681.

87. *Id.* at 683.

88. *Id.* at 687 (O’Connor, J., concurring).

89. *Id.*

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.⁹⁰

When the question involves a religious activity in which the state arguably participates, a relevant question is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement" of the religious activity.⁹¹ The endorsement test reflects the judgment that governmental endorsement of religion "sends a message to nonadherents" of the concept or practice endorsed "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."⁹² Correlatively, when government disapproves of religion, it "sends the opposite message."⁹³ The endorsement test has been followed by a majority of the Court on occasion,⁹⁴ but never consistently.

Another test for ascertaining a violation of the Establishment Clause is that of "non-coercion."⁹⁵ Under this test, a law violates the Establishment Clause if the government's promotion of religion forces the profession of religion or participation in a religious ceremony. The Court has occasionally found govern-

90. *Id.* at 690.

91. *Wallace v. Jaffree*, 472 U.S. 38, 73, 76 (1985) (O'Connor, J., concurring in judgment).

92. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

93. *Id.*

94. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305–10, 316 (2000) (holding unconstitutional the practice of allowing student-elected representatives to pray before high school football games); *Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding unconstitutional the prominent display of a nativity scene on government property).

95. *See, e.g., Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part) ("Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" (alteration in original) (quoting *Lynch*, 465 U.S. at 678)).

ment action coercive, even when the government's contribution to the coercion is indirect and lacking any threat of penalty.⁹⁶ However, some justices would limit the application of the coercion test to cases involving the threat of actual legal force.⁹⁷

b. Free Exercise Doctrine

The Supreme Court announced the current framework for evaluating a Free Exercise claim in *Employment Division v. Smith*.⁹⁸ In *Smith*, the Court held that the Free Exercise Clause is not violated merely because a religiously motivated practice is burdened by the application of a neutral, generally applicable and otherwise valid law.⁹⁹ In a majority opinion authored by Justice Scalia, the Court framed the constitutional issue of the case as follows:

[W]hether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.¹⁰⁰

Upholding the state's denial of unemployment benefits, the Court rejected the argument that free exercise of religion is

96. For example, in *Santa Fe*, the Court found coercion where, through a student election authorized by the school district, a student was selected to deliver an invocation before high school football games. The coercion took the form of social pressure "to participate in an act of religious worship." *Santa Fe*, 530 U.S. at 312.

97. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in judgment) (arguing that the framers of the Constitution understood establishment to embody actual legal coercion); *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (arguing that the coercion of historical concern was that through "force of law and threat of penalty").

98. 494 U.S. 872 (1990). For extensive commentary on *Smith*, see Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L.J. 953 (1998); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & RELIGION 99 (1990); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). For a concise discussion of the majority and other opinions in *Smith*, see Johnny Rex Buckles, *Employment Division v. Smith*, in 2 ENCYCLOPEDIA OF CHRISTIANITY IN THE UNITED STATES 792 (George T. Kurian & Mark A. Lampport eds., 2016).

99. See *Smith*, 494 U.S. at 878–80.

100. *Id.* at 874.

burdened merely when the state compels an individual to observe a generally applicable law that requires (or forbids) the performance of an act that her religious belief forbids (or requires).¹⁰¹ The Court affirmed its previous decisions that prohibit Government from regulating religious belief as such.¹⁰² However, the Court opined that applying a neutral, generally applicable law to religiously motivated action has been held unconstitutional only when the right to free exercise of religion is burdened with "other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children . . ." ¹⁰³ The Court also ruled that the test of *Sherbert v. Verner*,¹⁰⁴ which required the state to justify measures that substantially burden a religious practice by showing that such measures further a compelling governmental interest,¹⁰⁵ does not apply in the case of an "across-the-board criminal prohibition on a particular form of conduct."¹⁰⁶

A different result obtains when the law burdening religious freedom is non-neutral by design. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,¹⁰⁷ the Court held that the enactment of city ordinances prohibiting ritual animal sacrifice violated the Free Exercise Clause.¹⁰⁸ Relying on the test announced in *Smith*, the Court first analyzed whether the ordinances were "neutral" laws of "general applicability."¹⁰⁹ The Court found

101. *See id.* at 878–80.

102. *See id.* at 877.

103. *Id.* at 881 (citations omitted).

104. 374 U.S. 398 (1963).

105. *See id.* at 402–03.

106. *Smith*, 494 U.S. at 884. The Court did opine in dicta that the Free Exercise Clause is violated if prohibiting the exercise of religion is the object of the law in question, rather than simply the incidental effect of a generally applicable and otherwise valid law. *See id.* at 878.

107. 508 U.S. 520 (1993). For general commentary on *Lukumi*, see Lino A. Graglia, *Church of the Lukumi Babalu Aye: Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1 (1996); Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on Lukumi*, 69 TUL. L. REV. 335 (1994); Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883 (1994). For a concise discussion of the majority and other opinions in *Church of the Lukumi Babalu Aye*, see Johnny Rex Buckles, *Lukumi Babalu Aye, Inc. v. Hialeah*, in 3 ENCYCLOPEDIA OF CHRISTIANITY IN THE UNITED STATES, *supra* note 98, at 1379.

108. *Lukumi*, 508 U.S. at 524, 531–32, 547.

109. *Id.* at 531–46.

that the ordinances were not “neutral” because the object of the ordinances was to suppress Santeria animal sacrifice.¹¹⁰ Although the text of the ordinances arguably targeted Santeria worship,¹¹¹ its operative effect was definitely to target the religion.¹¹² Speaking to the latter, the opinion observes that “almost the only conduct subject to” the ordinances was Santeria worship,¹¹³ and the ordinances prohibited more religious activity than necessary to accomplish ostensible city goals.¹¹⁴ Relatedly, the ordinances failed the *Smith* condition of “general applicability” because of their underinclusiveness; they selectively imposed burdens on religiously motivated conduct but did not regulate nonreligious conduct that undermined alleged governmental interests.¹¹⁵ Because the ordinances failed the tests of neutrality and generally applicability, they “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”¹¹⁶ The ordinances failed this test of “strict scrutiny.” First, they were not “narrowly tailored”: they were underinclusive, and the government could have advanced its ostensible interests while burdening religion much less.¹¹⁷ Moreover, the underinclusiveness of the ordinances revealed the absence of a compelling government interest.¹¹⁸

2. Foundational Norms of the Religion Clauses

The Supreme Court’s Establishment Clause and Free Exercise Clause jurisprudence may be understood as grounded in one or more norms perceived to explain the purpose or purposes of the Religion Clauses. Commonly articulated norms include neutrality (or equality, either among religions or be-

110. *See id.* at 542.

111. *See id.* at 533–34.

112. *See id.* at 540–42.

113. *Id.* at 535.

114. *See id.* at 538–40.

115. *See id.* at 542–46.

116. *Id.* at 531–32.

117. *See id.* at 546.

118. *See id.* at 546–47.

tween religion and non-religion), religious liberty, and separation of church and state.¹¹⁹

a. Neutrality

The Supreme Court has often emphasized the neutrality norm as guiding the proper interpretation of the Religion Clauses.¹²⁰ Thus, in *McCreary County*, the Supreme Court characterized as the analytical “touchstone” “the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”¹²¹ Reiterating this point, the Court in *McCreary County* characterized religious neutrality as the “central Establishment Clause value.”¹²² Indeed, Justice Souter devotes an entire section of his majority opinion to explaining why the neutrality norm has “provided a good sense of direction”¹²³ in the Court’s Establishment Clause jurisprudence.¹²⁴

Also illustrative is *Epperson v. Arkansas*,¹²⁵ in which the Court held unconstitutional an Arkansas statute prohibiting any teacher in a state-supported school or university to teach, or adopt a textbook teaching, human descent from a lower form of animal.¹²⁶ The structure and language of the opinion rely on the neutrality norm. At the inception of the Court’s legal analysis, the opinion explicitly articulates and relies upon the neutrality norm:

119. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 699–700 (Breyer, J., concurring in judgment) (discussing various norms of the Religion Clauses).

120. See, e.g., *Walz v. Tax Comm’n*, 397 U.S. 664, 669–70 (1970) (“Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.”).

121. *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

122. *Id.*

123. *Id.* at 875.

124. See *id.* at 874–81.

125. 393 U.S. 97 (1968).

126. *Id.* at 109. The statute was adapted from the notorious Tennessee “monkey law” at issue in *Scopes v. State*, 289 S.W. 363 (Tenn. 1927), a case of Hollywood fame. See *Epperson*, 393 U.S. at 98. Violation of the statute constituted a misdemeanor and resulted in termination of the offending teacher’s employment. See *id.* at 99.

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.¹²⁷

Having grounded its opinion firmly on the neutrality norm, the Court applied it to foreclose what it perceived as governmental suppression of dissent from orthodoxy.¹²⁸

So also, in *School District of Abington Township v. Schempp*,¹²⁹ the Court found the Establishment Clause violated by a state law requiring that public school classes begin with a reading from the Bible, and a school district's practice of following this law and leading students in reciting the Lord's Prayer on a voluntary basis.¹³⁰ The Court so held because "[i]n the relationship between man and religion, the State is firmly committed to a position of neutrality."¹³¹

127. *Epperson*, 393 U.S. at 103–04 (citing *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947)).

128. *See id.* at 104–06. The Court's analysis derives from the neutrality norm, as the following excerpt illustrates:

While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which "aid or oppose" any religion. This prohibition is absolute.

Id. at 106 (citation omitted) (quoting *McCollum*, 333 U.S. at 225).

129. 374 U.S. 203 (1963).

130. *Id.* at 223–24.

131. *Id.* at 226. The Court elaborated on the guiding force of the neutrality norm as follows:

The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion

Finally, the Supreme Court has elevated the neutrality norm in its Free Exercise Clause jurisprudence to such a degree that its modern doctrinal framework hinges on the existence of neutrality. Under *Smith*, the Free Exercise Clause is not violated merely because a religiously motivated practice is burdened by the application of a neutral, generally applicable and otherwise valid law.¹³² Under *Lukumi*, a court applies heightened scrutiny to a law only when the law burdening religious freedom is non-neutral by design.¹³³ The Court plainly embraces the neutrality norm as central in applying the Religion Clauses.

b. Separation

The United States Supreme Court first explicitly recognized the norm of separation of church and state in a case upholding the constitutionality of a statute criminalizing polygamy, *Reynolds v. United States*.¹³⁴ *Reynolds* recounts the history of those arguing for securing better protection of religious liberty under the Constitution:

[A]t the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to say: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach

from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.

Id. at 222.

132. See *Emp't Div. v. Smith*, 494 U.S. 872, 878–80 (1990).

133. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

134. 98 U.S. 145 (1879).

actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.” Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.¹³⁵

A number of decisions have likewise recognized the separation norm. For example, in *McCullum v. Board of Education*,¹³⁶ the Court found a violation of the Establishment Clause when Illinois relieved schoolchildren of some of the hours of compulsory public education on the condition that they attend special religious classes held on public school premises and taught by privately funded teachers.¹³⁷ The Court reasoned that the program utilized “the tax-established and tax-supported public school system to aid religious groups to spread their faith.”¹³⁸ This use of tax-supported buildings for the religious instruction of pupils compelled by law to attend public schools “is not separation of Church and State.”¹³⁹

Other decisions of the Court, like *Reynolds*, have accepted the separation norm but found the norm not to have been violated. For example, in *Everson v. Board of Education*,¹⁴⁰ the Court held that New Jersey did not violate the Establishment Clause by using public funds to pay the bus fares of private school stu-

135. *Id.* at 164 (citation omitted) (quoting Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), in 8 THE WRITINGS OF THOMAS JEFFERSON 113, 113 (H. A. Washington ed., John C. Riker 1857)).

136. 333 U.S. 203 (1948).

137. *Id.* at 209–12.

138. *Id.* at 210.

139. *Id.* at 212.

140. 330 U.S. 1 (1947).

dents pursuant to a general program of paying the fares of students in both public and private schools.¹⁴¹ Yet the Court fully accepted the separation norm by embracing the imagery of the First Amendment as erecting “a wall between church and state” that “must be kept high and impregnable.”¹⁴²

Similarly, in *Zorach v. Clauson*,¹⁴³ the Court upheld the constitutionality of a “released time” program in New York City under which public school students were permitted, with parental authorization, to leave school premises during the school day to attend religious instruction on the grounds of churches and other religious institutions.¹⁴⁴ In so holding, the Court embraced the separation norm without applying it in a manner that is hostile to religious belief and expression. *Zorach* explains that the norm is real, important, and accommodating of religion:

There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the “free exercise” of religion and an “establishment” of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that, in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; “so help me God” in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our

141. *See id.* at 17–18.

142. *Id.* at 18.

143. 343 U.S. 306 (1952).

144. *Id.* at 315.

ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."¹⁴⁵

c. Promotion of Religious Liberty

Another norm underlying the Religion Clauses is the preservation and protection of religious liberty. The Free Exercise Clause protects religious liberty by preventing the government from unduly burdening religious exercise, and the Establishment Clause preserves religious liberty by forbidding governmental imposition of religion and by accommodating religious belief and practice.

The protection of religious liberty mandated by the Free Exercise Clause is apparent from its literal terms. But the Court has at times carefully articulated how the Establishment Clause also preserves religious liberty. To illustrate, in *Engel v. Vitale*,¹⁴⁶ the Court held that the Establishment Clause was violated by a New York public school board's requirement that classes begin the day by reciting a formal prayer crafted by the state's Board of Regents.¹⁴⁷ According to the Court, the Establishment Clause "must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."¹⁴⁸ Of most interest for present purposes is the Court's observation that the Religion Clauses "forbid two quite different kinds of governmental encroachment upon religious freedom."¹⁴⁹ The "first and most immediate purpose" of the Establishment Clause "rested on the belief that a union of government and religion tends to destroy government and to degrade religion."¹⁵⁰ A second purpose of the Establishment Clause "rested upon an awareness of the historical fact that governmentally established religions and

145. *Id.* at 312–13.

146. 370 U.S. 421 (1962).

147. *See id.* at 424–25, 430–36.

148. *Id.* at 425.

149. *Id.* at 430.

150. *Id.* at 431.

religious persecutions go hand in hand.”¹⁵¹ Avoiding “this sort of systematic religious persecution” explains why “the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion.”¹⁵² New York’s prescription of an official prayer in the public schools was “inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself.”¹⁵³ Thus, according to *Engel*, the goal of preserving religious liberty underlies the Establishment Clause, not just the Free Exercise Clause.¹⁵⁴

Zorach also invokes the norm of religious liberty for understanding the Establishment Clause:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.¹⁵⁵

151. *Id.* at 432.

152. *Id.* at 433.

153. *Id.*

154. *See also id.* at 425 (“It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.”).

155. *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952). Numerous cases understand the separation norm in a way that is consistent with other First Amendment norms. For example, the separation norm recognized in *Reynolds v. United States* was presented as a means to secure religious liberty. *See* 98 U.S. 145, 164 (1878). Further, in *Everson v. Board of Education*, the Court that strongly acknowledged the separation norm also stated that the First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does

Under *Zorach*, one value that must shape the Court's understanding of the Establishment Clause is religious liberty. The clause is not violated when government "respects the religious nature" of Americans and "accommodates the public service to their spiritual needs."¹⁵⁶

3. *Application to Faith-Based Conditions on Public Service*

One Supreme Court case squarely applies the First Amendment to religious test oaths. In *Torcaso v. Watkins*,¹⁵⁷ the Court invalidated a Maryland constitutional provision conditioning service in public office on a declaration of belief in the existence of God.¹⁵⁸ Observing the design of Article VI to prohibit the federal government from imposing religious test oaths,¹⁵⁹ the Court quickly turned to the First Amendment to strike down

not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." 330 U.S. 1, 18 (1947). Likewise, in *Walz v. Tax Commission*, the Court acknowledged the literal impossibility of an extreme notion of separation, and its inconsistency with the First Amendment:

Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs *amici*, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.

397 U.S. 664, 670 (1970). So also, the Court in *Lynch v. Donnelly* observed the metaphoric wall of separation between church and state "is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." 465 U.S. 668, 673 (1984). The same opinion states that the Constitution does not require "complete separation of church and state," but instead "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.*

In her dissent in the recently decided *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), Justice Sotomayor lamented that the majority's decision "leads us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment." *Id.* at 2041 (Sotomayor, J. dissenting). However, it is clear that the Court's understanding of the separation norm has long been shaped profoundly by its concomitant embrace of the neutrality norm and the norm of protecting religious liberty. Indeed, for some jurists and commentators, the separation norm is probably better conceptualized as an instrumental norm than as an ultimate value.

156. *Zorach*, 343 U.S. at 314.

157. 367 U.S. 488 (1961).

158. *See id.* at 496.

159. *See id.* at 491.

the state law.¹⁶⁰ According to the Court, the Establishment Clause of the First Amendment, which is incorporated by the Fourteenth Amendment to apply to the states,¹⁶¹ at a minimum means the following:

[N]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa.¹⁶²

In *Torcaso*, Maryland had placed its authority “on the side of one particular sort of believers,”¹⁶³ and this state bias was constitutionally prohibited:

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person “to profess a belief or disbelief in any religion.” Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.¹⁶⁴

Further, the constitutional infirmity existed even though the Maryland Constitution did not compel belief or disbelief, but rather imposed a condition for public service.¹⁶⁵

160. *See id.* at 491–92.

161. *See id.* at 492 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940)).

162. *Id.* at 492–93 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1940)).

163. *Id.* at 490.

164. *Id.* at 495 (citations omitted).

165. According to the Court, “that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.” *Id.* at 495–96 (citing *Wieman v. Updegraff*, 344 U.S. 183 (1952)).

The *Torcaso* opinion relies firmly on the separation norm. Invoking “the words of Jefferson,” the Court opined that “the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’”¹⁶⁶ Further relying on the separation norm, *Torcaso* approvingly cited the concurring opinion of Justice Frankfurter in *McCullum*, who affirmed the teaching of *Everson* that “we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.”¹⁶⁷

In *McDaniel v. Paty*,¹⁶⁸ the Court examined something of the mirror image of the state-imposed condition for public office in *Torcaso*: a clergy disqualification statute. In *Paty*, an ordained Baptist minister had been elected as a delegate to a state constitutional convention. He was later disqualified from so serving under Tennessee law barring clergy from serving as such a delegate or as a legislator. The *Paty* Court found that the state law violated the minister’s right to free exercise of religion.¹⁶⁹ Writing for a plurality,¹⁷⁰ Chief Justice Burger traced the history of the disqualification of ministers from legislative office from England through thirteen American states (including seven of the original states).¹⁷¹ Although the clergy-disqualification statutes were once considered by some as rational on anti-

166. *Id.* at 493 (quoting *Everson*, 330 U.S. at 15–16).

167. *McCullum v. Bd. of Educ.*, 333 U.S. 203, 232 (1948) (Frankfurter, J., concurring) (quoting *Everson*, 330 U.S. 1, 59 (1940) (Rutledge, J., dissenting)). The *Torcaso* Court also rejected the argument that *Zorach* had renounced the rationale of *McCullum*. Said the Court:

Nothing decided or written in *Zorach* lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept.

Torcaso, 367 U.S. 488, 494.

168. 435 U.S. 618 (1978).

169. *See id.* at 629 (plurality opinion).

170. Justices Powell, Rehnquist, and Stevens joined Chief Justice Burger’s plurality opinion. *Id.* at 620.

171. *See id.* at 622–25.

establishment grounds,¹⁷² the plurality found that the state law in question had burdened the minister's free exercise of religion.¹⁷³

The rationale of *Paty* is instructive. In finding the Tennessee constitutional provision at issue in violation of the Free Exercise Clause, the Court approvingly cited James Madison's view that a clergy-disqualification law "punish[es] a religious profession with the privation of a civil right."¹⁷⁴ The Court reasoned, "[To] condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties."¹⁷⁵

The *Paty* Court also contrasted belief-based penalties and conduct- or status-based penalties. The Court distinguished *Torcaso* on the grounds that the disqualification in *Paty* was based on status, and therefore conduct, rather than belief, as in *Torcaso*.¹⁷⁶ *Paty* affirmed that, had the Tennessee disqualification law deprived ministers "of a civil right solely because of their religious beliefs," no further inquiry would be necessary, for "[t]he Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such."¹⁷⁷ But because the Tennessee law governed conduct (according to *Paty*), the Court would evaluate the law under the then-controlling Free Exercise Clause test of *Wisconsin v. Yoder*.¹⁷⁸

Paty then rejected the position that Tennessee could justify its official bias against public service by clergy:

The essence of the rationale underlying the Tennessee restriction on ministers is that if elected to public office they will necessarily exercise their powers and influence to pro-

172. *See id.*

173. *See id.*

174. *Id.* at 626 (quoting James Madison, Observations on the "Draught of a Constitution for Virginia" (1788), in 5 WRITINGS OF JAMES MADISON 284, 288 (Gaillard Hunt ed., 1904)).

175. *Paty*, 435 U.S. at 626 (alteration in original) (quoting *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)).

176. *See id.* at 626-27.

177. *Id.* at 626.

178. 406 U.S. 205, 215 (1972).

mote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality. However widely that view may have been held in the 18th century by many, including enlightened statesmen of that day, *the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.*¹⁷⁹

In a footnote, the Court elaborated on this conclusion by observing that Virginia's "struggle for separation of church and state," an endeavor that influenced other states, as well as the federal government, included the participation of "many clergymen vigorously opposed [to] any established church."¹⁸⁰

In summary, the Court has held that both the Establishment Clause and the Free Exercise Clause forbid government from enacting laws that disqualify one from public service because he does not profess a certain religious belief or because he holds a certain religious status. These decisions are well grounded in the underlying norms of the Religion Clauses: religious neutrality, separation of church and state, and promotion of religious liberty.

C. *The Speech or Debate Clause*

Under the Speech or Debate Clause in Article I, Section 6, Clause 1 of the United States Constitution, for any speech or debate in the United States Senate or the House of Representatives, Senators and Representatives "shall not be questioned in any other Place."¹⁸¹ The history of the Clause derives from the

179. *Paty*, 435 U.S. at 628–29 (emphasis added) (citations omitted).

180. *Id.* at 629 n. 9.

181. U.S. CONST. art. I, § 6, cl. 1. The full text of the clause reads as follows:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Id.

English Bill of Rights,¹⁸² itself the product of decades of conflict between Parliament and English Kings who sought to limit the power of Parliament.¹⁸³ Similar free speech or debate guarantees for legislatures appeared in early state constitutions and in the Articles of Confederation.¹⁸⁴ Apparently because the need to protect legislative speech and debate was so widely recognized, the Speech or Debate Clause occasioned little discussion in the Constitutional Convention and in the state ratification process.¹⁸⁵ The apparent historical support for the privilege protected by the clause is evidenced by how closely the clause tracks the language of its antecedent in the English Bill of Rights; by contrast, other legislative privileges enjoyed by Parliament were curtailed or rejected at the Constitutional Convention.¹⁸⁶ Also relevant is the post-Convention defense of the privilege by Thomas Jefferson on the grounds of separation of powers.¹⁸⁷

The Supreme Court has considered the meaning and application of the Speech or Debate Clause infrequently relative to its exposition of numerous other constitutional provisions. However, the few cases that interpret the clause nicely illumine its general contours.¹⁸⁸ For over a century the Court has rejected an extremely narrow interpretation of the clause. In *Kilbourn v. Thompson*,¹⁸⁹ the Court considered the immunity of legislators whose activities culminated in the wrongful arrest of a prospective witness. Because the United States House of Repre-

182. See Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1129–30 (1973).

183. For an excellent discussion of the development of the free speech privilege in England, see *id.* at 1122–35. Initially, the free speech privilege protected members of Parliament from judicial actions brought by private individuals. See *id.* at 1122–23. The privilege then “evolved gradually and painfully into a practical instrument for security against the executive, an evolution triggered by basic changes in the functions of the legislature.” *Id.* at 1123.

184. See *id.* at 1136.

185. See *id.*

186. See *id.* at 1136–39. Indeed, the Convention rejected a proposal by James Madison to define the scope of the privilege more precisely. See *id.* at 1139–40.

187. See *id.* at 1141–42.

188. The discussion that follows is a survey of several relevant Supreme Court cases interpreting the Speech or Debate Clause, not an exhaustive discussion or analysis of all cases interpreting the clause.

189. 103 U.S. 168 (1881).

sentatives had no constitutional authority to compel a private citizen to testify before one of its committees, the Court concluded that the witness had been falsely imprisoned when arrested for contempt.¹⁹⁰ Nonetheless, the Court held that the Speech or Debate Clause conferred immunity upon the Speaker of the House and the individual members of the House committee before whom the wrongfully imprisoned witness had refused to testify.¹⁹¹ In so holding, the Court refused to limit the meaning of the clause “to words spoken in debate.”¹⁹² The rationale for the clause, to encourage elected lawmakers to perform their public duties without fear of civil or criminal prosecution, extends “to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting.”¹⁹³ In brief, the clause applies to “things generally done in a session of the House by one of its members in relation to the business before it.”¹⁹⁴

Later cases affirm and expound upon this early judicial articulation of the meaning of the Speech or Debate Clause. In *United States v. Johnson*,¹⁹⁵ the Court held that a prosecution under a general criminal statute dependent on inquiries into the motivation of a United States representative for a legislative act (a speech on the House floor) contravened the Speech or Debate Clause.¹⁹⁶ In so holding, *Johnson* emphasized the clause’s role in maintaining the constitutional separation of powers.¹⁹⁷

Subsequently, the Court in *United States v. Brewster*¹⁹⁸ reiterated the importance of distinguishing between a legislator’s acts and motivations, which are protected, from other activities, which are not protected. *Brewster* permitted criminal prosecution of a United States senator under a federal anti-bribery

190. *See id.* at 196–200.

191. *See id.* at 204–05.

192. *Id.* at 204.

193. *Id.*

194. *Id.*

195. 383 U.S. 169 (1966).

196. *See id.* at 180–85.

197. *See id.* at 181 (stating that the purpose of the Speech or Debate Clause is “to prevent intimidation by the executive and accountability before a possibly hostile judiciary”).

198. 408 U.S. 501 (1972).

statute.¹⁹⁹ The *Brewster* Court did so while embracing the general approach of *Johnson*, which *Brewster* cites for the proposition that “a Member of Congress may be prosecuted under a criminal statute provided that the Government’s case does not rely on legislative acts or the motivation for legislative acts.”²⁰⁰ *Brewster* distinguishes “purely legislative activities protected by the Speech or Debate Clause”²⁰¹ from “a wide range of legitimate ‘errands’ performed for constituents.”²⁰² The latter activities “are political in nature rather than legislative.”²⁰³ The Speech or Debate Clause is “limited to an act which was clearly a part of the legislative process—the *due* functioning of the process.”²⁰⁴ Under this analysis, because the indictment for taking a bribe required no inquiry into legislative acts or their motivation, the Speech or Debate Clause did not shield the senator from prosecution.²⁰⁵

In *Gravel v. United States*,²⁰⁶ the Court further explained the scope of protected legislative acts. In *Gravel*, the Court applied Speech or Debate Clause immunity for legislative acts to congressional aides, who function as the alter egos of legislators,²⁰⁷ but held that a senator’s arranging for private publication of a classified document comprising part of the record of a congressional subcommittee meeting was not a protected legislative

199. *See id.* at 525–29.

200. *Id.* at 512.

201. *Id.*

202. *Id.* Examples include “the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called ‘news letters’ to constituents, news releases, and speeches delivered outside the Congress.” *Id.*

203. *Id.*

204. *Id.* at 515–16.

205. The Court reasoned as follows:

The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

Id. at 526. Further, accepting a bribe is not part of the legislative process. *See id.*

206. 408 U.S. 606 (1972).

207. *Id.* at 616–22.

act.²⁰⁸ In so holding, the Court elaborated upon the scope of the clause:

The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but “only when necessary to prevent indirect impairment of such deliberations.”²⁰⁹

The *Gravel* Court also reiterated that the clause protects voting by members of Congress,²¹⁰ and made clear that the clause protects against inquiry into the “motives and purposes behind” the conduct of the senator and his aides at the subcommittee meeting at issue.²¹¹

The Supreme Court has also established that, when immunity under the Speech or Debate Clause applies, legislators are free not only from civil and criminal liability, but also from myriad forms of judicial interference. Thus, in *Eastland v. United States Servicemen’s Fund*,²¹² the issue was whether a court may enjoin the issuance of a *subpoena duces tecum* by the chairman of a Senate subcommittee and on its behalf.²¹³ The Court

208. *See id.* at 622–27.

209. *Id.* at 625 (quoting *United States v. Doe*, 455 F.2d 753, 760 (1st Cir. 1972)).

210. *See id.* at 617.

211. *See id.* at 629.

212. 421 U.S. 491 (1975).

213. The Senate subcommittee was investigating a nonprofit organization pursuant to a resolution of the full Senate and for the purpose of studying the enforcement of a federal internal security law. The subpoena commanded production of documents by a bank with respect to accounts of the nonprofit, which ostensibly had been created for the welfare of current and former members of the armed forces. The nonprofit sued the chairman of the subcommittee, nine other Senators, and the chief counsel to the subcommittee to enjoin implementation of the subpoena. The district court denied the motions for injunctive relief and dismissed the action as to individual Senators on the grounds of immunity under the Speech or Debate Clause, but the United States Court of Appeals for the D.C. Circuit reversed and remanded. The court of appeals ordered the district court to

held that the actions of the Senate subcommittee, the named senators, and the subcommittee's legal counsel were "immune from judicial interference" under the Speech or Debate Clause.²¹⁴ The Court observed that the purpose of the clause was to ensure the independence of legislators and to reinforce the separation of powers,²¹⁵ and that the clause protects against civil and criminal actions as well as against actions brought by private parties and by Executive officials.²¹⁶ That the clause applies to private civil actions "is supported by the absoluteness of the terms 'shall not be questioned,' and the sweep of the terms 'in any other Place.'"²¹⁷ Moreover, private civil actions disrupt the legislative process and weaken legislative independence.²¹⁸ The Court then opined that the issuance of the subpoena fell within the sphere of legislative acts described in prior opinions.²¹⁹ In general, the power to investigate inheres in the power to make laws, and issuing subpoenas is a legitimate exercise of the power to investigate.²²⁰ Further, the specific facts surrounding the controversy before the Court pointed to the legitimacy of the subpoena in the context of the subcommittee's purpose.²²¹ Accordingly, the Speech or Debate Clause provid-

proceed in accordance with specified guidelines. For a summary of the remedy fashioned by the court of appeals, see *Eastland*, 421 U.S. at 497-500.

214. *Id.* at 501.

215. *See id.* at 502.

216. *See id.* at 502-03.

217. *Id.* at 503.

218. Said the Court:

Just as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function. Moreover, whether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled. We reaffirm that once it is determined that Members are acting within the "legitimate legislative sphere" the Speech or Debate Clause is an absolute bar to interference.

Id. (citing *Doe v. McMillan*, 412 U.S. 306, 314 (1973)).

219. *See id.* at 503-07.

220. *See id.* at 504.

221. *See id.* at 506. Generally, probing "the sources of funds used to carry on activities suspected by a subcommittee of Congress to have a potential for undermining the morale of the Armed Forces is within the legitimate legislative

ed “complete immunity” for subcommittee members and their counsel.²²²

D. Application of Constitutional Authorities to the Sanders-Vought Matter and Similar Scenarios

The previous discussion of the Religious Test Clause, the Religion Clauses, and the Speech or Debate Clause illumines the task of determining the constitutionality of the actions of members of Congress who, like Senator Sanders, express disdain for a nominee for public service and apparently vote against the nominee because of the nominee’s faith. Existing precedent compels the following conclusion: legislators who act as did Senator Sanders plainly violate constitutional norms, but they do not violate the letter of the Constitution, at least not in a way that is remediable.

Deeming a nominee unfit for public office solely on the basis of his theological views of salvation from sin is so obviously repugnant to the norm that underlies the Religious Test Clause that little explication is necessary. The underlying norm is one of affording people of all faiths or no particular faith the opportunity to serve their country. People can no more be required to profess belief in universalism as a condition of serving as Deputy Director of the OMB than they can be required to profess belief in theism or atheism.²²³

But this conclusion does not mean that Senator Sanders’s actions violate the letter of the Religious Test Clause. As discussed in Section I.A, the better view is that the clause is implicated only by test oaths or their formal equivalent. Individual legislators, speaking and voting according to their own religious prejudices, are incapable of imposing such a formal religious test.²²⁴

sphere.” *Id.* Further, given the Senate’s specific authorization of the subcommittee to investigate possible infiltration of those acting under the influence of foreign governments, the subpoena fell within the province of the subcommittee. *See id.* at 507.

222. *See id.* at 507.

223. *See* Nelson, *supra* note 34 (quoting Professor Paul Horwitz as stating “the values behind the Religious Test Clause and the religion clauses of the First Amendment certainly count against Senator Sanders’s position here”).

224. Indeed, that the Senate Committee on the Budget approved Russell Vought’s nomination demonstrates that Senator Sanders was individually without power to impose a religious test.

The Supreme Court's Speech or Debate Clause jurisprudence confirms the conclusion that courts lack the power to inquire into the religious prejudices of individual legislators for the purpose of setting aside their votes on nominees or finding them liable for violations of constitutional rights. Senator Sanders and others who speak and vote against nominees on account of their religious views enjoy broad immunity under the Clause.²²⁵ The Court has held or stated in dicta that the Clause protects against judicial interference with speech in official assemblies of a full House of Congress, committees, and subcommittees,²²⁶ votes in such assemblies,²²⁷ and other legislative acts.²²⁸ Immunity also reaches the motives of legislators in speaking, deliberating, and voting on matters,²²⁹ whether the action against legislators is civil or criminal.²³⁰ As offensive as religious discrimination in nomination hearings surely is, an individual legislator who speaks and votes in accordance with religious biases may do so with immunity, and his individual actions cannot be set aside.

A similar analysis applies in evaluating Senator Sanders's conduct under the Religion Clauses. Senators who oppose a nominee solely on the basis of her religious beliefs as such, that is, with no legitimate basis for concluding that those beliefs would impair the nominee's ability to discharge public duties,²³¹ egregiously offend all major norms that have been un-

A different question would arise if all (or perhaps a majority of) senators voted against a nominee because she failed to comply with some religious preference that the senators shared. If the senators acted pursuant to an agreement, one could argue that such collective action is the substantive equivalent of a formal requirement. Otherwise, the analysis of this Article suggests that no violation of the Religious Test Clause has occurred.

225. See Nelson, *supra* note 34 (quoting Professor Michael McConnell as opining that "senators can vote against nominees for any reason or no reason at all" and still enjoy immunity under the Speech or Debate Clause).

226. See, e.g., *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

227. See, e.g., *Gravel v. United States*, 408 U.S. 606, 617 (1972); *Kilbourn*, 103 U.S. at 204.

228. See, e.g., *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975).

229. See, e.g., *Gravel*, 408 U.S. at 626; *United States v. Johnson*, 383 U.S. 169, 180-85 (1966).

230. See, e.g., *Eastland*, 421 U.S. at 502-03.

231. Throughout this Article, when I refer to disqualifying a nominee "solely on the basis of her religious beliefs as such," I mean to critique the act of disqualifying a nominee when no plausible case has been made that the nominee's religious

derstood to inform a proper understanding of the Religion Clauses. To disqualify a nominee solely on account of her faith is most assuredly a violation of the neutrality norm, which protects those who believe a religious tenet to the same extent that it protects those who do not. Government cannot constitutionally insist, for example, that senior cabinet officials reject the belief that God loves the world and sent His one and only Son to die for the world so that the world might be saved from sin through Him (and only Him). Nor can government, under color of law, constitutionally require a would-be nominee to embrace the religious perspective expressed by Senator Van Hollen in the hearing, that is, that “part of being a Christian” is “recognizing that there are lots of ways that people can pursue their God.”²³² The theological implications associated with “being a Christian,” whether that person is Senator Van Hollen, Russell Vought, or anyone else, are not for government to determine.²³³

Likewise, senators who oppose a nominee because of her religious beliefs that have no plausible bearing on her ability to serve the country offend the other two major norms of the Religion Clauses. The norm of protecting religious liberty is obviously violated when one is pressured to choose between serving the public and recanting one’s theological beliefs. So also, a government actor that assumes a papal role in declaring acceptable theology for nominees to public office has clearly contravened the norm of separation of church and state. Separation of church and state at least means that state actors should not be dictating to nominees what theological positions are and are not “part of being a Christian” (or an element of some other religious doctrinal framework). One would do well to remem-

beliefs would impair the nominee’s ability to discharge public duties. I do not mean to critique decisions to oppose a nominee when it is clear that her religious beliefs would prevent her from serving. For example, no constitutional norm is offended by voting against a nominee to a senior post in the Department of Health and Human Services whose religious beliefs compel her to oppose the distribution and use of all life-saving pharmaceuticals.

232. *Hearing, supra* note 2, at 17 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).

233. *See* Nelson, *supra* note 34 (quoting Professor Paul Horwitz as remarking that Sanders “was not advancing a political view, but a theological one” and that “he has no business telling nominees that they must all believe and testify that that [sic] all roads to Heaven are the same”).

ber what Jefferson meant by the “wall of separation” between church and state in his letter to the Danbury Baptists. The very letter that metaphorically invoked the wall imagery insists that a person “owes account to none other [than God] for his faith or his worship,” and that “the legislative powers of the government reach actions only, and not opinions.”²³⁴ If Russell Vought need account to “none other” than God for his faith, then he need not account to Senator Sanders or Senator Van Hollen. And if legislative powers reach “not opinions,” then they reach not Russell Vought’s soteriological opinions, including those that differ from those of Senators Sanders and Van Hollen.

But violating a constitutional norm is not necessarily the same as violating the text of the Constitution. Whether the Constitution has been violated depends on whether state action is present. A clear case of state action is duly enacted legislation. Assume, for example, that Congress enacts the prejudicial criteria of Senator Sanders (that is, a statutory provision that bars from public service those who believe that Jesus is the only way of salvation from sin). Any codification of the prejudicial criteria of Senator Sanders would not survive constitutional scrutiny. Such codification would violate not only the Religious Test Clause, but also Supreme Court precedent interpreting the Religion Clauses.

The violation of the Religious Test Clause would be manifest, for the codification would be a formal test that the Clause forbids.

Moreover, if federal law disqualified a nominee solely because the nominee’s faith is inconsistent with that preferred by one or more state actors (for example, universalism), the disqualification would plainly violate the Free Exercise Clause under *McDaniel v. Paty*. There the plurality reasoned that Congress is absolutely foreclosed from regulating, prohibiting, or rewarding religious belief,²³⁵ a principle accepted in *Smith*.²³⁶ Denying someone the opportunity to serve in public office on

234. *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (quoting Letter from Thomas Jefferson to the Danbury Baptist Association, *supra* note 135).

235. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion).

236. See *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990).

the basis of religious belief fares no better than other forms of coercive state action.²³⁷

Similarly, if federal law disqualified a nominee solely because the nominee's faith is inconsistent with that preferred by one or more state actors, the disqualification would transgress the Establishment Clause under *Torcaso v. Watkins*. There the Court emphasized that the government cannot force someone to profess belief or disbelief in religion,²³⁸ even when that compulsion takes the form of a condition for public service.²³⁹ In other words, no law can condition Russell Vought's appointment on disaffirming his belief that salvation from sin is possible only through faith in the Lord Jesus Christ.²⁴⁰

Disqualifying a nominee by statutory law solely on the basis of the nominee's faith would also offend the major Establishment Clause tests. Although disqualifying a nominee on account of his congressionally disfavored religious views may or may not violate the first prong of *Lemon*,²⁴¹ it would surely be difficult to establish a legitimate secular purpose for forbidding evangelicals like Vought from serving.²⁴² Moreover, disqualifying a nominee because of her theology would often have the primary effect of inhibiting religion (in violation of the second prong of *Lemon*).²⁴³ In addition, scrutinizing a nominee's theological positions obviously entangles government actors with religion (in violation of the third prong of *Lemon*). Similarly, religion-based disqualification would often run afoul of Justice O'Connor's endorsement test.²⁴⁴ A reasonable observer would

237. See *Paty*, 435 U.S. at 626.

238. See *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

239. See *id.* at 495–96.

240. As the Court stated in *Everson v. Board of Education*, government cannot “exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving . . . [governmental] benefits.” 330 U.S. 1, 16 (1947).

241. A secular purpose would exist, for example, for disqualifying from public service those who, on religious grounds, advocate for the genocide of all red-heads. But it would be difficult to find a credible secular purpose for disqualifying someone from service merely because she embraces the doctrine of predestination.

242. Part II of this paper explains why the possible secular concerns of Senator Sanders over Vought's nomination were baseless.

243. To foreclose all of a named religious faith from public service tends significantly to dissuade the observance of that faith.

244. See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

naturally perceive the disqualification as an endorsement of the officially approved religious view (such as universalism), and the disqualification would plainly send a message that non-conforming nominees (such as those who confess Christ as the exclusive Way of salvation) are “outsiders” who are “not full members of the political community.”²⁴⁵ Finally, to require a nominee to disavow previously expressed religious views in order to pass the Senate’s muster is also coercive. The Establishment Clause decisions that focus on coercion²⁴⁶ provide no sanctuary for statutory religion-based litmus tests for serving in public office.

Nonetheless, the better view is that the actions of an individual senator in opposing a nominee on religious grounds do not violate the Religion Clauses. When Senator Bernie Sanders spoke and voted against Russell Vought, he did not act on behalf of the Congress, let alone the full Senate or even the Senate Committee on the Budget. His actions lacked the force of law or even the imprimatur of the state. Senator Sanders was speaking solely for himself, and he was casting only his own vote. Although he was a governmental actor, he was not acting as an agent carrying out the business of the government as principal. The United States Federal Government has no power to vote in a Senate committee meeting. Voting is the privilege and responsibility of an individual senator, acting in that capacity. Senator Sanders’s speech and vote were not state action.²⁴⁷ Because his action was not the action of government, that is, not that of an agent acting on behalf of the government as principal, his behavior is not actionable under the Religion Clauses.

The conclusion that senators who govern in the mold of Sanders are constitutionally free to do so finds support in the Court’s Speech or Debate Clause jurisprudence. Senators and representatives enjoy broad immunity under that clause with respect to their individual legislative acts. Senator Sanders’s

245. *Id.* at 688.

246. See, e.g., *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in judgment and dissenting in part).

247. See Steven N. Sherr, *Freedom and Federalism: The First Amendment’s Protection of Legislative Voting*, 101 *YALE L.J.* 233, 252 n.96 (1991) (explaining that the votes of legislative minorities “do not themselves constitute government action”).

interrogation occurred at an official Senate committee meeting, at which lawful legislative functions were conducted. His speech is the core of what the Speech or Debate Clause protects, and his vote is protected against judicial intrusion by case law dating from the nineteenth century (indeed, even earlier if one includes English cases).²⁴⁸ The better view is that Senator Sanders is immune from liability and safe from any judicial inquiry into the constitutionality of his words and vote in opposing Russell Vought.²⁴⁹

248. See Reinstein & Silverglate, *supra* note 182, at 1130 (noting that, in the case of Sir William Williams, even King James II acknowledged that the free speech privilege provided absolute immunity to members of Parliament “for speeches, debates, and votes within the walls of Parliament”).

Professor George Dent, in commenting on a prior draft of this Article, suggested one possible approach for deterring the type of questioning of nominees employed by Senator Sanders: the adoption of a Senate rule that subjects a senator to a potential vote of sanction by the full Senate if that body finds that a senator has probed a nominee’s religious views without demonstrating that those views affect whether she would obey the law in discharging her public duties. The text of the Speech or Debate Clause does not appear to foreclose this proposal, for the proposal requires no “questioning” of a senator’s legislative acts “in any other Place”; the sole “questioning” would occur within the Senate itself.

249. An issue more difficult than the constitutionality of the acts of individual legislators as such is the constitutionality of the action of a legislative body itself when the question of motive arises. In that situation, the Supreme Court’s Speech or Debate Clause jurisprudence and its Establishment Clause jurisprudence are in tension. The former shuns judicial inquiry into motive. The latter, in some cases, looks to legislative purpose, which for some justices appears to include an inquiry into motives. For a thoughtful analysis of the motive-purpose distinction and the problems of probing legislative motive, see Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523 (2016). For a critique of searching for legislative motive in applying the Establishment Clause, see Scott W. Breedlove & Victoria S. Salzmann, *The Devil Made Me Do It: The Irrelevance of Legislative Motivation under the Establishment Clause*, 53 BAYLOR L. REV. 419 (2001). For a discussion of how the judiciary has developed in its willingness to review legislative purpose generally, see Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008).

Also deserving observation is that even the collective action of a committee or subcommittee of Congress is distinguishable in important respects from legislation. The latter results from action of both full houses of Congress (passing a bill) and the United States President (signing a bill into law), features apparent design (the words and structure of a written statute), frequently spawns statements of purpose (in committee reports or preambles), and binds others in the future through enforcement by the Executive Branch. Whatever the wisdom or folly of attempting to discern the “purpose” underlying legislation in deciding its constitutionality, the context of voting on a nominee by a congressional committee or subcommittee is sufficiently removed from the context of enforcing challenged legislation that the judicial precedent interpreting the Speech or Debate Clause is

In summary, Senator Sanders's hostile opposition to Russell Vought during the hearing to consider Vought's nomination blatantly violated the norms underlying the Religious Test Clause, the Establishment Clause, and the Free Exercise Clause. But his opposition to Vought did not violate the text of the Constitution. And even if this conclusion is debatable, the Court's Speech or Debate Clause jurisprudence renders Senator Sanders immune from judicial interference for his committee conduct.

II. EVANGELICALS AND PUBLIC SERVICE

Part I explains the literal, practical constitutional permissibility but normative constitutional impropriety of Senator Sanders's interrogation of, and opposition to, Russell Vought. This analysis would end most law review articles. But the analysis of the Sanders-Vought exchange should not end there. Senator Sanders, and perhaps to a lesser extent, Senator Van Hollen, had a real problem with Russell Vought's theology. So strong was Senator Sanders's objection to Vought's theology that it led him to trample one of the great ideals of our constitutional democracy: no one should be denied the opportunity to serve in public office merely on account of religious belief. One suspects that other legislators may similarly quash this ideal in the legislative process without displaying their religious prejudice as blatantly as did Senator Sanders.

Thus, this Article continues with a theological-political discussion to advance a healthy and necessary public dialogue. The Congress and the greater body politic must learn to approach difficult, sensitive matters involving religion and public policy with better information, more rigorous analysis, and more open-mindedness than that on display in the Vought hearings. Part II is offered to help foster these deliberative goods. By better understanding the foundation and implications of the evangelical theology embraced by Russell Vought, those (like Senator Sanders) who might originally dismiss Mr.

not eclipsed by case law that searches for legislative purpose in assessing the constitutionality of statutes.

Vought and other evangelicals should come to view them in a different light.²⁵⁰

What Senator Sanders apparently could not tolerate in Mr. Vought was his understanding of soteriology. In Christian theology, soteriology, from the Koine Greek “σωτηρία” (“salvation,” or “deliverance”),²⁵¹ is the doctrine of salvation from sin.²⁵² Across Christian denominations and church history, there is and has long been a diversity of perspectives on such soteriological questions as the efficacious scope²⁵³ and purpose²⁵⁴ of the atoning death of Jesus Christ,²⁵⁵ the timing and nature of the regeneration of the believer,²⁵⁶ the eternal security

250. I do not mind adding that these issues are extremely important to me personally. Like Russell Vought, I embrace the tenets of evangelicalism as articulated in this Article. These tenets are theological, not primarily political (and certainly not politically partisan), and I surmise that they flow from the implications of the personal nature, work, and teaching of the One who died and rose again on my behalf. Ensuring that government actors do not impair my constitutional right to exercise these religious convictions is naturally a matter of some priority. But even more than this, these core evangelical commitments not only compel me to respect the rights of all in our democracy, but also challenge me to exceed the standards expected of public servants. Consequently, I am especially interested in explaining why, even apart from the desire to respect constitutional norms, government officials should not exclude evangelicals from public service because of the policy concerns that Senator Sanders and others like him apparently possess. To the contrary, they should welcome service by evangelicals, as well as all Americans, regardless of their creed, who bring values of good will, selflessness, and compassion to the privilege of public service.

251. See WALTER BAUER ET AL., *A GREEK-ENGLISH LEXICON OF THE NEW TESTAMENT AND OTHER EARLY CHRISTIAN LITERATURE* 801 (Univ. Chi. Press, 2d ed. 1979).

252. See LOUIS BERKHOF, *SYSTEMATIC THEOLOGY* 415 (combined ed. 1996) (“Soteriology deals with the communication of the blessings of salvation to the sinner and his restoration to divine favor and to a life in intimate communion with God.”); *THE OXFORD DICTIONARY OF WORLD RELIGIONS* 915 (John Bowker ed., 1997) (defining soteriology as “[t]he doctrine of salvation”).

253. For a discussion of the scope of the atonement (such as whether Christ died for all or only for the elect), see ROBERT P. LIGHTNER, *SIN, THE SAVIOR, AND SALVATION* 123–27 (1991).

254. See BERKHOF, *supra* note 252, at 384–91 (discussing theories of the atonement throughout church history); LIGHTNER, *supra* note 253, at 103–23 (discussing theories of the atonement and the purpose for Christ’s death).

255. For a discussion of various historical perspectives on the atonement, see ALISTER E. MCGRATH, *CHRISTIAN THEOLOGY: AN INTRODUCTION* 251–70 (6th ed. 2017).

256. For a discussion, see BERKHOF, *supra* note 252, at 465–79; MILLARD J. ERICKSON, *CHRISTIAN THEOLOGY* 872–75 (Baker Acad., 3d. ed. 2013); LIGHTNER, *supra* note 253, at 219–21.

of the believer,²⁵⁷ the purpose and effect of water baptism,²⁵⁸ the destiny of unbelieving humanity,²⁵⁹ and a great number of other details. But within the orthodox church,²⁶⁰ and certainly within evangelicalism,²⁶¹ emphasis has long been placed on the necessity for personal trust in the Lord Jesus for salvation from sin, based on who Jesus is (the eternal, Divine Son of God the Father) and what He has done (offering Himself as a substitutionary sacrifice for sin and rising from the dead), thereby enabling Him to give eternal life to all who trust in Him for salvation. This Part surveys key concepts of evangelicalism and evangelical soteriology in Section A, then explores what they do and do not imply in Section B.

A. *Evangelicalism and Basic Soteriological Concepts in Evangelical Theology*

A helpful preliminary step in the analysis of evangelicalism and public policy is to adopt a working concept of “evangelical.”²⁶² Although the term “evangelical” has tended to elude

257. On the question of the eternal security of the believer and the perseverance of the saints, see BERKHOF, *supra* note 252, at 545–49; ERICKSON, *supra* note 256, at 914–24; WAYNE GRUDEM, SYSTEMATIC THEOLOGY: AN INTRODUCTION TO BIBLICAL DOCTRINE 788–808 (1994); LIGHTNER, *supra* note 253, at 228–49.

258. For a survey of different views on the purpose of baptism and related issues, see ERICKSON, *supra* note 256, at 1016–32. For a discussion of various Christian views on infant baptism, see MCGRATH, *supra* note 255, at 401–04.

259. See generally ERICKSON, *supra* note 256, at 940–46 (discussing and evaluating varieties of universalism).

260. In explaining the distinction between orthodoxy and heresy, Oxford University Professor Alister McGrath relies on F.D.E. Schleiermacher’s argument that “the central and distinctive idea of Christianity is that God has redeemed us through Jesus Christ, and through no one else and in no other way.” MCGRATH, *supra* note 255, at 98. “Christian understandings of God, Jesus Christ, and human nature” must comport with this central notion of redemption in order to remain Christian. *Id.* To purport to accept this distinctively Christian idea that God has redeemed humanity through Christ alone, but to explain it in a way that makes redemption impossible, not genuine, or merely optional through Christ, is to commit heresy. See *id.* This Article employs McGrath’s concept of orthodoxy when referring to “orthodox” Christianity and Christians.

261. See *infra* Section II.A; see also ALISTER MCGRATH, EVANGELICALISM & THE FUTURE OF CHRISTIANITY 56 (1995) (stating that “at its heart, evangelicalism is historic Christian orthodoxy”).

262. McGrath traces the term “evangelical” to the sixteenth century, when it referred to Catholic writers desiring the church to embrace a more biblical faith

delineation,²⁶³ an excellent source for appreciating various understandings of evangelicalism, especially as it relates to a controversy involving Wheaton College, is the brief survey promulgated by Wheaton's former program known as the Institute for the Study of American Evangelicals.²⁶⁴ This institute described a number of major senses of "evangelical."²⁶⁵ Under the first conception, an "evangelical" is any Christian who embraces a few central doctrines of Christianity and emphasizes certain practices. Evangelicalism under this view is typified by a belief that each person needs to be divinely changed or converted, a commitment to actively live the Gospel, a high regard for the Bible, a theological emphasis on the sacrifice of Christ on the cross, and a tendency to cooperate transdenominationally in evangelism and other ministry efforts.²⁶⁶ Another perspective views evangelicalism in terms of "an organic group of movements and religious tradition" characterized by a certain style, set of beliefs, and attitude.²⁶⁷ Such a conception sees a diverse canopy of evangelicalism that envelopes "black Baptists and Dutch Reformed Churches, Mennonites and Pentecostals, Catholic charismatics and Southern Baptists."²⁶⁸ A third sense of the term "evangelical," particularly in the United States, refers to what began as a primarily Midwestern coalition that arose during World War II to counter "the perceived anti-intellectual, separatist, belligerent nature of the fundamentalist movement in the 1920s and 1930s."²⁶⁹ Important evangelical leaders of the movement have included

and practice than that present in the late medieval church. See MCGRATH, *supra* note 261, at 19.

263. See *id.* at 53 ("It is notoriously difficult to give a precise definition of evangelicalism.").

264. The institute closed in December of 2014. For an overview of the institute's history, see *Institute for the Study of American Evangelicals*, WHEATON COLL., <https://www.wheaton.edu/academics/academic-centers/isae/> [https://perma.cc/EA54-36ZP] (last visited Mar. 3, 2018).

265. See Larry Eskridge, *Defining the Term in Contemporary Times*, *Institute for the Study of American Evangelicals*, WHEATON COLL., <https://web.archive.org/web/20170805202658/http://www.wheaton.edu/ISAE/Defining-Evangelicalism/Defining-the-Term> [https://perma.cc/4ZNF-LXYK] (last visited Mar. 24, 2018).

266. See *id.* (relying on the works of David Bebbington and George M. Marsden).

267. *Id.*

268. *Id.*

269. *Id.*

Carl F.H. Henry, Harold John Ockenga and Billy Graham.²⁷⁰ Moody Bible Institute and Wheaton College have been important educational institutions within the movement.²⁷¹ Prominent para-church associations have included the National Association of Evangelicals and Youth for Christ.²⁷² These and other leading figures²⁷³ have broadened and provided cohesion to evangelicalism.

These and other conceptions of “evangelical”²⁷⁴ are best viewed as complementary, not mutually exclusive. Broadly, these perspectives point to evangelicalism as both a movement and a faith community characterized by the following: (1) a commitment to the authority of the Bible, (2) an emphasis on salvation as a personal transformation effected by God through personal trust in Jesus on the basis of who He is (that is, God and man) and what He has done (that is, His death and resurrection), (3) a desire to cooperate trans-denominationally to spread the Gospel and meet human needs in the name of Christ, and (4) an effort to engage the culture, rather than retreat from it, intellectually and socially.

270. *See id.*

271. *See id.*

272. *See id.*

273. The list of people and institutions identified by the Institute for the Study of American Evangelicals is hardly exhaustive.

274. Another way to conceptualize “evangelicals” is to view them as those who historically have focused on three issues: (1) reconciling faith and reason, (2) becoming certain of salvation, and (3) reconciling personal faith with an increasingly secular and pluralistic society. *See Eskridge, supra* note 265 (relying on University of North Carolina professor Molly Worthen).

Alister McGrath, an Anglican and self-described “committed yet critical evangelical,” MCGRATH, *supra* note 261, at 11, sets forth the following “six fundamental convictions” of evangelicalism:

1. The supreme authority of Scripture as a source of knowledge of God and a guide to Christian living.
2. The majesty of Jesus Christ, both as incarnate God and Lord and as the Savior of sinful humanity.
3. The lordship of the Holy Spirit.
4. The need for personal conversion.
5. The priority of evangelism for both individual Christians and the church as a whole.
6. The importance of the Christian community for spiritual nourishment, fellowship and growth.

Id. at 55–56.

This brief survey of the meaning of “evangelical” provides theological context for Russell Vought’s articulated soteriological convictions. They align with the evangelical subject of his opinion article, Wheaton College. Wheaton’s Statement of Faith²⁷⁵ affirms among other doctrines the triune nature of God;

275. *Wheaton Statement of Faith, supra* note 15. It reads in full:

WE BELIEVE in one sovereign God, eternally existing in three persons: the everlasting Father, His only begotten Son, Jesus Christ our Lord, and the Holy Spirit, the giver of life; and we believe that God created the Heavens and the earth out of nothing by His spoken word, and for His own glory.

WE BELIEVE that God has revealed Himself and His truth in the created order, in the Scriptures, and supremely in Jesus Christ; and that the Scriptures of the Old and New Testaments are verbally inspired by God and inerrant in the original writing, so that they are fully trustworthy and of supreme and final authority in all they say.

WE BELIEVE that Jesus Christ was conceived by the Holy Spirit, born of the Virgin Mary, was true God and true man, existing in one person and without sin; and we believe in the resurrection of the crucified body of our Lord, in His ascension into heaven, and in His present life there for us as Lord of all, High Priest, and Advocate.

WE BELIEVE that God directly created Adam and Eve, the historical parents of the entire human race; and that they were created in His own image, distinct from all other living creatures, and in a state of original righteousness.

WE BELIEVE that our first parents sinned by rebelling against God’s revealed will and thereby incurred both physical and spiritual death, and that as a result all human beings are born with a sinful nature that leads them to sin in thought, word, and deed.

WE BELIEVE in the existence of Satan, sin, and evil powers, and that all these have been defeated by God in the cross of Christ.

WE BELIEVE that the Lord Jesus Christ died for our sins, according to the Scriptures, as a representative and substitutionary sacrifice, triumphing over all evil; and that all who believe in Him are justified by His shed blood and forgiven of all their sins.

WE BELIEVE that all who receive the Lord Jesus Christ by faith are born again of the Holy Spirit and thereby become children of God and are enabled to offer spiritual worship acceptable to God.

WE BELIEVE that the Holy Spirit indwells and gives life to believers, enables them to understand the Scriptures, empowers them for godly living, and equips them for service and witness.

WE BELIEVE that the one, holy, universal Church is the body of Christ and is composed of the communities of Christ’s people. The task of Christ’s people in this world is to be God’s redeemed community, embodying His love by worshipping God with confession, prayer, and praise; by proclaiming the gospel of God’s redemptive love through our Lord Jesus Christ to the ends of the earth by word and deed; by caring for

the supreme revelation of God in Christ Jesus; the inspiration and accuracy of the Bible; the crucifixion, bodily resurrection, and ascension of the Lord Jesus; the substitutionary sacrifice of Christ; that “all who receive the Lord Jesus Christ by faith are born again of the Holy Spirit and thereby become children of God and are enabled to offer spiritual worship acceptable to God”; and the bodily resurrection of everyone, unto “the everlasting punishment of the lost, and the everlasting blessedness of the saved.”²⁷⁶

The soteriological concepts that seem to have offended the sensibilities of Senator Sanders inhere in the evangelical understanding of how one is removed from the state of condemnation from sin.²⁷⁷ Mr. Vought’s view, consistent with the position of Wheaton College,²⁷⁸ is that everyone²⁷⁹—regardless of nationality, ethnicity, race, sex, family ancestry, and even religious culture—is born with a propensity to sin²⁸⁰ and, apart

all of God’s creation and actively seeking the good of everyone, especially the poor and needy.

WE BELIEVE in the blessed hope that Jesus Christ will soon return to this earth, personally, visibly, and unexpectedly, in power and great glory, to gather His elect, to raise the dead, to judge the nations, and to bring His Kingdom to fulfillment.

WE BELIEVE in the bodily resurrection of the just and unjust, the everlasting punishment of the lost, and the everlasting blessedness of the saved.

Id.

276. *Id.*

277. The doctrine of salvation and the doctrine of sin are inseparably linked in Christian theology. See THE OXFORD DICTIONARY OF WORLD RELIGIONS, *supra* note 252, at 915 (stating that “[t]he doctrines of the Fall and of sin are presuppositions” of the saving work of God in Christian theology).

278. See *Wheaton Statement of Faith*, *supra* note 15 (affirming that “all human beings are born with a sinful nature that leads them to sin in thought, word, and deed”).

279. See *Romans* 3:9 (stating “we have already charged that both Jews and Greeks are all under sin”).

280. See *Romans* 7:18–19 (“For I know that nothing good dwells in me, that is, in my flesh; for the willing is present in me, but the doing of the good is not. For the good that I want, I do not do, but I practice the very evil that I do not want.”); *Romans* 7:23 (“I see a different law in the members of my body, waging war against the law of my mind and making me a prisoner of the law of sin which is in my members.”); *Galatians* 5:17 (“For the flesh sets its desire against the Spirit, and the Spirit against the flesh; for these are in opposition to one another, so that you may not do the things that you please.”); see also ERICKSON, *supra* note 256, at 575 (“All of us, apparently without exception, are sinners. By this we mean not merely

from union with Christ, stands guilty of sin before the holy,²⁸¹ and perfectly and uniquely righteous,²⁸² God.²⁸³ The propensity to sin is the condition of all humanity after the original rebellion of the first humans in Eden.²⁸⁴ Grounded in Scripture²⁸⁵ and expounded upon since the days of the early church, perhaps most memorably in the writings of Augustine of Hippo,²⁸⁶ this view of the pervasive sinfulness of humanity is widely held across evangelicalism.²⁸⁷ Further, the traditional evangeli-

that all of us sin, but that we all have a depraved or corrupted nature that so inclines us toward sin that it is virtually inevitable.”).

281. See 1 *Samuel* 2:2 (“There is no one holy like the LORD, Indeed, there is no one besides You, Nor is there any rock like our God.”); *Isaiah* 6:3 (describing the cry of the seraphim in the heavenly throne room as “Holy, Holy, Holy, is the LORD of hosts”); *Isaiah* 8:13 (“It is the LORD of hosts whom you should regard as holy. And He shall be your fear, And He shall be your dread.”); *Revelation* 4:8 (describing the heavenly worship of four winged creatures proclaiming “HOLY, HOLY, HOLY is THE LORD GOD, THE ALMIGHTY, WHO WAS AND WHO IS AND WHO IS TO COME”).

282. See *Psalms* 7:11 (“God is a righteous judge, And a God who has indignation every day.”); *Isaiah* 45:21 (“And there is no other God besides Me, A righteous God and a Savior; There is none except Me.”); *Romans* 3:5–6 (“But if our unrighteousness demonstrates the righteousness of God, what shall we say? The God who inflicts wrath is not unrighteous, is He? (I am speaking in human terms.) May it never be! For otherwise, how will God judge the world?”).

283. See, e.g., *Isaiah* 54:6 (“For all of us have become like one who is unclean, And all our righteous deeds are like a filthy garment; And all of us wither like a leaf, And our iniquities, like the wind, take us away.”); *Romans* 3:23 (stating that “all have sinned”); *Romans* 5:18 (“So then as through one transgression there resulted condemnation to all men, even so through one act of righteousness there resulted justification of life to all men.”); *James* 2:10 (“For whoever keeps the whole law and yet stumbles in one *point*, he has become guilty of all.”). The statement of universal guilt is a generalization. Many evangelicals believe that people who lack the cognitive ability to grasp the need for salvation (for example, very young children, and the severely mentally challenged) are not held accountable for sin.

284. See *Genesis* 3:1–24. For the consequences of the sin of Adam for the whole of humanity, see *Romans* 5:12–21. For a discussion of original sin, see ERICKSON, *supra* note 256, at 575–83.

285. See *supra* notes 279–80. That the doctrine of sin is rooted in Scripture is important to evangelicals. As McGrath observes, “commitment to the priority and authority of Scripture has become an integral element of the evangelical tradition.” MCGRATH, *supra* note 261, at 59.

286. For a discussion of the debates between Augustine and Pelagius on sin and salvation, see MCGRATH, *supra* note 255, at 330–34.

287. See LIGHTNER, *supra* note 253, at 44 (“Evangelical Christians are in common agreement on man’s exceedingly sinful condition.”).

cal understanding²⁸⁸ is that one cannot deliver oneself from this state of sin and guilt through one's meritorious effort.²⁸⁹ No commitment to so many prayers each day, no amassing of hours at the local homeless shelter or hospice, no rigorous program of reading or memorizing the Bible, no perfect attendance at worship services, and not even the giving of one's wealth away to the church or the poor renders one worthy of Divine pardon.²⁹⁰ Forgiveness of sin is obtainable only by receiving it as a gift from God.²⁹¹ And that gift is given through faith in the Lord Jesus Christ,²⁹² who by His death paid the price for human sin,²⁹³ and through His resurrection was declared the Son

288. A great number of Christians, even those who may not think of themselves as "evangelicals," would likely embrace many of the soteriological concepts discussed in this part of the Article. One may embrace "evangelical theology" without realizing what to call it.

289. The Apostle Paul stated the matter plainly as follows:

But when the kindness of God our Savior and His love for mankind appeared, He saved us, not on the basis of deeds which we have done in righteousness, but according to His mercy, by the washing of regeneration and renewing by the Holy Spirit, whom He poured out upon us richly through Jesus Christ our Savior, so that being justified by His grace we would be made heirs according to the hope of eternal life.

Titus 3:4-7; see also *Romans* 3:27-28 ("Where then is boasting? It is excluded. By what kind of law? Of works? No, but by a law of faith. For we maintain that a man is justified by faith apart from works of the Law."); *Ephesians* 2:8-9 ("For by grace you have been saved through faith; and that not of yourselves, it is the gift of God; not as a result of works, so that no one may boast.").

290. See *Romans* 3:20 (stating "by the works of the Law no flesh will be justified in His sight").

291. See *John* 4:10 (discussing the gift of "living water" that Jesus offered a woman from Samaria); *Romans* 5:17 (explaining the "gift of righteousness" in Christ); *Romans* 6:23 ("For the wages of sin is death, but the free gift of God is eternal life in Christ Jesus our Lord."); *Ephesians* 2:8.

292. See *John* 3:16 ("For God so loved the world, that He gave His only begotten Son, that whoever believes in Him shall not perish, but have eternal life."); *John* 3:18 ("He who believes in Him [that is, God's Son Jesus] is not judged; he who does not believe has been judged already, because he has not believed in the name of the only begotten Son of God."); *John* 11:25-26 ("Jesus said to her, 'I am the resurrection and the life; he who believes in Me will live even if he dies, and everyone who lives and believes in Me will never die.'"); *Romans* 1:16-17 (describing the gospel of Jesus Christ as "the power of God for salvation to everyone who believes," and stating that the gospel reveals God's righteousness "from faith to faith").

293. See *Romans* 3:24-25 (stating that people are "justified as a gift by His grace through the redemption which is in Christ Jesus," who is "a propitiation in His blood through faith"); *Romans* 5:6 ("For while we were still helpless, at the right time Christ died for the ungodly."); *1 Corinthians* 15:3 (stating that "Christ died for our sins according to the Scriptures"); *Ephesians* 1:7 (stating that in Christ "we

of God with power²⁹⁴ to grant eternal life to those who trust Him for it.²⁹⁵ There are no conditions to receiving the gift of salvation. Even faith in Jesus is not viewed as a meritorious condition, but instead as the channel for receiving the gift of Divine pardon and renewal,²⁹⁶ a humble and dependent state of heart, will and mind that essentially says, "I accept your gift, Lord Jesus, on the basis of who you are and what you have done."²⁹⁷

have redemption through His blood, the forgiveness of our trespasses"); 1 *Peter* 3:18 ("For Christ also died for sins once for all, *the* just for *the* unjust, so that He might bring us to God, having been put to death in the flesh, but made alive in the spirit . . ."); 1 *John* 2:2 (stating that the Lord Jesus "is the propitiation for our sins; and not for ours only, but also for *those of the whole world.*").

The author of *Hebrews* explains Christ's sacrifice of Himself for the sin of humanity as a priestly service:

For it was fitting for us to have such a high priest, holy, innocent, undefiled, separated from sinners and exalted above the heavens; who does not need daily, like those high priests, to offer up sacrifices, first for His own sins and then for the *sins* of the people, because this He did once for all when He offered up Himself.

Hebrews 7:26–27; see also *Hebrews* 9:12 (stating that Christ entered into the heavenly tabernacle as High Priest "not through the blood of goats and calves, but through His own blood, . . . having obtained eternal redemption").

294. See *Romans* 1:4 (stating that Jesus "was declared the Son of God with power by the resurrection from the dead").

295. See *John* 3:16 (stating that "that whoever believes in Him [that is, the Son of God] shall not perish, but have eternal life"); *John* 3:36 ("He who believes in the Son has eternal life . . ."); *John* 5:24 ("Truly, truly, I say to you, he who hears My word, and believes Him who sent Me, has eternal life, and does not come into judgment, but has passed out of death into life."); *John* 6:27 ("Do not work for the food which perishes, but for the food which endures to eternal life, which the Son of Man will give to you, for on Him the Father, God, has set His seal."); *John* 6:29 ("This is the work of God, that you believe in Him whom He has sent."); *John* 6:40 ("For this is the will of My Father, that everyone who beholds the Son and believes in Him will have eternal life, and I Myself will raise him up on the last day."); *John* 10:27–28 ("My sheep hear My voice, and I know them, and they follow Me; and I give eternal life to them, and they will never perish; and no one will snatch them out of My hand."); 1 *Timothy* 1:16 (stating that Paul received mercy so that "Jesus Christ might demonstrate His perfect patience as an example for those who would believe in Him for eternal life."); 1 *John* 5:13 ("These things I have written to you who believe in the name of the Son of God, so that you may know that you have eternal life.").

296. See MCGRATH, *supra* note 255, at 339 (describing Martin Luther's concept of justification by grace through faith; stating that the phrase does not mean that a sinner is justified "on account of" faith).

297. See LIGHTNER, *supra* note 253, at 160 ("Christ's work alone saves, but unless His Person and work are received by faith, no benefit comes to the individual sinner.").

This understanding of salvation solely as the work of God²⁹⁸ received through personally trusting the Lord Jesus²⁹⁹ for eternal life reflects not only a theological perspective of the condition of humankind, but also a view of God's identity and nature. Because human beings cannot "achieve" or "merit" salvation, it arises solely from the grace of God.³⁰⁰ God's grace, or unearned favor,³⁰¹ arises from His love for human beings.³⁰² The love of God the Father³⁰³ led Him to send His Son, the eternal Word³⁰⁴ who is one with the Father in essence³⁰⁵ yet distinct in His personhood,³⁰⁶ to become the Savior of the world.³⁰⁷ The Son, eternally God,³⁰⁸ willingly became a human being,³⁰⁹

298. See *id.* at 139 ("Salvation is from the Lord. It is His work from start to finish.").

299. See GRUDEM, *supra* note 257, at 710 (stating that "saving faith is not just a belief in facts but *personal trust in Jesus to save me*").

300. See *Romans* 3:24 (stating that the believer is "justified as a gift by His [that is, God's] grace through the redemption which is in Christ Jesus"); *Ephesians* 1:7-8 (stating that believers "have redemption through His [that is, Christ's] blood, the forgiveness of our trespasses, according to the riches of His grace which He lavished on us"); *Ephesians* 2:8 (stating that "by grace you have been saved through faith; and that not of yourselves, *it is the gift of God*"); *Titus* 3:7 (stating that the believer in Christ is "justified by His [that is, God's] grace").

301. See LIGHTNER, *supra* note 253, at 145 ("The grace of God has to do with the undeserved favor He displays toward sinners.").

302. See *Ephesians* 2:4-6 (explaining that, "because of His great love with which He loved us, even when we were dead in our transgressions, [God] made us alive together with Christ (by grace you have been saved), and raised us up with Him, and seated us with Him in the heavenly *places* in Christ Jesus").

303. See 1 *John* 3:1 ("See how great a love the Father has bestowed on us, that we would be called children of God . . .").

304. See *John* 1:1-3 ("In the beginning was the Word, and the Word was with God, and the Word was God. He was in the beginning with God. All things came into being through Him, and apart from Him nothing came into being that has come into being."); *John* 1:14 ("And the Word became flesh, and dwelt among us, and we saw His glory, glory as of the only begotten from the Father, full of grace and truth.").

305. See *John* 10:30 ("I and the Father are one."). That each Person of the Godhead is of one essence is the language of the orthodox articulation of the doctrine of the Trinity. See BERKHOF, *supra* note 252, at 87.

306. See 1 *Timothy* 2:5 ("For there is one God, *and* one mediator also between God and men, *the man* Christ Jesus . . ."). The distinct Personhood of each member of the Godhead is also a tenet of the orthodox doctrine of the Trinity. See BERKHOF, *supra* note 252, at 87-88.

307. See *John* 3:16.

308. See *John* 1:1-3, *John* 8:58 ("Jesus said to them, 'Truly, truly, I say to you, before Abraham was born, I am.'"); *Hebrews* 1:1-3 (stating that God "has spoken to us in His Son, whom He appointed heir of all things, through whom also He

lived a perfectly righteous life,³¹⁰ and then voluntarily laid down His life as a substitutionary sacrifice for human sin.³¹¹ Salvation requires an act of God because people are helpless to save themselves.³¹² But God had to judge human sin in order to maintain justice.³¹³ One, and only one, could be both a perfect human sacrifice and the Divine Savior. That One must be both God and human—the Lord Jesus Christ,³¹⁴ the second Person of the Trinity.³¹⁵ God judged the sin of humanity by condemning

made the world”; describing Jesus as “the radiance of His [that is, God’s] glory and the exact representation of His nature,” and as the One who “upholds all things by the word of His power”; *Revelation* 22:13 (“I am the Alpha and the Omega, the first and the last, the beginning and the end.”). For a summary of the extensive scriptural support for the proposition that Jesus is God, see BERKHOF, *supra* note 252, at 94–95.

309. See *John* 1:14; *Hebrews* 2:14 (“[S]ince the children share in flesh and blood, He [that is, Jesus] Himself likewise also partook of the same, that through death He might render powerless him who had the power of death, that is, the devil . . .”).

310. See *2 Corinthians* 5:21 (stating that God “made Him who knew no sin to be sin on our behalf, so that we might become the righteousness of God in Him”); *Hebrews* 4:15 (“For we do not have a high priest who cannot sympathize with our weaknesses, but One who has been tempted in all things as *we are*, yet without sin.”).

311. See *Romans* 3:24–25; *Romans* 5:6; *1 Corinthians* 15:3; *Ephesians* 1:7; *1 Peter* 3:18; *1 John* 2:2; *Hebrews* 7:26–27; *Hebrews* 9:12.

312. See *Romans* 5:6 (“For while we were still helpless, at the right time Christ died for the ungodly.”).

313. In response to the rhetorical question, “The God who inflicts wrath is not unrighteous, is He?” the Apostle Paul answered, “May it never be! For otherwise, how will God judge the world?” *Romans* 3:5–6. He then explained that God also maintains justice by judging human sin through the cross of Christ:

[Sinners are] justified as a gift by His grace through the redemption which is in Christ Jesus; whom God displayed publicly as a propitiation in His blood through faith. *This was* to demonstrate His righteousness, because in the forbearance of God He passed over the sins previously committed; for the demonstration, *I say*, of His righteousness at the present time, so that He would be just and the justifier of the one who has faith in Jesus.

Romans 3:24–26.

314. See LIGHTNER, *supra* note 253, at 73 (“Bridging the gap between God and man depends upon the union of humanity and deity in Christ.”).

315. The doctrine of the Trinity, expressed in ontological terms, is that God is one essence in three persons. God is eternally Father, Son, and Spirit. Although each Person of the Godhead is distinct, the Godhead is indivisible. Moreover, each Person coinheres with the other Persons (meaning that each Person is present within the Person of each other member of the Trinity). See ERICKSON, *supra* note 256, at 305. For a discussion of the doctrine of the Trinity, see BERKHOF, *supra* note 252, at 82–99; ERICKSON, *supra* note 256, at 291–313.

it in the sinless Christ, who bore the sins of humanity on the cross.³¹⁶ Receiving the pardon of the Father through the atonement of the Son,³¹⁷ the believer is also regenerated³¹⁸ and sanctified³¹⁹ by the Holy Spirit,³²⁰ the third Person of the Trinity, who was given by God to believing humanity after the resurrection and ascension of Jesus.³²¹ In this way, salvation is completely the

316. See *Romans* 8:3 (“For what the Law could not do, weak as it was through the flesh, God *did*: sending His own Son in the likeness of sinful flesh and *as an offering* for sin, He condemned sin in the flesh . . .”); *2 Corinthians* 5:21 (“He made Him who knew no sin *to be* sin on our behalf, so that we might become the righteousness of God in Him.”); *Galatians* 3:13–14 (“Christ redeemed us from the curse of the Law, having become a curse for us—for it is written, ‘Cursed is everyone who hangs on a tree’—in order that in Christ Jesus the blessing of Abraham might come to the Gentiles, so that we would receive the promise of the Spirit through faith.”); *1 John* 2:2 (stating Jesus is “the propitiation for our sins; and not for ours only, but also for *those* of the whole world”).

317. See *Romans* 5:1–2 (“Therefore, having been justified by faith, we have peace with God through our Lord Jesus Christ, through whom also we have obtained our introduction by faith into this grace in which we stand . . .”); *2 Corinthians* 5:18–19 (stating that God “reconciled us to Himself through Christ and gave us the ministry of reconciliation, namely, that God was in Christ reconciling the world to Himself, not counting their trespasses against them”); *Ephesians* 1:7 (stating that in Christ “we have redemption through His blood, the forgiveness of our trespasses, according to the riches of His grace”); *Colossians* 1:14 (stating that in Christ “we have redemption, the forgiveness of sins”).

318. Regeneration “is God’s transformation of individual believers, his giving a new spiritual vitality and direction to their lives when they accept Christ.” ERICKSON, *supra* note 256, at 872.

319. “Sanctification is the continuing work of God in the life of believers, making them actually holy.” *Id.* at 897; see also *id.* at 899 (“Sanctification is the work of the Holy Spirit.”). Sanctification begins with conversion, progresses during the life of the believer, and is finally accomplished in the glorification of the believer’s new (resurrected) body at the return of Christ. See GRUDEM, *supra* note 257, at 747–53.

320. See *2 Corinthians* 3:18 (“But we all, with unveiled face, beholding as in a mirror the glory of the Lord, are being transformed into the same image from glory to glory, just as from the Lord, the Spirit.”); *1 Thessalonians* 4:7–8 (“For God has not called us for the purpose of impurity, but in sanctification. So, he who rejects *this* is not rejecting man but the God who gives His Holy Spirit to you.”); *2 Thessalonians* 2:13 (“But we should always give thanks to God for you, brethren beloved by the Lord, because God has chosen you from the beginning for salvation through sanctification by the Spirit and faith in the truth.”); *Titus* 3:5–6 (stating that God saved us “by the washing of regeneration and renewing by the Holy Spirit, whom He poured out upon us richly through Jesus Christ our Savior”).

321. See *John* 14:16–17 (stating that, when Jesus has returned to the Father, He “will give you another Helper, that He may be with you forever; *that is* the Spirit of truth”); *Acts* 2:1–4 (describing the coming of the Holy Spirit on believers on the Day of Pentecost).

work of the Triune God,³²² who for love of the pinnacle of His creation did what no merely human being could do alone.³²³

This synopsis of evangelicalism and evangelical soteriology lays the groundwork for examining the implications of evangelical thought for public service by evangelicals such as Russell Vought. As Section II.B explains, biases that evangelicals may encounter in government officials such as Senator Sanders are unjustified.

B. Implications of Evangelicalism for Public Servants

The conclusion of Senator Sanders that Russell Vought was “not someone who is what this country is supposed to be about,”³²⁴ and therefore unfit for public service, appears to derive from Senator Sanders’s assessment of Mr. Vought’s evangelical soteriology, or what Senator Sanders assumes are the implications of it. The hostility of Sanders seems more visceral than analytical, for he failed to advance with precision any argument that Mr. Vought’s theology precluded him from constitutionally or otherwise effectively discharging the office which he had been nominated to fill. Senator Van Hollen hardly reasoned any better. When he raised the question of “public trust,”³²⁵ he offered no evidence or logical argument that Mr. Vought’s soteriology would lead him to violate the “public trust” in any way. The failure of Senators Sanders and Van Hollen to advance a reasoned argument renders critical interaction with their comments challenging. One must speculate as to the precise grounds on which Senator Sanders disqualified the evangelical Russell Vought from serving his country, and on which Senator Van Hollen tried to give Sanders cover.

This Section explores possible objections to Mr. Vought, and by extension to any evangelical, that government actors like Senator Sanders may harbor but fail to articulate. I limit the

322. See LIGHTNER, *supra* note 253, at 143 (stating that “[e]ach of the three members of the holy Trinity—Father, Son, and Holy Spirit—has a vital part” in the salvation of humankind).

323. See *id.* at 140 (“Guilty sinners dead in trespasses and sin and without any merit before God will not and cannot initiate contact with God.”).

324. *Hearing, supra* note 2, at 16 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).

325. *Id.* at 17.

discussion to those objections that are suggested in Senator Sanders's interrogation of Mr. Vought. The objections that I examine are the following: (1) evangelical soteriology is mutually exclusive with other faiths, including Islam; (2) evangelical soteriology reflects intolerance of people of other faiths; and (3) evangelical soteriology assumes a view of sin that is offensive.

1. *The Question of Mutual Exclusivity*

Perhaps some object to public service by evangelicals such as Russell Vought because evangelical soteriology insists on certain truths that are inconsistent with the faith claims of other religions. One could point to inconsistencies between Christianity (in general, and specifically evangelicalism) and numerous other religious faiths and forms of spirituality, including Judaism, Hinduism, Buddhism, New Ageism, and Scientology. Because Mr. Vought's opinion piece involved a question of the worship of God by Christians and Muslims,³²⁶ and this question provides context for the exchange between Vought and Sanders, let us focus on the possible objection that Christians hold certain views that are antithetical to Islam (as represented by the teachings of the Quran). My response is (1) they do, and (2) so what?

That certain claims of the Quran and certain claims of evangelical Christianity are mutually exclusive is undeniable. To name some of the most important differences, evangelicals (like other historically orthodox Christians)³²⁷ believe that God is Trinity: the Father, the Son, and the Holy Spirit.³²⁸ The Quran teaches against the Trinity.³²⁹ Correlatively, evangelicals believe that Jesus is the Divine Son of God the Father³³⁰ and also

326. See Vought, *supra* note 18.

327. Again, in setting forth "evangelical" beliefs, I do not imply that these beliefs are unique to evangelicals. Many orthodox Christians who may not identify with evangelicalism still affirm many or all of the doctrines identified in this Section.

328. For a discussion of the doctrine of the Trinity, see MCGRATH, *supra* note 255, at 299–325. As McGrath explains, the doctrine of the Trinity is vitally important in Christianity because it is inseparable from the Christian understanding of who Jesus is. See *id.* at 301.

329. *Quran* 4:171; 5:73.

330. The deity of Christ is no small matter in orthodox Christianity, as Dallas Theological Seminary Professor Robert Lightner explains:

man. The Quran denies that Jesus is the eternally begotten Son of God.³³¹ Indeed, the Quran teaches that ascribing deity to Jesus is blasphemous and will result in a fiery judgment.³³² Evangelical theology emphasizes the historical reality and saving nature of the death of Christ by crucifixion and his bodily resurrection.³³³ The Quran teaches that Jesus was not even actually crucified.³³⁴ Evangelical Christians believe that deliverance from sin's ultimate penalty is avoided simply by personally trusting in the Lord Jesus Christ for this deliverance.³³⁵ They join the Apostle Paul in affirming, "if you confess with your mouth Jesus as Lord, and believe in your heart that God raised Him from the dead, you will be saved."³³⁶ Like the Philippian jailer who inquired of Paul, should an inquisitive soul ask, "[W]hat must I do to be saved?" an evangelical would echo the apostle, "Believe in the Lord Jesus, and you will be saved . . ."³³⁷ The Quran, in contrast, teaches that judgment will be based on a balancing of an individual's morals, beliefs, and deeds (or character-producing deeds).³³⁸ The full deity and humanity of Christ, and the need of every human being to trust in the resurrected Son of God for eternal life, are the core of the

An attack upon the deity of the Savior of sinners is an attack upon Christianity itself. There is no room for difference or debate here. To deny that Jesus of Nazareth was fully God is to remove oneself from the historic, orthodox Christian faith.

LIGHTNER, *supra* note 253, at 67

331. *Quran* 112:1–4.

332. See *Quran* 5:72 ("They do blaspheme who say: 'Allah is Christ the son of Mary.' But said Christ: 'O children of Israel, worship Allah my Lord and your Lord.' Whoever joins other gods with Allah, Allah will forbid him the garden and the Fire will be his abode. There will for the wrong-doers be no one to help.").

333. See MCGRATH, *supra* note 261, at 66–67 (stating that "evangelicalism places a special emphasis on the centrality of the cross of Christ" and that the death of Christ on the cross is "the unique, necessary and sufficient basis of salvation, which both demonstrates the full extent of God's love for us and establishes the centrality of Christ to Christian worship and adoration").

334. *Quran* 4:157–158.

335. See GRUDEM, *supra* note 257, at 710 ("Saving faith is trust in Jesus Christ as a living person for forgiveness of sins and for eternal life with God.").

336. *Romans* 10:9.

337. *Acts* 16:30–31.

338. *Quran* 7:8–9; 21:47. See generally Ibrahim Amini, *Scale of Deeds*, AL-ISLAM.ORG, <https://www.al-islam.org/resurrection-maad-quran-ayatullah-ibrahim-amini/scale-deeds> [https://perma.cc/8HXN-24J9] (last visited Mar. 24, 2018).

Christian faith. The Quran disputes every aspect of this core (other than the recognition that Jesus was a human). The inescapable conclusion is that the Quran disputes absolutely foundational elements of evangelical soteriology (indeed, more generally, historically orthodox Christian soteriology) based upon the Person and work of the Lord Jesus Christ and the helpless condition of humanity apart from faith in Christ. Fundamental differences between Islam (as represented by the teachings of the Quran) and Christianity, especially how each religion views God and Christ, are what Russell Vought was addressing in his article.³³⁹

Thus, to the extent that Senator Sanders and other political office-holders spot doctrinal incompatibility between evangelical soteriology and the teachings of Islam's most revered source of doctrine, they are correct. But that brings us to the second prong of my response: so what? Mutual exclusivity between evangelical soteriology and Islamic teaching is hardly grounds for asserting the unfitness of Russell Vought, any other evangelical, or any Muslim for public service. By definition, mutual exclusivity is just that—*mutual*. The proposition that evangelical soteriology flatly contradicts the belief system of millions of Muslim Americans can be restated as the proposition that Islamic theology flatly contradicts the belief system of millions of evangelical Americans.³⁴⁰ Indeed, orthodox Christi-

339. This fact, which appeared to escape Senator Sanders, was firmly grasped by a staff writer for *The Atlantic*:

Quoted in the context of his piece, Vought's statement about Muslims carries a different meaning from what Sanders was implying: He was deconstructing [Wheaton College Professor] Hawkins's theological claims about the relationship between Islam and Christianity.

Emma Green, *Bernie Sanders's Religious Test for Christians in Public Office*, ATLANTIC (June 8, 2017), <https://www.theatlantic.com/politics/archive/2017/06/bernie-sanders-chris-van-hollen-russell-vought/529614/> [<https://perma.cc/5SPH-MCCN>].

340. The statement in the text is an application of simple logic. If $A \neq B$, then $B \neq A$. That mutual exclusivity "runs both ways" is obviously true in the case of religion, and Senator Sanders's inability to recognize it in the context of Vought's analysis is troubling:

It's one thing to take issue with bigotry. It's another to try to exclude people from office based on their theological convictions. Sanders used the term "Islamophobia" to suggest that Vought fears Muslims for who they are. But in his writing, Vought was contesting something different: He disagrees with what Muslims believe, and does not think their faith is satisfactory for salvation. Right or wrong, this is a conviction held by

anity in general is mutually exclusive with what the Quran teaches in important respects, just as there are major inconsistencies between traditional understandings of every major world religion and the doctrines of others. Even universalism embraces propositions that are inconsistent with any religion teaching that a certain path of faith or obedience is necessary for enlightenment, access to heaven, or other form of spiritual advancement.

More broadly, mutual exclusivity exists among all kinds of belief systems. Atheism is mutually exclusive with any theistic perspective. Nihilism³⁴¹ is mutually exclusive with any religion or philosophy that finds meaning and asserts values in life. In contemporary politics, Americans hold mutually exclusive positions on such matters as the role of government in delivering health care, immigration policy, taxation, and the propriety of funding faith-based organizations and abortion providers. In short, mutual exclusivity is a certainty in all but the most homogeneous of societies.

Thus, mutual exclusivity between evangelical soteriology and traditional Islam is completely unremarkable. If Russell Vought and other evangelicals are disqualified from public service, mutual exclusivity cannot legitimately explain their disqualification.

2. *The Question of Tolerance*

Senator Sanders appears to believe that Mr. Vought should not be allowed to serve in public office because he is or would be intolerant of Muslims specifically, or perhaps more general-

millions of Americans—and many Muslims might say the same thing about Christianity.

Id.

To further illustrate the point, as observed by Dr. Jeremy Evans in commenting on a prior draft of this article, if Senator Sanders's view is that holding theological positions that are mutually exclusive with the views of other Americans is disqualifying, Senator Sanders would disqualify himself. His objections to the views of Mr. Vought illustrate mutual exclusivity between Sanders's beliefs and Vought's beliefs. Or to put the matter more bluntly, consistent logic compels the conclusion that, if Vought's views of salvation in Christ alone are "Islamophobic," then Sanders's mutually exclusive views are "Christophobic" (or at least "Evangelicalphobic").

341. See THE OXFORD DICTIONARY OF WORLD RELIGIONS, *supra* note 252, at 699 (defining nihilism as "[t]he view that positive claims (in metaphysics, ethics, epistemology, religion, etc.) are false").

ly, of anyone who holds viewpoints (at least religious ones) that differ from his own. After all, Sanders characterized Vought's theological views as "hateful"³⁴² and "Islamophobic."³⁴³

"Intolerance" is not self-defining. Four possible senses of the term will be discussed to determine if any are sufficient to justify the position of Senator Sanders. One sense of the term, easily refuted, is intolerance as "disagreement." Mr. Vought disagreed with any understanding of salvation from sin other than one grounded in personal faith in the Lord Jesus Christ. But objecting to a nominee because of his or her "disagreement" with others is just another way of articulating the mutual exclusivity objection. Mr. Vought disagrees with the Quranic teaching on Jesus and salvation because it is mutually exclusive with evangelical (and any orthodox) Christian soteriology. Insofar as mutual exclusivity between a candidate's views of various issues and the views of at least some other Americans is inevitable and inconsequential, objecting to a nominee merely because the nominee "disagrees" with millions of Americans on religious, philosophical, ethical, or other issues is nonsense.

But Russell Vought did more than possess disagreement with millions of Americans; he expressed that disagreement openly. Thus, perhaps Senator Sanders considers Mr. Vought "intolerant" because he had the audacity to express disagreement with millions of Americans on the question of soteriology publicly.

A little reflection should lead one also to reject this second sense of intolerance—open disagreement with others. Liberal democracies thrive on full and frank deliberation. Constitutionally, the United States normalizes the value of open discussion by protecting the freedoms of speech and the press. These rights are central to the proper functioning of our republic.³⁴⁴ We value public deliberation in our political discourse, as well as in our discourse about social, religious, medical, and many

342. *Hearing, supra* note 2, at 4 (statement of Sen. Bernard Sanders, Ranking Member, Senate Comm. on the Budget).

343. *Id.*

344. Indeed, the Speech or Debate Clause is designed in part to ensure the unrestrained ability of legislators to discuss and vote freely upon matters before Congress. It would be a grim irony indeed were one to adopt this second sense of intolerance when Senator Sanders is himself shielded from constitutional scrutiny so that he may engage in open debate.

other types of issues. Robust public deliberation cannot take place if people are stifled from expressing views that challenge the views of others. To object to a nominee on the grounds that he or she has taken public positions that differ from those of others, even two million of them, is to reject the value of public deliberation in a liberal democracy. That approach to intolerance would also tend to reward cowards and hypocrites, both of whom would be more likely to survive the nomination process than would their more outspoken colleagues. The nomination process should instead not penalize nominees merely because they have participated in controversial public discussions of important issues. Equating “public disagreement” with “intolerance” has no place in America.

These first two senses of “intolerance” are content-neutral. But it appears that Senator Sanders believed that Mr. Vought was or would be intolerant of others not simply because he had disagreed with them, or had done so publicly. Senator Sanders’s own words reflect a conclusion that Mr. Vought’s evangelicalism, or at least how he articulated it, is substantively intolerant. Is evangelical soteriology “intolerant” in the sense of implying disrespect or mistreatment, perhaps discriminatory treatment, of those who are not evangelicals? That Senator Sanders had this concern is evident from his questioning Mr. Vought about whether his views are “respectful of other religions,”³⁴⁵ as well as Sanders’s opening remarks to the committee in which he characterized Vought’s views as “Islamophobic” and “hateful.”³⁴⁶ Sanders also included “Islamophobia” in the list of items comprising “discrimination of all forms.”³⁴⁷ He then referred to “progress in becoming a less discriminatory and more tolerant society,” opined that “we must not go backwards,” and announced that the nomination “of an individual who has expressed such strong Islamophobic language is simply unacceptable.”³⁴⁸

345. *Hearing, supra* note 2, at 15 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).

346. *Id.* at 4 (statement of Sen. Bernard Sanders, Ranking Member, Senate Comm. on the Budget).

347. *Id.*

348. *Id.*

Because of the inflammatory rhetoric of Senator Sanders, whether evangelical theology is substantively intolerant in the sense of fostering disrespect for others must be squarely addressed. There is no escaping the imperative of analyzing this issue thoughtfully under the rationale that doing so is politically impolite. Evangelicals such as Vought deserve better than the likes of Sanders's charged and conclusory pronouncements of abhorrence. Senator Sanders essentially prosecuted Vought's evangelical soteriology in a trial-like setting and then rested his case.³⁴⁹ Vought's views require a fair hearing.

Mr. Vought attempted to assure Senator Sanders that he harbored no intolerance in the sense of hatred or discriminatory proclivity. Mr. Vought responded to Senator Sanders by stating his belief that every human being is made in the image of God and is worthy of respect.³⁵⁰ To those uninitiated in Christian theology, invoking the creation of human beings in the "image of God" as a solid foundation for treating everyone respectfully, indeed with equal dignity, may sound like running for cover. But to a serious Christian, including an evangelical, the creation of humanity in the image of God means that every person, of every nation, tribe, and tongue, is sacred, and must be treated as such. Wayne Grudem, a professor of Theology and Biblical Studies at Phoenix Seminary, says it well:

Every single human being, no matter how much the image of God is marred by sin, or illness, or weakness, or age, or any other disability, still has the *status* of being in God's im-

349. Senator Van Hollen's attempted whitewashing of Senator Sanders's inquisition was demonstrably counterfactual. Van Hollen defended Sanders by telling Vought that "nobody is questioning your faith." *Id.* at 17 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget). This denial of reality is comically stunning. Of course Sanders was questioning Vought's faith. He did it repeatedly. He asked several questions about whether Vought believed that those who did not accept Jesus Christ as Savior would be "condemned" and whether that view was disrespectful or Islamophobic. *See id.* at 15. The whole context of Vought's article (to which Sanders objected) was the central importance of who Jesus is and what He has done. To reject the saving work of the Divine Jesus is to reject the orthodox Christian concept of God, Christ, and salvation from sin. To question Vought about his views on the matter is clearly to "question his faith." Indeed, it is to question him on matters that are among the most central elements of his faith.

350. *See Hearing, supra* note 2, at 15 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).

age and therefore must be treated with the dignity and respect that is due to God's image-bearer. This has profound implications for our conduct toward others. It means that people of every race deserve equal dignity and rights. It means that elderly people, those seriously ill, the mentally retarded, and children yet unborn, deserve full protection and honor as human beings.³⁵¹

Because Mr. Vought focused on the "image of God" in his response, I will first examine its relevance to this third sense of "intolerance" that concerned Senator Sanders.

The creation of humanity in the image of God (often referred to in theological discourse in its Latin form, the *imago Dei*³⁵²) is taught from the first chapter of Genesis³⁵³ and is affirmed in Wheaton College's Statement of Faith.³⁵⁴ In terms of the most basic implications for civilized society, creation in God's image is reason not to take innocent human life.³⁵⁵ But being made in God's image implies much more than refraining from homicide, and this point is recognized in evangelical theology and the Scripture that evangelicalism so highly regards. Humanity is "crown[ed] . . . with glory and majesty,"³⁵⁶ and superior to the rest of the physical creation.³⁵⁷ To bear God's image implies the duty and privilege of reflecting God and His character.³⁵⁸ Theologians have observed that the reflection of God's likeness is multi-dimensional, including such features of humanity as rationality,³⁵⁹ spirituality,³⁶⁰ and relationality³⁶¹ (among oth-

351. GRUDEM, *supra* note 257, at 450.

352. See, e.g., MCGRATH, *supra* note 255, at 327.

353. *Genesis* 1:26–27 ("Then God said, 'Let Us make man in Our image, according to Our likeness; and let them rule over the fish of the sea and over the birds of the sky and over the cattle and over all the earth, and over every creeping thing that creeps on the earth.' God created man in His own image, in the image of God He created him; male and female He created them.").

354. See *Wheaton Statement of Faith*, *supra* note 15 (affirming that "God directly created Adam and Eve, the historical parents of the entire human race; and that they were created in His own image, distinct from all other living creatures").

355. See *Genesis* 9:6.

356. *Psalms* 8:5.

357. See *Psalms* 8:6–8.

358. See BERKHOF, *supra* note 252, at 220 (stating that the image of God includes "true knowledge, righteousness, and holiness").

359. See *id.* at 221 (stating that that the image of God includes "intellectual power, natural affections, and moral freedom"; stating that humans have "a rational and moral nature").

ers).³⁶² The *imago Dei* links the creation of humanity with other important biblical themes, doctrines and commands, including the doctrine of the Trinity,³⁶³ soteriology,³⁶⁴ and the command to love others as oneself.³⁶⁵

As to the relationship between the *imago Dei* and the treatment of others, James makes the connection explicit. He teaches the inconsistency of blessing God, on the one hand, and cursing human beings, on the other.³⁶⁶ In pointing out the inconsistency, James notes that human beings “have been made in the likeness of God.”³⁶⁷ James teaches that one who blesses God should also bless those who are made in God’s image. Honoring God requires that we love people, who are made in God’s image.

The teaching is reminiscent of that of the Lord Jesus. An expert in the law once asked Jesus to identify the “great commandment” in the law. The Apostle Matthew reports the response of Jesus as follows:

And He said to him, “YOU SHALL LOVE THE LORD YOUR GOD WITH ALL YOUR HEART, AND WITH ALL YOUR SOUL, AND WITH ALL YOUR MIND.’ This is the great and foremost commandment. The second is like it, ‘YOU SHALL LOVE YOUR NEIGHBOR AS YOURSELF.’ On these two commandments depend the whole Law and the Prophets.”³⁶⁸

Like James, Jesus taught correspondence between one’s vertical relationship (that between God and people) and one’s horizon-

360. See *id.* at 222 (“Another element usually included in the image of God is that of spirituality.”).

361. See GRUDEM, *supra* note 257, at 447–48.

362. See generally ERICKSON, *supra* note 256, at 457–74 (discussing the meaning and implications of the creation of human beings in the image of God); GRUDEM, *supra* note 257, at 442–50 (same).

363. See Stanley J. Grenz, *Theological Foundations for Male-Female Relationships*, 41 J. EVANGELICAL THEOLOGY SOC’Y 615, 622 (1998) (“The doctrine of the Trinity makes clear that throughout eternity God is the fellowship of the three persons. No wonder, then, that God’s image-bearers best reflect the divine nature in their relationality.”).

364. See GRUDEM, *supra* note 257, at 445 (describing redemption in Christ as a progressive recovering of the image of God).

365. See ERICKSON, *supra* note 256, at 471 (discussing reasons that humans are made in God’s image and noting God’s intention that “humans be bound together with one another in love”).

366. See *James* 3:9–10.

367. *James* 3:9.

368. *Matthew* 22:37–40.

tal relationships (those among people). One cannot legitimately separate love for God and love for those who are made in His image—all people.

The inclusivity of the command to love one's neighbor, who is also made in the *imago Dei*, is quite striking in Luke's similar account of the testing of Jesus by an expert in the law.³⁶⁹ After correctly crystallizing the moral standard required by the law into the two great commandments cited above, the lawyer then asked Jesus, "Who is my neighbor?"³⁷⁰ Jesus responded by telling perhaps the most famous parable of all, the Parable of the Good Samaritan.³⁷¹ The hero of the parable was, of course, a Samaritan—a man who was *other* than those surrounding Jesus: he was from *another* culture that embraced *other* religious perspectives, and his family tree branched through *other* nationalities and ethnicities. But it was this *other* man's love of a fellow human being that Jesus held up as exemplary for loving one's neighbor as oneself. This Samaritan did much more than merely pay lip service to "tolerating" someone of a very different background. He loved the *other* generously and tenderly, and even at some risk to his own personal safety. That is what it means to love one's neighbor. That is an important aspect of what it means to reflect the *imago Dei* and to honor it in a fellow human being.

Thus, when Russell Vought responded to Senator Sanders's question of whether he was Islamophobic by insisting that he believed everyone to be made in the image of God and therefore worthy of respect, Vought was drawing upon a theological tradition that views love for other human beings, including those of other faiths and nationalities, as a foundational moral imperative that follows from the creation of humanity in the image of God.³⁷² Vought was essentially saying, "Of course I would not mistreat a Muslim for being Muslim. A Muslim is

369. See Luke 10:25–37.

370. Luke 10:29.

371. Luke 10:30–37.

372. See, e.g., ERICKSON, *supra* note 256, at 473 (listing implications of the doctrine of the *imago Dei*, including the sacredness of human life and the "universality of the image"; observing "there is dignity to being human" and stating "[w]e should not be disdainful of any human being"; reasoning that creation in the image of God means that "depriving someone of freedom through illegal means, manipulation, or intimidation is improper").

created in the image of God, just as I am, and is therefore of equal dignity and worth.”

Indeed, an unbiased perusal of Mr. Vought’s argument reveals his inclusive and evangelistic motive for objecting to the statement of Dr. Hawkins, the Wheaton political science professor who claimed that Christians and Muslims worship the same God. In his article criticizing her statement, Vought reasoned as follows:

Why downplay the primacy of Jesus Christ in having a relationship with God? Does Dr. Hawkins really want to send a confusing (albeit highly nuanced) message to the world (and many of her own Christian students) in which the quick takeaway for many people will be that they do not need to know this Jesus Christ who claims to be their God and King? How does that lead to more brothers and sisters in Christ? It doesn’t.³⁷³

“What brothers and sisters?” one may ask. The answer is obvious: those who currently do not know Christ. In other words, Vought was arguing for the imperative of adhering to the Gospel message univocally to the end that those who hear it and trust in Jesus will become Vought’s brothers and sisters in Christ. The aim of Mr. Vought was not the exclusion of Muslims. Rather, by upholding the distinctively Christian message of salvation through personal faith in the God-man, the Lord Jesus, Vought looked to expand His family of faith to include Muslims and others who do not know this Jesus for who He is.

In embracing the prospect of “leading more brothers and sisters to Christ,” Mr. Vought was adhering to one of evangelicalism’s distinctive priorities—broadly inclusive evangelism.³⁷⁴ This evangelical imperative follows directly from the teaching of Scripture. The Apostle Matthew records that the Lord Jesus, after His resurrection and prior to His ascension, commanded His disciples to proclaim the Gospel message to all people, throughout the world.³⁷⁵ Luke affirms this international com-

373. Vought, *supra* note 18.

374. As McGrath observes, “the intense joy of knowing Christ makes it natural for evangelicals to wish to share this experience with those whom they love, as an act of generosity and consideration.” MCGRATH, *supra* note 261, at 76.

375. See *Matthew* 28:18–20 (“All authority has been given to Me [Jesus] in heaven and on earth. Go therefore and make disciples of all the nations, baptizing them in

mission in the first chapter of Acts.³⁷⁶ And the Apostle Paul belabored the point that the community of those who receive Jesus Christ by faith constitutes an inter-ethnic, international body bound in unity.³⁷⁷

But what of Mr. Vought's article supporting the academic suspension of Dr. Hawkins for asserting that the worship of Allah is the worship of the Trinity? How can supporting this suspension be "tolerant"? The short answer is that context matters. Mr. Vought was not opining on the suspension of a professor at a public school, a non-sectarian private school, or a private Muslim school. One would be rightly concerned, for example, had Mr. Vought blogged that the Harvard Law School should not hire a promising faculty candidate, perhaps a scholar of Islamic law, merely because the scholar supports the worship of Allah. The mission of a large, secular law school is perfectly consistent with hiring both nonbelievers and believers from all types of religious traditions. Such is not the case with Wheaton College. Wheaton may be a liberal arts college, but it is and has always been an evangelical Christian school. Ensuring that its faculty members fully support its Statement of Faith is not an "intolerant" (that is, a "disrespectful" or "demeaning") activity, nor is supporting the school for requiring adherence to its Statement of Faith. Further, if one believes that the consistency between the remarks of the suspended professor and Wheaton's Statement of Faith is a debatable matter, it hardly follows that to opine in favor of the school's side in the debate is "intolerant" in the sense of disrespecting or mistreating the professor or maligning Muslims.

the name of the Father and the Son and the Holy Spirit, teaching them to observe all that I commanded you; and lo, I am with you always, even to the end of the age.").

376. See *Acts* 1:8 ("[Y]ou will receive power when the Holy Spirit has come upon you; and you shall be My witnesses both in Jerusalem, and in all Judea and Samaria, and even to the remotest part of the earth.").

377. See, e.g., *1 Corinthians* 12:13 ("For by one Spirit we were all baptized into one body, whether Jews or Greeks, whether slaves or free, and we were all made to drink of one Spirit."); *Galatians* 3:28 ("There is neither Jew nor Greek, there is neither slave nor free man, there is neither male nor female; for you are all one in Christ Jesus."); *Ephesians* 4:4-6 ("There is one body and one Spirit, just as also you were called in one hope of your calling; one Lord, one faith, one baptism, one God and Father of all who is over all and through all and in all."); *Colossians* 3:10-11 ("[T]here is no distinction between Greek and Jew, circumcised and uncircumcised, barbarian, Scythian, slave and freeman, but Christ is all, and in all.").

Alas, even if Mr. Vought and Wheaton College misanalysed the theological implications of the professor's comments, the conclusion should be simply that their viewpoint was theologically mistaken, not disrespectful or demeaning.³⁷⁸

One may invoke anecdotes where certain evangelicals have failed to live up to their theological standards, just as one may cite examples of a great number of individuals, religious and otherwise, who have fallen short of their ideals. But any notion that Mr. Vought, by virtue of the evangelical theology expressed in his support of Wheaton College, should be expected to disrespect or mistreat anyone who does not share his religious tradition is misplaced. Mr. Vought's theological convictions impel him to show respect, decency, and kindness—and even beyond these, love—to those who do not think like him, Muslim or otherwise. Vought's convictions certainly do not render him a bigot.

3. *The Question of Offensiveness*

Perhaps Senator Sanders and certain other members of Congress consider Mr. Vought's evangelical soteriology "offensive," just as the city stewards of Hialeah, Florida apparently found the practice of Santeria animal sacrifice offensive in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*. Quite apart from observing that a legislator contravenes the norms underlying the Religion Clauses by disadvantaging those whose religion is deemed "offensive," I challenge those offended by Mr. Vought's soteriology to consider (1) whether objectively baseless, but real, feelings of the offensiveness of a nominee's religious viewpoints should be accorded much (if any) weight in confirmation hearings; and (2) whether the substance of Mr.

378. Lael Weinberger aptly writes as follows:

It would be worthwhile for Christians to have conversations about what it means to claim that Muslims and Christians (and Jews, and Mormons) "worship the same God." Whatever you think the right answer is, it doesn't do anyone any good to deny that there are good-faith arguments to be heard from both sides. Throwing around accusations of bigotry or of false motives makes it harder, not easier, to have a reasonable and productive conversation.

Lael Weinberger, *Disagreement, Charity, and Islam*, FIRST THINGS: FIRST THOUGHTS (Dec. 22, 2015), <https://www.firstthings.com/blogs/firstthoughts/2015/12/disagreement-charity-and-islam> [<https://perma.cc/3U8N-72Y5>].

Vought's soteriology provides an objective, relevant basis for taking offense (that is, whether his soteriology reflects negatively on his ability to serve his country effectively). I answer each question in the negative.

As a threshold matter, determining objectively relevant grounds for feeling offended may sound paradoxical, insofar as the taking of offense is always subjective; only a particular subject knows whether and how he feels offended. But not all offense is the same. Some legislators might oppose a nominee because of any number of the nominee's characteristics that might offend someone somewhere, but for no reason relevant to public service (for example, because the nominee is blond, bald, financially successful, extroverted, pensive, pale, or Midwestern). I will first focus on this type of offense, one that is purely subjective, not based on a nominee's ability to serve in public office.

Disqualifying a nominee for no reason other than that some may be offended by the nominee's religious views is ill-advised. Most obviously, this treatment of a nominee is dishonorable and counterproductive. The practice ignores the strengths of a nominee, instead relying on the happenstance that some personal characteristic having nothing to do with the ability to engage in public service will control the fate of the nomination. Such dismissal of a nominee is unfair to the nominee, who deserves to be evaluated on the merits of her likely ability to serve the country. The practice also disserves the United States federal government, which benefits from the appointment of capable public officials. Moreover, rejecting a nominee simply because the nominee's religion may offend others for no reason germane to public service runs counter not only to the norms that undergird the Religion Clauses, but also to the broad values of the First Amendment. We protect not just the exercise of religion that may offend, but also speech, publication by the press, and assemblies that may offend. The First Amendment itself reflects a value judgment that avoiding offense *merely for the sake of avoiding offense* is not a keen governmental priority. Further, there is really no sensible reason for legislators who oppose nominees because of their "religious offensiveness" to stop with religious folk; constituents may be just as unjustifiably offended by those with different philosophical views, social practices, places of birth, hair styles, and

preferences in movies, music or video games, etc. Accepting “tendency to offend” as a criterion for opposing a nominee would therefore stifle numerous forms of diversity in public life. Such a practice is hardly prudent in a nation that purports to embrace pluralism. In short, that some may be personally “offended” by an evangelical nominee’s theological convictions is not by itself a legitimate reason to reject the nominee.³⁷⁹

The next question is whether a legitimate objective basis exists for rejecting Mr. Vought as someone whose religious views are offensive. Any number of objectively observable facts would be grounds for disqualifying a nominee. Consider a different nominee with a record of violence, emotionally bullying subordinates, or marching in mobs through college towns while wielding tiki torches and shouting racial epithets. Many of us find these actions terribly offensive, but the reason that the nominee should be rejected is not the offense that we justifiably feel, but the objectively observable grounds that render the nominee unfit for service. The country is not well served by those who attempt to dehumanize or physically harm others as a matter of course.

The question, then, is whether Mr. Vought’s view of sin and salvation itself (on its own terms) provides objective grounds for disqualifying him from service. Let us focus on that aspect of Mr. Vought’s theology that apparently offended Senator Sanders—Vought’s belief that only those who have trusted in Christ Jesus for salvation from sin will escape the wrath of God. I will treat Vought’s acceptance of this proposition as the observable fact that may offend some people. Although the precise reason that this belief may have offended Senator Sanders is not perfectly clear, it may have to do with a concern

379. With respect to the specific facts surrounding the Vought hearing, that some may be offended by Vought’s view of the sinful condition of humanity simply because it conflicts with their personal sensibilities, such as their assessment that they are not that sinful, does not provide objective grounds for disqualifying him from office. The government has no business arbitrating divergent theological assessments of the condition of humanity in selecting public servants. Offense taken at Vought’s understanding of sin and salvation, with no showing of its relevance to his conduct in office, is thus precisely the type of offense that is irrelevant. This observation in no sense denies that some people may genuinely feel offended by the message that they are sinners. *See, e.g.,* LIGHTNER, *supra* note 253, at 43 (“The Gospel is offensive because it strips people of all room for pride in human accomplishment.”).

that Vought's belief inherently demeans non-Christians. Sanders used the terms "Islamophobic" and "respectful" in repeatedly questioning Vought about his views that Muslims stand "condemned." The senator thus may have worried that Vought's soteriology *on its own terms* implied disrespect for people of others faiths, or an aversion to them.³⁸⁰ I will therefore frame the issue that may have concerned Senator Sanders as follows: does Russell Vought's evangelical perspective on sin and salvation inherently imply an aversion towards, or disrespect for, Muslims specifically, or non-Christians generally? The answer is an emphatic "no."

Evangelical soteriology is inseparable from the doctrine of sin.³⁸¹ The doctrine of sin assumed by Mr. Vought's comments and widely accepted within evangelicalism is the biblical doctrine that everyone, prior to trusting in Christ for salvation, exists in a state of sin and condemnation.³⁸² The Apostle John writes that such was the teaching of Jesus.³⁸³ The Apostle Paul taught likewise.³⁸⁴ The evangelical understanding of sin is not that condemnation results from one's being a "worse" sinner than another, but simply from one's being a sinner. And, as Mr. Vought's *alma mater* Wheaton College affirms,³⁸⁵ every human

380. I have already explained why evangelical theology in general would compel Mr. Vought to show actual respect to those outside of his faith. See *supra* Section II.B.2. The proposition examined here is different, for it focuses narrowly on whether evangelical soteriology on its own terms disrespects those who reject it, rather than the ethic one would expect an evangelical to follow in life.

381. The link is not conceptually difficult to grasp. See, e.g., LIGHTNER, *supra* note 253, at 43 ("Before anyone can be redeemed, he must accept God's estimate of his sinfulness.").

382. See, e.g., ERICKSON, *supra* note 256, at 559 (stating that "sin is a barrier to the relationship between God and humans, bringing them under God's judgment and condemnation"); LIGHTNER, *supra* note 253, at 36 ("Outside of Christ we stand condemned before God and in need of His salvation . . ."); *id.* at 42 (stating that, without salvation in Christ, people "are already judged by God").

383. See *John* 3:18 ("He who believes in Him is not judged; he who does not believe has been judged already, because he has not believed in the name of the only begotten Son of God."); *John* 3:36 ("He who believes in the Son has eternal life; but he who does not obey the Son will not see life, but the wrath of God abides on him.").

384. See, e.g., *Ephesians* 2:1 (stating "you were dead in your trespasses and sins"); *Ephesians* 2:3 (stating "we too all . . . were by nature children of wrath, even as the rest.").

385. See *Wheaton Statement of Faith*, *supra* note 15, which states as follows:

being is a sinner and therefore unworthy of entering into the glorious presence of the one and only, holy God.³⁸⁶ Thus, when Russell Vought spoke of condemnation, he was speaking of the divine-legal status of everyone apart from Christ. He was not saying that Muslims deserve to be condemned any more than Christians, or that they lack the moral approbation due Christians or other non-Muslims. It is not a matter of relative merit or comparative morality.

Indeed, in evangelical theology, one's deliverance from condemnation is not a question of merit or moral achievement at all, except for the merit and perfect character of Christ Himself.³⁸⁷ Jesus described salvation as a gift to be received through faith,³⁸⁸ not a prize to be awarded through moral achievement. To the same effect, the Apostle Paul described salvation as a gift,³⁸⁹ and emphasized that it is not a result of good works.³⁹⁰ The source of salvation is the grace of God, not anything within

WE BELIEVE that our first parents sinned by rebelling against God's revealed will and thereby incurred both physical and spiritual death, and that as a result all human beings are born with a sinful nature that leads them to sin in thought, word, and deed.

386. See, e.g., *Romans* 3:23 ("All have sinned and fall short of the glory of God.").

387. In his letter to the church at Philippi, the Apostle Paul acknowledges that he relies not on "a righteousness of my own derived from the Law, but that which is through faith in Christ, the righteousness which comes from God on the basis of faith." *Philippians* 3:9. Paul is thus writing that it is the righteousness of God in Christ that makes Paul righteous before God, not Paul's own righteousness.

388. See, e.g., *John* 3:16 ("For God so loved the world, that He gave His only begotten Son, that whoever believes in Him shall not perish, but have eternal life."); *John* 4:10 ("Jesus answered and said to her, 'If you knew the gift of God, and who it is who says to you, 'Give Me a drink,' you would have asked Him, and He would have given you living water.'"); *John* 7:37-38 ("Jesus stood and cried out, saying, 'If anyone is thirsty, let him come to Me and drink. He who believes in Me, as the Scripture said, "From his innermost being will flow rivers of living water.'").

389. See, e.g., *Romans* 3:24 (stating that those who trust in Jesus are "justified as a gift by His grace through the redemption which is in Christ Jesus"); *Romans* 6:23 ("For the wages of sin is death, but the free gift of God is eternal life in Christ Jesus our Lord."); *Ephesians* 2:8 ("For by grace you have been saved through faith; and that not of yourselves, it is the gift of God . . .").

390. See, e.g., *Romans* 3:28 ("For we maintain that a man is justified by faith apart from works of the Law."); *Ephesians* 2:9 (describing the believer's salvation "not as a result of works, so that no one may boast"); *Titus* 3:5-6 (stating that God "saved us, not on the basis of deeds which we have done in righteousness, but according to His mercy, by the washing of regeneration and renewing by the Holy Spirit, whom He poured out upon us richly through Jesus Christ our Savior").

humanity itself.³⁹¹ Thus, not even faith itself is a moral basis for salvation in evangelical theology.³⁹² Rather, faith in Christ is the medium for receiving the gift of salvation from God.³⁹³ The believer in Christ does not somehow “deserve” salvation “because of” faith. Rather, the believer in Jesus receives the gift of salvation through trusting in Christ (that is, in His Person and His work) for salvation.

Thus, if Senator Sanders assumed that Mr. Vought’s evangelical soteriology implied a belief that Muslims somehow are less deserving of salvation than are Christians—or, stated another way, that Muslims deserve condemnation more than Christians—his assumption reflects a lack of theological understanding. In evangelical theology, nobody “deserves” salvation, be he Christian, Muslim, Jewish, Buddhist, Hindu, agnostic, atheist, or anything else. Salvation is not awarded to the deserving. Rather, by God’s grace it is given to those undeserving souls who trust in Christ for it.

Conceivably, Senator Sanders misunderstood Mr. Vought’s theology in a different way. Perhaps Sanders reasoned that, if Vought believes that Muslims will be condemned, it must also mean that Vought’s belief system implies that God does not love or care about Muslims, and therefore this belief system is inherently demeaning or disrespectful of Muslims and other non-Christians. Once again, any such inference from Mr. Vought’s theology is erroneous.

391. That salvation arises from the grace of God is nicely summarized in the following excerpt from Paul’s letter to the Ephesians, which repeatedly refers to God’s grace:

But God, being rich in mercy, because of His great love with which He loved us, even when we were dead in our transgressions, made us alive together with Christ (by grace you have been saved), and raised us up with Him, and seated us with Him in the heavenly *places* in Christ Jesus, so that in the ages to come He might show the surpassing riches of His grace in kindness toward us in Christ Jesus. For by grace you have been saved through faith

Ephesians 2:4–8; see also *Romans* 3:24 (stating that the believer is “justified as a gift by His [God’s] grace through the redemption which is in Christ Jesus”); *Titus* 3:7 (stating that the believer in Christ is “justified by His [God’s] grace”).

392. See LIGHTNER, *supra* note 253, at 160 (“Man’s faith is not the cause of his salvation.”).

393. See *id.* (stating that salvation “is always *through* faith by God’s marvelous grace”).

The scriptural basis for Russell Vought's theology is clear in affirming that God loves all human beings and longs for them to trust in His Son to receive the gift of salvation. The Apostle Paul said that God "desires all men to be saved and to come to the knowledge of the truth,"³⁹⁴ and cited his own past of terrorizing the church³⁹⁵ to illustrate how God offers salvation to everyone, even the worst of sinners.³⁹⁶ He taught that God, "because of His great love with which He loved us, even when we were dead in our transgressions, made us alive together with Christ."³⁹⁷ Similarly, the Apostle Peter taught, "The Lord is not slow about His promise, as some count slowness, but is patient toward you, not wishing for any to perish but for all to come to repentance."³⁹⁸ The Lord Jesus similarly demonstrated and taught of God's love and open invitation of salvation to all who would trust in Him in conversations with the Jewish rabbi Nicodemus,³⁹⁹ a socially stigmatized Samaritan woman,⁴⁰⁰ and two sisters grieving the death of their brother,⁴⁰¹ as well as in his public teaching ministry.⁴⁰²

For Russell Vought and other evangelicals, God the Father so loves people who are currently living in a divine-legal state of condemnation that he gave His eternally beloved Son as a sacrifice for their sin, and He ever yearns for them to trust in Him for eternal life. So also, Christ the Son willingly sacrificed Himself because of His love of humankind.⁴⁰³ Far from carrying any

394. 1 *Timothy* 2:4.

395. See *Acts* 8:1–3; 1 *Timothy* 1:13.

396. The Apostle Paul said it this way:

It is a trustworthy statement, deserving full acceptance, that Christ Jesus came into the world to save sinners, among whom I am foremost of all. Yet for this reason I found mercy, so that in me as the foremost, Jesus Christ might demonstrate His perfect patience as an example for those who would believe in Him for eternal life.

1 *Timothy* 1:15–16.

397. *Ephesians* 2:4–5; see also *Romans* 5:8 ("But God demonstrates His own love toward us, in that while we were yet sinners, Christ died for us.").

398. 2 *Peter* 3:9.

399. See *John* 3:1–21.

400. See *John* 4:7–38.

401. See *John* 11:1–46.

402. See, e.g., *John* 6:26–40.

403. See *Galatians* 2:20 ("[T]he life which I now live in the flesh I live by faith in the Son of God, who loved me and gave Himself up for me . . ."); *Ephesians* 5:2

negative implications about God's love for those outside the fold of the Christian faith, evangelical soteriology is founded on God's love for people who have yet to embrace Christ the Savior. Further, evangelical soteriology instructs those who have received the gift of salvation—and therefore have known and benefitted from God's love—to recognize the inherent value of all bearers of God's image, to treat them accordingly, and to seek their spiritual blessing. These evangelical imperatives are to be lived out for the good of every soul inhabiting the center of the celestial sphere, from the Western Sahara to Washington, from Vietnam to Vermont. To believe or act otherwise would be to disaffirm the nature of the love of God, a love upon which evangelicals and other orthodox Christians have staked their eternal destiny.

Any further speculation on how Senator Sanders may have misinterpreted Mr. Vought's soteriology in some slightly different way likely would not advance the analysis meaningfully. The general point is clear. Mr. Vought's soteriological views imply no disrespect of, or hatred towards, Muslims or anyone else. They imply quite the opposite. Vought's soteriology is firmly grounded in the love of God for all of humanity, no matter where they were born, what language they speak, what they look like, or what they have thought about God for their entire lives. Vought's views are not objective grounds for disqualifying him or other evangelicals from public service, even if some might find them offensive for reasons unrelated to the discharge of governmental duties.

III. CONCLUSION

United States senators can and should do better than to ascribe disrespectfulness, discriminatory propensities, and hatred to nominees for public office merely because those nominees hold theological views that contravene the claims of other religious adherents or the sentiments of secular elites. Senators who chastise nominees for holding fast to doctrinal principles in conflict with those of other religions or the sensibilities of

("Christ also loved you and gave Himself up for us, an offering and a sacrifice to God . . ."); *Revelation* 1:5 (stating that Jesus Christ "loves us and released us from our sins by His blood").

areligious political leaders palpably violate the norms of the Religious Test Clause and the Religion Clauses of the First Amendment. But offending these norms is not equivalent to transgressing the letter of the Constitution. Although a line of questioning, like that of Senator Sanders in his interrogation of Russell Vought, may be entirely inappropriate, it is not necessarily unconstitutional. Inquiring in the manner of Senator Sanders falls short of imposing a religious test, and it does not constitute state action in violation of the Religion Clauses. The absence of a constitutional infraction on account of such questioning, or at least the nonexistence of a remediable constitutional breach, is further supported by a number of Supreme Court cases interpreting and applying the Speech or Debate Clause.

The analysis of Senator Sanders's interrogation of Mr. Vought must not end with a constitutional pass and a stern censure, however. The objection of Sanders to Vought's bold, evangelical claim that salvation from sin exists exclusively through the Lord Jesus Christ invites a broader discussion of whether authentically evangelical nominees are, by virtue of their theology, unfit to serve the public in a religiously pluralistic, democratic republic. A careful review of evangelical theology, and particularly evangelical soteriology, compels the conclusion that Russell Vought, and other evangelicals like him, are perfectly capable of serving the country nobly while holding firmly to their faith. That evangelical views and, more broadly, historically orthodox Christianity are incompatible with certain dogmas of other religions implies neither derogation of, nor disrespect for, adherents of other religious traditions. Far from suggesting that others may be discriminated against or otherwise mistreated, an evangelical ethic compels generous, even sacrificial, love of others, including those of other races, nationalities, creeds, and cultures. And the evangelical understanding of the universal love of God for humanity, embodied in the Person and work of Christ, drives the evangelical to embrace a globally inclusive vision of evangelism and to harbor hope for all of humanity to receive the grace of God through faith in the Lord Jesus. Living with this conviction and hope is wholly compatible with public service.

Senators who sit in judgment seats in confirmation hearings would do well to consider carefully their own biases against those with religious views unlike their own, be they evangeli-

cal Christians, members of Christian denominations not typically associated with evangelicalism, traditional Muslims, Reform Jews, modern Hindus, agnostics, atheists, or anyone else. Senators would do even better to also learn more about the faiths of nominees before disparaging them as bigots.

And as for evangelicals and other orthodox Christians considering whether to endure the possible spectacle of subjecting themselves to the type of antagonistic questioning endured by Russell Vought, they may rest assured that no legitimate public policy rationale disqualifies them from serving their country merely because of their faith-based commitments. Rather, they can face their inquisitors with full confidence in their theology of love and hope for all of humanity, even as did the Apostle Paul, when he wrote the following words:

I am not ashamed of the gospel, for it is the power of God for salvation to everyone who believes⁴⁰⁴

404. *Romans* 1:16.

LIBERAL SECULARISM AND RELIGIOUS FREEDOM IN THE PUBLIC SPACE: REFORMING POLITICAL DISCOURSE

ALEX DEAGON*

INTRODUCTION

One would prefer not to think of Justice Anthony Kennedy as a Keynesian “[m]adm[a]n in authority who hear[s] voices in the air” and who “distill[s] [his] frenzy from some academic scribbler of a few years back.”¹ Still, in at least one passage, *Obergefell v. Hodges*² confirms that “the ideas which civil servants and politicians . . . apply to current events are not likely to be the newest.”³ Consider:

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.⁴

According to Justice Kennedy, “decent and honorable religious or philosophical premises” may ground “sincere, personal opposition” to same-sex marriage—apparently reasonably so—but those same premises, if they would be enacted in law and public policy, become unacceptable.⁵ This idea is not “the newest.” It is, in fact, the liberalism that venerable academic scribblers such as John Rawls and Robert Audi have

* Lecturer, Faculty of Law, Queensland University of Technology.

1. JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 383–84 (1936).

2. 135 S. Ct. 2584 (2015).

3. KEYNES, *supra* note 1, at 384.

4. *Obergefell*, 135 S. Ct. at 2602.

5. *See id.*

long espoused.⁶ Unfortunately, that liberalism has also long been unsatisfactory, and it remains so, not least because it unduly restricts religious liberty.

This Article advocates the realization of a more robust, and indeed a more neutral, liberty, particularly in the realm of political discourse. Part I shows that Rawls and Audi, as exemplars of liberalism, enticingly claim that religious freedom and non-establishment are separate principles and that the implementation of these principles leads to a neutral public square. Part II attempts to show that a public square so ordered, while appearing to be even-handed, is actually secularist, or not “truly” neutral. Instead, non-establishment leads to a public square where non-religion predominates over religion in political discourse. Finally, Part III articulates and defends the broader view of religious freedom. Ultimately, only the full inclusion of all religious and non-religious perspectives in a pluralistic debate will promote the neutrality, freedom, and equality that liberal theorists rightly and ardently desire.

I. THE LIBERAL ACCOUNT OF RELIGIOUS FREEDOM: FREEDOM, NEUTRALITY, AND EQUALITY

A. *Separation of Religious Freedom from Non-Establishment*

The traditional and prevailing liberal view is that religious freedom and non-establishment are separate principles. Religious freedom is about individuals being free to believe and practice as they choose without interference by the state, and non-establishment is about preventing government from endorsing or coercing the practice of a particular religion.⁷ In the liberal framework, the separation of these principles is supposed to preserve religious freedom. Rawls and Audi are ex-

6. See generally ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON (2000); JOHN RAWLS, POLITICAL LIBERALISM (expanded ed. 2005); Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677 (1993).

7. See Rex Ahdar & Ian Leigh, *Is Establishment Consistent with Religious Freedom*, 49 MCGILL L.J. 635, 638–39, 649 (2004); see also, e.g., Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 673–74 (1980); John Norton Moore, *The Supreme Court and the Relationship Between the “Establishment” and “Free Exercise” Clauses*, 42 TEX. L. REV. 142, 146–49 (1964). See generally 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008).

emplary exponents of this entrenched separationist perspective in which distinguishing religious freedom from non-establishment and balancing them appropriately results in genuine neutrality, freedom, and equality.⁸

Under Rawls's theory of liberalism, all coercive laws must be justified by "public reason."⁹ Coercive laws may not be based on "comprehensive doctrines."¹⁰ For Rawls, *any* comprehensive

8. See generally Cecile Laborde, *Political Liberalism and Religion: On Separation and Establishment*, 21 J. POL. PHIL. 67, 67–69 (2013).

9. According to Rawls, public reason is "the shared form of reasoning that the citizens of a pluralist democratic society should use when deciding constitutional essentials and questions of basic justice." See Blain Neufeld, *Public reason*, in THE CAMBRIDGE RAWLS LEXICON, § 172, at 666 (Jon Mandle & David A. Reidy eds., 2014); see also *infra* note 22. Rawls believes this form of reasoning "makes the realization of the ideal of fair social cooperation amongst free and equal citizens possible in pluralist societies." *Id.*; see also Jonathan Quong, *Public Reason*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2018), <https://plato.stanford.edu/entries/public-reason/> [<https://perma.cc/R48V-LAAT>] (Public reason is "the moral or political rules that regulate our common life [must] be, in some sense, justifiable or acceptable to all those persons over whom the rules purport to have authority.").

10. RAWLS, *supra* note 6, at 60–61. According to Rawls:

A comprehensive doctrine is a set of beliefs affirmed by citizens concerning a range of values, including moral, metaphysical, and religious commitments, as well as beliefs about personal virtues, and political beliefs about the way society ought to be arranged. They form a conception of the good and inform judgments concerning "what is of value in life, the ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole."

Paul Voice, *Comprehensive doctrine*, in THE CAMBRIDGE RAWLS LEXICON, *supra* note 9, § 39, at 126. (quoting RAWLS, *supra* note 6, at 13 (citation omitted)). A fully comprehensive doctrine "cover[s] all (or most of) the major issues of human value, including moral, religious, metaphysical and political values." *Id.* at 127.

In Rawls's view, a comprehensive doctrine may be reasonable or unreasonable. Reasonable comprehensive doctrines are translatable into political reasons; they "propose terms in public political discourse that others might be willing to accept. In other words, they offer political rather than comprehensive reasons." *Id.* A reasonable comprehensive doctrine is an exercise of theoretical reason in the sense that it organizes major moral and philosophical aspects of human life in a consistent and coherent manner; it is an exercise of practical reason in the sense that it attaches weight to associated values in ways which distinguish it from other doctrines; and while it is not absolute it does draw upon an established tradition of thought. See RAWLS, *supra* note 6, at 59. Unreasonable comprehensive doctrines "make political judgments, take political action, and argue for principles of justice solely from within the perspective of their comprehensive doctrines." Voice, *supra*, at 127.

Comprehensive doctrines may also be religious or secular. "[P]erfectionism, utilitarianism, Idealism, and Marxism" are examples of (arguably) secular fully

doctrine, reasonable or unreasonable, religious or secular, cannot be a public reason without translation into “proper political reasons,”¹¹ and so is an inadequate basis for coercive law. The liberal principle of non-establishment, in particular, prohibits coercive laws based on religious comprehensive doctrines. This non-establishment principle is distinct from the Rawlsian principle of religious freedom, which forbids the use of state power to repress religious reasonable comprehensive doctrines.

At first glance, the distinction between Rawls’s non-establishment and religious freedom principles might seem artificial. Could it not be that a religious reasonable comprehensive doctrine might form the basis for a coercive law (breaching the non-establishment principle) which represses other incommensurable religious reasonable comprehensive doctrines (breaching the religious freedom principle at the same time)? This is certainly possible, even probable. But that kind of situation does not exhaust the permutations of reasonable comprehensive doctrines in relation to the two principles. A religious reasonable comprehensive doctrine might form the basis for a secular law, which does not repress another reasonable religious comprehensive doctrine (for example, a law requiring that creation be taught alongside evolution in public schools). Here the non-establishment principle would be violated but the religious freedom principle would not. Conversely, a secular reasonable comprehensive doctrine might form the basis for a law that represses a religious reasonable comprehensive doctrine (for example, a Marxist regime might prohibit the publication of Christian literature). Here the religious freedom principle would be violated but the non-establishment principle would not be (though the general Rawlsian prohibition on laws based on comprehensive doctrines would). Thus, notwithstanding the overlap between the two principles, they are nonetheless independent in the Rawlsian framework.¹²

comprehensive doctrines. *Id.* Christianity and Islam are examples of religious fully comprehensive doctrines.

11. RAWLS, *supra* note 6, at 453 (arguing that comprehensive doctrines must be translated into “proper political reasons” consistent with public reason before they may be deployed in public political forums); *see also infra* Section II.A (explaining the insufficiency of this “proviso”).

12. A similar argument could be applied to Audi’s framework outlined below. The illustration assumes a traditional view of non-establishment and religious freedom, consistent with the Rawlsian framework. Less traditional views might

Audi's views are similar in this respect. The assumption underlying his view of the role of religious arguments in liberal democracies is that they are free societies "committed to preserving freedom, especially in religion."¹³ This commitment to preserving freedom in the sense of preventing "unjustified" coercion against religion is the typical liberal idea of religious freedom. As distinct from coercion against religion (contrary to the religious freedom principle), Audi supports the non-establishment idea that religion should not be invoked as the basis for political laws, for this could lead to division and dominance of one religion over others in a pluralistic society, which is incompatible with liberal ideas of freedom and equality.¹⁴

B. Balancing Religious Freedom and Non-Establishment

Rawls addresses this question of pluralism as follows:

[T]he basic structure of such a society is effectively regulated by a political conception of justice that is the focus of an overlapping consensus of at least the reasonable comprehensive doctrines affirmed by its citizens. This enables that shared political conception to serve as the basis of public reason in debates about political questions when constitutional essentials and matters of basic justice are at stake.¹⁵

A reasonable approach sees "society as a system of fair cooperation" between reasonable comprehensive doctrines.¹⁶ When doctrines that are reasonably acceptable to all people (regardless of their own reasonable comprehensive doctrines) are used to promulgate laws, those laws provide fair terms for all individuals in the society. The Rawlsian approach, in a sense, is a

consider "secularism" or "Marxism" as "religious" for non-establishment purposes, but they are not considered here. See, e.g., Larry Alexander, *Kent Greenawalt and the Difficulty (Impossibility?) of Religion Clause Theory*, 25 CONST. COMMENT. 243 (2008); Derek Davis, *Is Atheism a Religion? Recent Judicial Perspectives on the Constitutional Meaning of "Religion"*, 47 J. CHURCH & ST. 707 (2005); John Knechtle, *If We Don't Know What It Is, How Do We Know If It's Established?*, 41 BRANDEIS L.J. 521 (2003). The broader view of religious freedom developed in Part III would see the first example as an issue of non-establishment within the context of religious freedom and evaluate it on that basis. The second example would obviously still be directly considered as an issue of religious freedom.

13. Audi, *supra* note 6, at 687.

14. *Id.* at 690-91.

15. RAWLS, *supra* note 6, at 48.

16. *Id.* at 49-50.

system of equality based on the universal acceptance of minimum terms.¹⁷

Reasonable persons may not accept, or indeed may deny, reasonable comprehensive doctrines. Nevertheless, they should not want the state apparatus to repress reasonable comprehensive doctrines to which they do not adhere because they would not desire repression of their own reasonable comprehensive doctrines.¹⁸ This is the condition of reciprocity. To preserve “unity and stability,” Rawls introduces the idea of an “overlapping consensus of reasonable comprehensive doctrines,” which “endorse the political conception, each from its own point of view.”¹⁹ To the extent that there is a consensus, there is a certain unity, and “stability is possible when the doctrines making up the consensus are affirmed by society’s politically active citizens.”²⁰ For Rawls, all this “leads to a form of toleration and supports the idea of public reason.”²¹

Rawls states that:

Public reason is characteristic of a democratic people: it is the reason of its citizens, of those sharing the status of equal citizenship. The subject of their reason is the good of the public: what the political conception of justice requires of society’s basic structure of institutions, and of the purposes and ends they are to serve.²²

The citizens, “as a collective body, exercise final political and coercive power over one another in enacting laws” on fundamental issues, such as equality of opportunity and which religions to tolerate.²³ Fundamentally, therefore, political power may only be exercised on the basis of public reason as a matter of liberal legitimacy:

[O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational [in accordance

17. *See id.*

18. *See id.* at 60–62.

19. *Id.* at 134.

20. *Id.*

21. *Id.* at 59.

22. *Id.* at 213.

23. *Id.* at 214.

with non-establishment] . . . consistent with their freedom and equality [preserving religious freedom].²⁴

Audi takes up the Rawlsian line of thought, albeit with explicitly “secular” reason rather than the more ostensibly neutral “public” reason. He presents a theory of how “religious arguments may be properly used in a free and democratic society [without] mask[ing] their religious character [or] undermin[ing]” the separation of church and state, which he distinguishes from secularization.²⁵ Audi focuses specifically on the “role of religious arguments and the explicit use of, or tacit reliance on, religious considerations as grounds for laws or public policies.”²⁶ His theory has a similar framework to Rawls’s: “[L]iberal democracy is properly so called because of its two fundamental commitments: to the freedom of citizens and to their basic political equality, symbolized above all in the practice of according one person one vote.”²⁷ Audi identifies the balance of these two potentially competing principles as challenging, particularly considering the injunction to respect the individual autonomy and equality of persons such that their vote is not coerced or prevented from being truly representative.²⁸

Any liberal society ought to incorporate as much promotion of the good in that society as is needed to fulfill their sociopolitical vision, but no more and no less. Similarly, coercion, as ostensibly inimical to promoting freedom, is only justified when the action or inaction is what people would do “autonomously” if “appropriately informed and fully rational;” when citizens understand the rationale, they are able to support the action on the basis of general liberal democratic ideals “*independently* of what they happen to approve of politically, religiously, or . . . morally.”²⁹

For Audi, it follows that “the use of secular reason must in general be the main basis of sociopolitical decision.”³⁰ He does not indicate what an exceptional circumstance would be, or how secondary bases could be incorporated. He explains this

24. *Id.* at 217–18.

25. Audi, note 6, at 678.

26. *Id.* at 678–79.

27. AUDI, *supra* note 6, at 4.

28. *Id.* at 5–6.

29. Audi, *supra* note 6, at 689–90.

30. *Id.* at 690.

by saying that where there is a “reason which is esoteric in a sense implying that a normal rational person lacks access to it,” that person will tend to resent coercion on such a basis.³¹ Since such coercion has no place in a liberal democracy, esoteric reasons—presumably including religious reasons as diametrically opposed to secular reason—should not be the basis for legal and political coercion.³² Audi then underscores the point by contemplating the strife that permitting esoteric reasons would lead to.³³

Fundamentally, the state should be “secular” in the sense that religion should not influence, support, or control state power because religion is intrinsically private and fractured through different, competing beliefs. This is Audi’s version of the non-establishment principle.³⁴ Furthermore, this separation actually protects religious freedom by allowing freedom of belief and practice without influence or interference by the state.³⁵

31. *Id.*

32. *See id.*

33. *See id.* at 690–91.

34. The *Lemon* test in Establishment Clause jurisprudence echoes this basic scheme: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citations omitted) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)). The vitality of this test is somewhat unclear, since more recent cases have looked to endorsement, coercion, historical practice, or the level of controversy sparked. The endorsement test, first formulated by Justice O’Connor, bars the government from appearing to endorse or favor a religion over other religions, or religion generally over non-religion. *See Cty. of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O’Connor, J. concurring) (proposing, for the first time, the endorsement test). In the public prayer context, the Court has inquired into “coercion.” *See Lee v. Weisman*, 505 U.S. 577, 587 (1992) (holding that the Establishment Clause prohibits government coercion of anyone to support or participate in religion or its exercise). The Establishment Clause has not, however, been extended to prohibit certain practices rooted in history and tradition. *See, e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (holding Establishment Clause does not prohibit town tradition of having volunteer chaplains pray to begin each legislative session); *Van Orden v. Perry*, 545 U.S. 677, 681–92 (2005) (plurality opinion) (holding Establishment Clause does not prohibit Texas from displaying a Ten Commandments monument at the state capital); *Marsh v. Chambers*, 463 U.S. 783 (1983) (holding the Establishment Clause does not prohibit Nebraska from having paid chaplains give prayers to begin each legislative session). Justice Breyer plotted a different course in *Van Orden*, suggesting in a concurrence that the Establishment Clause should be pragmatically applied to reduce religious controversies. *See* 545 U.S. at 698–706 (Breyer, J., concurring).

35. *See Audi, supra* note 6, at 690–91.

II. A SUBTLE SECULARISM

The commitment to protecting freedom and equality through a neutral balance of religious freedom and non-establishment is a foundational principle of both the Rawlsian and Audian frameworks. The effect of these frameworks, however, is actually to privilege non-establishment over religious freedom, and the result for religion is neither neutral nor free.

A. *Non-Establishment Dominance*

Rawls argues that the content of public reason is formed by a political conception of justice, which involves values of political justice such as equal political and civil liberty, equality of opportunity, social equality and economic reciprocity, and values of the common good. In addition, the inquiry must be free and public, and people must be reasonable and ready to honor the duty of civility. Finally, the principle of political legitimacy requires that the discussions be equally “justifiable to all citizens,” meaning that “we are to appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial [W]e are not to appeal to comprehensive religious and philosophical doctrines.”³⁶

There are many difficulties with this final statement. It is hardly clear what common sense actually is, nor is it clear what general beliefs and forms of reasoning are “presently accepted,” nor is it clear what methods and conclusions of science are apparently beyond controversy. Presently accepted or non-controversial surely cannot mean universally accepted at this moment in time, for there is very little content that is accepted without exception or debate. If not universally accepted, to

36. RAWLS, *supra* note 6, at 224–25. The Establishment Clause in First Amendment jurisprudence generally has not extended this far, largely because the Free Speech Clause protects expressing religious views in political contexts. See *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 831 (1995) (holding that university’s denial of funding to students seeking to publish pro-religion content violated Free Speech Clause by discriminating against “religious editorial viewpoints”). Nevertheless, traces of this principle do arise when discerning the purpose of a given law in Establishment Clause cases. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding that a law requiring that creationism and evolution be taught side-by-side in schools established religion because its purpose was to promote religion, in part based on statements by supporters in the state legislature).

what extent must the population “accept” this form of reasoning or this scientific premise? Rawls does not address this question.³⁷ And in either case, it does not seem possible to campaign for change to what “equally justifiable” means under this system, since any alternatives are automatically excluded by the principle of political legitimacy.

These general problems are related to the specific problem of where religious views fit in this framework. Through the apparent adherence to liberal non-establishment principles, it would seem that religious perspectives are automatically excluded. If the vision Rawls espouses is the authentic, equally participating citizen, the apparent restriction on public religious arguments is troubling. It is difficult to imagine how one can agitate for change on a religious basis without presenting a religious argument. Rawls acknowledges that a religion may be a reasonable doctrine, and as long as it is presented in a reasonable (accessible and equal) way, there seems to be no reason why it should not be included. Perhaps there is an implicit assumption that comprehensive religious doctrines are not in accordance with “common” sense, but this would just be effectively reinscribing “secular” or “non-religious” sense as “common” sense—and such a move is difficult for Rawls, because it is not really free and equal for religious citizens at all. To his credit, Rawls does acknowledge this, and he distinguishes public reason from secular values or secular reason, which he defines as “reasoning in terms of comprehensive non-religious doctrines. Such doctrines and values are much too broad to serve the purposes of public reason.”³⁸

Rawls therefore attempts to provide for religious freedom in his account of public reason, and argues that the reasonable comprehensive doctrines are not being excluded from public reason outright, but are merely being presented in this reasonable and accessible fashion:

What public reason asks is that citizens be able to explain their vote to one another in terms of a reasonable balance of

37. For Eberle’s engagement with the problems of populist conceptions of public justification in the Rawlsian framework for explication of the point, see CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTIONS IN LIBERAL POLITICS* 212–22 (2002). For the same point in relation to equivalent claims by Audi, see BRYAN MCGRAW, *FAITH IN POLITICS: RELIGION AND LIBERAL DEMOCRACY* 95 (2010).

38. RAWLS, *supra* note 6, at 452.

public political values, it being understood by everyone that of course the plurality of reasonable comprehensive doctrines held by citizens is thought by them to provide further and often transcendent backing for those values The only comprehensive doctrines that run afoul of public reason are those that cannot support a reasonable balance of political values. Yet given that the doctrines actually held support a reasonable balance, how could anyone complain? What would be the objection?³⁹

The objection is not to a reasonable balance of public political values, or even necessarily to explanation of a vote or policy position in terms of a reasonable balance of these values. The objection is to the implicit prior premise that comprehensive religious doctrines, as an example, cannot support a reasonable balance in the sense that articulation of one's views are politically illegitimate if such a doctrine is appealed to during that articulation. This premise, adhering to non-establishment principles requiring that religious doctrine not form the basis for political decision, restricts religious freedom by preventing religious doctrine from being invoked to support public political values. Religions can also aim to promote a reasonable balance of freedom and equality as general public political values, especially the imperative to preserve religious freedom.⁴⁰ Even if certain religious comprehensive doctrines restrict freedom and equality, this might not be enough to justify their exclusion. Some restrictions on freedom and equality are compatible with a reasonable balance, for example, religious ministers being granted exemptions against anti-discrimination laws in terms of whom they choose to marry.

The fundamental question, then, is why religious doctrine cannot form part of the public reason. The doctrine must presumably only be accepted in the sense of being comprehensible or accessible, not universally agreed upon. If religious views can form part of the public reason, a more consistent view that promotes freedom and equality for all citizens seems to be that public reason can incorporate some of these fundamental reasonable comprehensive doctrines, religious and secular.

39. *Id.* at 243–44.

40. See e.g., REX AHDAR & IAN LEIGH, *RELIGIOUS FREEDOM IN THE LIBERAL STATE* 11–37 (2005); JOHN MILBANK & ADRIAN PABST, *THE POLITICS OF VIRTUE: POST-LIBERALISM AND THE HUMAN FUTURE* 28–36 (2016).

Rawls does come close to something like this when defining the limits of public reason. In particular, he supports an “inclusive view” of public reason, which he understands to be “allowing citizens, in certain situations, to present what they regard as the basis of political values rooted in their comprehensive doctrine, provided they do this in ways that strengthen the ideal of public reason itself.”⁴¹ Rawls illustrates this through situations involving different religious groups disputing amongst themselves about an issue of basic justice, and his position appears to be that these groups may publicly declare why their respective comprehensive religious doctrines affirm authentic freedom and equality, which ultimately strengthens these political values constitutive of public reason in a liberal state.⁴² This later development by Rawls exposes a tension between this view and his position expressed in earlier versions of *Political Liberalism*.

The issue could ultimately be decided by Rawls’s final piece on public reason, “The Idea of Public Reason Revisited,” which he declares to be “by far the best statement I have written on ideas of public reason and political liberalism.”⁴³ Here, Rawls clarifies that “in public reason comprehensive doctrines of truth or right” should be “replaced by an idea of the politically reasonable addressed to citizens as citizens.”⁴⁴ This does not involve criticism of any comprehensive doctrine, and any “reasonable doctrine” must accept a “constitutional democratic regime” and the idea of “legitimate law.”⁴⁵ Rawls distinguishes between the “public” nature of the reason, which operates at the level of judicial decision-making and statements by legislators or parliamentary candidates, and the nonpublic reasons of background culture, which include the many various comprehensive doctrines and to which public reason does not apply.⁴⁶ Importantly, “[s]ometimes those who appear to reject the idea of public reason actually mean to assert the need for full and

41. RAWLS, *supra* note 6, at 247.

42. *See id.* at 248–49.

43. *Id.* at 438.

44. *Id.* at 441.

45. *Id.*

46. *Id.* at 443–44.

open discussion in the background culture. With this political liberalism fully agrees."⁴⁷

The distinction Rawls makes between public and nonpublic reasons is essential. The argument in this Article so far could be viewed as advocating for full and open discussion in the background culture, consistent with Rawls. Certainly this Article does not argue for any less. Indeed, it argues for more. Rawls essentially postulates a separation between nonpublic reasons and public reasons. If we are talking about religious reasonable comprehensive doctrines, religious discourse or religious "freedom" is relegated to the private sphere, and non-establishment principles undergirding public reason in this sense imply that public reason is just a certain kind of non-religious (secular) reason. In other words, the separation of religious freedom into nonpublic or private reasons as a function of (non-establishment) public reason results in the dominance of the non-establishment principle and the secularization of public discourse. Religious freedom is intrinsically restricted. In particular, the inclusion of statements by parliamentary candidates as within the realm of public reason is vexing. On this view, reference by such candidates to a comprehensive religious doctrine for the formation of their political views is politically illegitimate and inconsistent with the tenets of public reason. This notion of public reason ought to be rejected as inconsistent with freedom and equality, because it eliminates the possibility that a religious reasonable comprehensive doctrine can inform "public" debate of political questions.

Again, Rawls acutely anticipates the objection:

[T]hose who believe that fundamental political questions should be decided by what they regard as the best reasons according to their own idea of the whole truth—including their religious or secular comprehensive doctrine—and not by reasons that might be shared by all citizens as free and equal, will of course reject the idea of public reason. Political liberalism views this insistence on the whole truth in politics as incompatible with democratic citizenship and the idea of legitimate law.⁴⁸

47. *Id.* at 444.

48. *Id.* at 447.

This view certainly seems a prudent one, particularly if we consider something institutional such as a theocracy that is incompatible with the idea of democracy. But if we are merely talking about public discussion or policy arguments, then problems remain.

There is no objection to the fact that ideas should be communicated in a way that is accessible for all citizens so that they can freely and equally participate in the democratic process. However, if we are excluding, say, the “whole truth in politics” based on the best reasons of a particular religion, is this not a *de facto* secularism or implementation of a secular comprehensive doctrine, which is in turn not shared by free and equal religious citizens? Indeed, is it even fully reasonable to argue for a religious position without relying fully on the religious doctrine?

Consider the claim that the legal community should be governed according to the Christian principle of the “law of love,” with all the pregnant theological ideas that implies.⁴⁹ This is obviously a religious argument based on a religious comprehensive doctrine. But it is far from incompatible with “democratic citizenship” and “the idea of legitimate law”: even if people do not agree with the underlying theological concepts, they can rationally accept and implement the practice of loving your neighbor as yourself as beneficial for society.⁵⁰ If we were to divorce the law of love from its theological context—making it a secular argument rather than a religious one—the argument would lose force and specificity. One would not even know what “loving your neighbor” really means without, for example, considering the Parable of the Good Samaritan contained in the New Testament.⁵¹ In this sense, excluding the “whole truth” of a religious comprehensive doctrine unnecessarily secularizes political discourse and undermines the pursuit of political justice by limiting conceptions of public good.

In the end, it seems straightforward that a doctrine is based on either secular or religious reasoning, and if religious reasoning is excluded, that only leaves a comprehensive secular doctrine—despite Rawls’s claim that public reason is not reducible

49. See generally ALEX DEAGON, FROM VIOLENCE TO PEACE: THEOLOGY, LAW AND COMMUNITY (2017).

50. See MILBANK & PABST, *supra* note 40, at 7.

51. See *Luke* 10:25–37.

to secular reason.⁵² Non-establishment principles remain dominant and continue to exclude the public manifestation of religious reasons, thus restricting religious freedom. Furthermore, the exclusion of religious perspectives is difficult to reconcile with the possibility, discussed earlier, for comprehensive religious doctrine to be explicitly invoked in order to strengthen the ideas of political liberalism such as freedom of speech and equality of opportunity. Though it may be possible to work out a consistent system, there is an unresolved tension here.

Rawls does acknowledge that the content of public reason is given by political conceptions of justice (as defined above), and to engage in public reason is to appeal to one of these conceptions in debating political questions. "This requirement still allows us to introduce into political discussion at any time our comprehensive doctrine, religious or nonreligious, provided that, in due course, we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support."⁵³ This "proviso," as Rawls calls it,⁵⁴ seems to say that one can publicly put forward a religious perspective for policy influence as long as it is justified through public reason. However, that is really just a tautology—one can only engage in public reason (that is, introduce into political discussion one's comprehensive religious doctrine to support a principle, according to the proviso) if one engages in secular public reason by giving properly public reasons for the relevant principle. Religious perspectives on their own ground remain relegated to the background culture. The proviso becomes a restatement of the original framework rather than an exception to it. In addition, Rawls states:

[W]hat we cannot do in public reason is to proceed directly from our comprehensive doctrine, or a part thereof, to one or several political principles and values, and the particular institutions they support. Instead, we are required first to work to the basic ideas of a complete political conception and from there to elaborate its principles and ideals, and to use the arguments they provide.⁵⁵

52. Cf. MCGRAW, *supra* note 37, at 134 (concluding that Rawlsian public reason ends up being, in effect, Audi's secular reason).

53. RAWLS, *supra* note 6, at 453.

54. *Id.*

55. *Id.* at 455.

For religious or secular comprehensive doctrines in particular, Rawls claims this legitimacy condition is necessary in order to “fairly” ensure the “liberty of its adherents consistent with the equal liberties of other reasonable free and equal citizens.”⁵⁶ This is true to an extent, but the liberties of free participation and equal opportunity are nevertheless denied to those seeking to ground their political views in a comprehensive religious doctrine for the purpose of public discussion. Despite the undeniable attempt at preserving religious freedom through the legitimacy condition, the condition’s emphasis on non-establishment through excluding religious arguments from public policy actually undermines freedom and equality.

Audi adopts similar assumptions and a similar line of reasoning to Rawls’s, with the important difference that he explicitly distinguishes between religious reasons, which should not form the basis for public policy, and secular reasons that are universally understandable and therefore may form a legitimate basis for public policy.⁵⁷ He states that an equalitarian principle is required in liberal democracies in order to ensure that governments do not establish or prefer one religion over others or over non-religions, since this would impair a free and equal society.⁵⁸

In addition to this liberal idea of non-establishment, Audi advocates the typical liberal principle of religious freedom, acknowledging that religious ideals may well “inspire” the political structure of society, and may “figure quite properly in major aspects of its development.”⁵⁹ He also states that a free and democratic society should, at a minimum, allow freedom of religious belief, assembly and practice, “provided these practices do not violate certain basic moral rights.”⁶⁰ These are certainly agreeable propositions, but this minimalist conception, if it is as far as Audi is willing to go, fundamentally relegates religion to the private sphere. Audi does not explain how reli-

56. *Id.* at 460.

57. For a fascinating exchange between Audi and Wolterstorff (who is broadly in support of the ideas promoted in this article), see generally ROBERT AUDI & NICHOLAS WOLTERSTORFF, *RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE* (1997).

58. See AUDI, *supra* note 6, at 36.

59. *Id.* at 6.

60. *Id.* at 34.

gious ideals might properly figure in important aspects of the development of political structure. He also does not define basic moral rights, which could enable the scope of religious freedom to be conceived as very narrow. This type of narrow, privatized definition of religious freedom suggests that the principle of non-establishment dominates Audi's conception. Indeed, consistent application of Audi's principles would either leave politics "largely denuded of moral arguments altogether" or "affect things so slightly as to be irrelevant politically."⁶¹

The need for a free and equal society that does not operate by illegitimate coercion is not here disputed and to at least this extent the equalitarian principle should be affirmed.⁶² Nevertheless, there is a question as to whether the equalitarian principle also applies to the secular. Audi does not consider whether the principle could be applied to the establishment or preference of secularism over different religions. It seems that it should if the principle is neutrally or equally applied.⁶³ In Audi's framework, however, the dominant emphasis on non-establishment appears to prevent establishment or preference of religion over non-religion only. It does not prevent establishment or preference of non-religion over religion. And if non-religion is preferred over religion, obviously this advantages the atheist, agnostic, or secularist in the political context—in effect restricting religion by excluding it from the public space, and restricting religious individuals by preventing them from putting religious arguments in political discourse. As alluded to earlier with the "law of love" example, not all religious beliefs can be easily or meaningfully framed as secular values without also importing the relevant content of that religious belief. It may well be very onerous to require the ordinary religious citizen to reframe their religious conviction as

61. MCGRAW, *supra* note 37, at 91.

62. Even so, it is not always clear what "coercion" means. *Cf.* Lee v. Weisman, 505 U.S. 577, 593 (1992) (holding that the social pressures to remain silent, stand, and so forth during a prayer at a graduation ceremony amounted to coercion).

63. Although the prohibition against "an establishment of religion" precludes this kind of argument on constitutional grounds, the Equal Protection Clause and Free Exercise Clause *might* provide some protection against governmental preference of non-religion. *See* Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017) (holding that the exclusion of a church from a generally available government benefit violated the Free Exercise Clause).

a secular argument.⁶⁴ It might even be part of the convictions of a religious citizen that he is required to base his social and political convictions on his religion rather than a purely secular argument.⁶⁵ These factors severely restrict the ability of religious citizens to participate in the democratic process on their own terms. Such advantage for the non-religious is precisely what the liberal theory seeks to avoid, according to both Audi and Rawls. That is the fundamental reason why secular liberalism is problematic as an approach to freedom of religion. Audi's argument therefore fails for these—and other—reasons.⁶⁶

Audi, like Rawls, anticipates the position that an article like this ultimately raises: we are not necessarily talking about preferring different religions by legal coercion or institutional arrangement, but merely facilitating a free and equal audience for the consideration of religious arguments in a policy context. Audi still asserts that “just as we separate church and state institutionally, we should, in certain aspects of our thinking and public conduct, separate religion from law and public policy matters.”⁶⁷ This principle of non-establishment prevents religious motivation for policy change that is incommensurable with the rest of the population, unless the policy change can also be supported by “evidentially adequate secular reasons.”⁶⁸

The incompatibility problem does not seem to be alleviated, however, by the provision of allegedly universal secular reasons, for these intrinsically exclude religious reasons and therefore unequally restrict religious freedom. There may be no good secular reasons for a particular proposal, but there may be good religious reasons. Even Cecile Laborde, an ardent and competent defender of public reason in the vein of Rawls and Audi, acknowledges this. Laborde gives the example of fundamental issues of life and death such as abortion or euthanasia which invoke the “sanctity of all human life” as an argument.⁶⁹ According to Laborde, the secular ideal of human

64. See the example provided by Wolterstorff in AUDI & WOLTERSTORFF, *supra* note 57, at 161–64.

65. See AUDI & WOLTERSTORFF, *supra* note 57, at 105.

66. See *id.* at 91–103.

67. Audi, *supra* note 6, at 691.

68. *Id.*

69. See Cecile Laborde, *Justificatory secularism*, in RELIGION IN A LIBERAL STATE 164, 180 (Gavin D'Costa et al. eds., 2013).

dignity is “perhaps not robust enough” to be a pure secular justification for preserving life in this context, and the various strands of it are certainly not the shared, accepted views which public reason requires.⁷⁰ If that is so, there seems to be no objection to the religious reasons being proposed and debated alongside the secular reasons. The discussion of religious perspectives may well prove to be evidentially adequate and therefore legitimate, unless there is a presumption against the evidential adequacy of religious arguments.

Audi is careful here, emphasizing that there may be secular reasons parallel to religious reasons, and it is not necessary that religious reasons be evidentially inadequate. The point of the non-establishment principle is to prevent domination by one religion over others.⁷¹ Audi, through what he calls the reciprocity argument, nevertheless argues that if religious authorities are the source of a person’s belief influencing a policy, he should attempt to provide a “readily intelligible secular rationale” for that policy, because that is what he would reasonably desire other religions with incompatible practices to do. However, even Audi acknowledges that the freedom to use public religious arguments is constrained, which is permissible because of the overriding need for non-establishment. He notes, “[t]he kind of commitment to secular reason that I propose may constrain the use of some religious arguments, but it can protect people against coercion or pressure brought by conflicting religious arguments from others.”⁷² Audi also notes that his principles have limits, and stresses that they are not stringent. Religious arguments can be properly used with parallel secular arguments, whether in a public policy context or in other contexts.⁷³ However, this point appears to be little more than a token acknowledgement of religious freedom within a context of non-establishment dominance.

Moreover, as Christopher Eberle argues, even if we are talking about coercion, the fact that a citizen must try to seek Audian public justification—that is, secular reasons—for a law does not at all imply that a citizen cannot support a coercive

70. *See id.*

71. *See Audi, supra* note 6, at 694.

72. *Id.* at 700.

73. *See id.* at 695–696.

law for which no secular reasons can be found.⁷⁴ Eberle observes that a citizen's resentment towards a coercive law is not a function of "the fact that my compatriots have only a religious reason for that law," but may be from my belief that those supporting the law have failed to pursue a rational justification for the law.⁷⁵ If such a rational justification is pursued but ultimately rejected by me, it is the content and coercion of the law that causes resentment, not the reasons for the law (which could be secular or religious in this context).⁷⁶ Therefore, the reciprocity argument fails to justify the exclusion of religious reasons.

The reciprocity point is certainly a valid and commendable motivation. But again, there seems to be no reason why a religion cannot provide a "readily intelligible" rationale or argument, unless the assumption is that the very concept of a readily intelligible religious argument is incoherent—which Audi denies. It seems plausible that one could articulate a religious argument in a way that is understandable by a secular person, even if the secular person does not share the religious assumptions.⁷⁷ One can then discuss the validity of the respective assumptions, come to a conclusion, and enact policy on whatever compromise is made. Not everyone will agree, but they can understand, and this is consistent with the operation of a liberal democracy.

Audi finally concedes:

This sociopolitical ascendancy of secular argument in justifying coercion does not, however, imply a commitment to its being epistemically better than all religious argument. Agreeing on the principles—and referees—of a game does not entail believing that, from a higher point of view, there can be no better game, or superior referees. But at least as long as we consent to play the game, we are obligated to abide by its rules.⁷⁸

As far as the need to compromise and settle on agreement somewhere in a liberal democracy, this is fair enough. But there is no reason why public debate about the principles of the

74. See EBERLE, *supra* note 37, at 68–71.

75. *Id.* at 137.

76. See *id.* at 137–39.

77. See MCGRAW, *supra* note 37, at 91.

78. Audi, *supra* note 6, at 697–98.

game and the referees cannot be canvassed, or the status quo challenged. If a free and equal society is to debate the validity of the rules of the game, there must be some scope to refer to mechanisms outside those rules. Again, this is not necessarily at the stage of institutional coercion, but at the stage of public policy discussion. If the rules of the game are “evidentially adequate secular reasons,” and there is no suggestion that religious reasons are necessarily evidentially inadequate, and we as a free democratic society are at least able to critically evaluate these rules, reference to religious reasons is an essential component of that evaluation process.⁷⁹

B. *Not Neutral and Not Free*

The secularist liberal solution of simply eliminating religious perspectives in a public policy context based on a principle of non-establishment does not allow either equality or freedom for religious persons or groups holding religious views that affect public policy issues.

Individuals and groups do not enjoy equality with others like them if the government does not act neutrally toward them. As a general rule, however, as John Perry observes, “public speech cannot be regulated by neutral rules specified in advance” because “[l]imits on public reason based on such a conception are bound to be unfair, excluding reasons purely because they are contested, and often excluding reasons that we have good reason to endorse,” such as arguments for the abolition of slavery.⁸⁰ If there are exceptions to this rule, modern political liberalism does not trigger them. The problem is not just that liberalism affects different worldviews differently, but that it lacks the neutrality it espouses because its very appeal to concepts such as freedom and equality entails metaphysical commitments.⁸¹ Stanley Fish puts it incisively:

79. See generally STEVEN SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995); Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255 (1997).

80. John Perry, *Arguing out of bounds: Christian eloquence and the end of Johannine liberalism*, in RELIGION IN A LIBERAL STATE, *supra* note 69, at 219, 230.

81. See *id.* at 65; see also MATTHEW SCHERER, *BEYOND CHURCH AND STATE: DEMOCRACY, SECULARISM AND CONVERSION* 132–38 (2013); Raymond Plant, *Religion in a liberal state*, in RELIGION IN A LIBERAL STATE, *supra* note 69, at 9, 19, 22. Scherer goes even further, arguing that Rawlsian secularism involves not only “faith in a particular image of reason,” but the veneration of Rawls as a “saint” and “canoni-

[I]t is my contention . . . that liberalism doesn't have the content it believes it has. That is, it does not have at its center an adjudicative mechanism that stands apart from any particular moral and political agenda. Rather it is a very particular moral agenda (privileging the individual over the community, the cognitive over the affective, the abstract over the particular) that has managed, by the very partisan means it claims to transcend, to grab the moral high ground, and to grab it from a discourse—the discourse of religion—that had held it for centuries.⁸²

Liberalism neglects that it is a position espousing particular views. Secular reasons are not amoral, certainly not neutral, and their very definition as secular depends on the dichotomy between liberalism, which it claims is governed by reason, and religion, which it claims is governed by faith. This supposedly neutral theory dooms any attempt to present viable “religious” alternatives or challenges to secular reason because, in the liberal framework, these arguments are not the kind of reasons that can rightly be considered.

Thornton and Luker offer a slightly different, if related, faulty distinction. For them, religious belief is concerned with interior life, “paradigmatically private and subjective,” as opposed to law which is “concerned only with the outward manifestation of a belief or prejudice.”⁸³ Starting from these premises, they lament that “[r]eligious organisations have long held a relationship to the public sphere *qua* government through assertion of moral authority over issues of social significance.”⁸⁴ But they do not take into account that for many religions, religion is intrinsically political in the sense that that it also regulates and informs public interactions and obedience to laws in addition to “private” belief and worship (for example through proselytization or particular moral views with politico-legal import, such as about marriage or abortion).

Thornton and Luker's non-neutral framework brings to light the limits on freedom that result from inequality. Under the liberal paradigm, religions are not free to advance their politi-

zation” of his works, resulting in a kind of “miraculous” captivation and “conversion” of his audience through skilled rhetoric. See SCHERER, *supra*.

82. Stanley Fish, *Liberalism Doesn't Exist*, 1987 DUKE L.J. 997, 1000 (1987).

83. Margaret Thornton & Trish Luker, *The Spectral Ground: Religious Belief Discrimination*, 9 MACQUARIE L.J. 71, 72–73 (2009). These claims are addressed in Part III.

84. *Id.* at 73.

cal views. Indeed, where the state is one expanding in regulatory power, such disadvantaged religions face further restriction. If the expanding regulatory state has its own vision of the social good which it seeks to implement (as Leigh and Ahdar claim it does), and that vision conflicts with particular religious doctrines or practices, the inevitable result will be the restriction of religious freedom.⁸⁵ In this way the liberal principles of non-establishment and religious freedom overlap: an expanding regulatory state seeking to implement its vision of the good, and assuming religion is private or at least subservient to state interests, will lead to increasing state interference with religious belief or practice that conflicts with the state vision.⁸⁶

On what non-neutral grounds is such a restriction, not just on belief and practice, but even on public defense of those beliefs and practices, justifiable? More broadly, why it is a problem when religious organizations assert moral authority over issues of social significance? Non-religious people and organizations also assert moral authority over issues of social significance. This is what it means to be part of a democracy entailing different views. At the point moral authority is asserted, the different parties can engage in a full, free, open, and equal discussion.

III. PURSUING TRUE NEUTRALITY AND EQUALITY: PLURALISM AND RELIGIOUS FREEDOM

A. *A Broader View of Religious Freedom?*

None of this is to say that religious freedom should be absolute. Of course certain “religious practices” including murder and human sacrifice cannot be considered reasonable exercises

85. See Ahdar & Leigh, *supra* note 7, at 679–80.

86. This type of state interference occurs already. For example, in *Craig v. Masterpiece Cakeshop*, a Colorado court of appeals upheld the application of a state anti-discrimination statute to a bakery that refused, on religious grounds, to prepare a cake for a same-sex wedding. See 370 P.3d 272 (Colo. Ct. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017). Similar laws have forced Catholic Charities to stop offering adoption services in Massachusetts, Illinois, and Washington, D.C., because those laws would otherwise require Catholic Charities to place children with same-sex couples. See Joshua J. Craddock, *The Case for Complicity-Based Religious Accommodations*, 12 TENN. J.L. & POL’Y 233, 266 nn.99–100 (2018).

of religious freedom within a liberal democracy.⁸⁷ The limiting principle here is conduct that directly harms others in a way disproportionate to the expression of the freedom.⁸⁸ This is a generally liberal rationale as it pursues freedom and equality, but it is different from the liberal-secularist approach, which privileges non-religion over religion in a non-neutral and unequal way, thereby unduly restricting religious freedom. To address this imbalance and restore genuine freedom and equality, this Part proposes a broader view of religious freedom within a pluralist approach to the interaction between religion and non-religion in the public political context.

However radical, a broad view of religious freedom is not idiosyncratic. Consider first Leigh and Ahdar's explanations of the Christian justifications for religious freedom, which imply that religious freedom encompasses both "freedom to preach, worship and practise" and that it is "not for religion to compel religion," meaning also that the state should not compel particular religious practice.⁸⁹ This first aspect is the traditional principle of "religious freedom" or "free exercise of religion," while the second is the traditionally independent principle of "non-establishment of religion." Hence on this view, religious freedom encompasses both free exercise and non-establishment. Leigh and Ahdar further explicitly define "religious freedom" as having a broad nature, including internal and external dimensions.⁹⁰ The internal dimension is "a purely internal freedom to believe."⁹¹ The external dimension includes the "freedom to actively manifest one's religion or belief in various spheres (public, private, etc.) and in a variety of ways

87. Cf. *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding a law prohibiting polygamy against a Free Exercise Clause challenge).

88. See Alex Deagon, *Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage*, 20 INT'L TRADE & BUS. L. REV. 239, 280–86 (2017).

89. See AHDAR & LEIGH, *supra* note 40, at 12, 23–25, 35–50. For example, Professor Garnett argues that religious freedom needs to be understood by reference to the older Catholic idea of the "freedom of the church," which meant both that the state cannot appoint church leaders (or otherwise interfere) and that the church is publicly recognized and protected in its role vis-a-vis the state; the preamble and first clause of the Magna Carta are examples of this. See generally Richard Garnett, "The Freedom of the Church": (Towards) an Exposition, Translation, and Defense, 21 J. CONTEMP. LEGAL ISSUES 33 (2013).

90. Ahdar & Leigh, *supra* note 7, at 650–51.

91. *Id.* at 650.

(worship, teaching, and so on),” subject to certain limitations.⁹² These first two aspects comprise the traditional “narrow” definition of religious freedom. Leigh and Ahdar then state that religious freedom further includes “freedom *from* coercion or discrimination on the grounds of religious (or non-religious) belief.”⁹³ This is traditionally the principle of non-establishment. Thus, Leigh and Ahdar’s view is a capacious view of religious freedom, including both free exercise and non-establishment.

Michael McConnell expresses a similar view in critiquing the strict secularism of Brian Leiter.⁹⁴ McConnell argues that “[t]he establishment of religion may be consistent with mere toleration [in Leiter’s sense of the state promoting a particular view and having a non-neutral approach to different views], but it is not consistent with the full and free exercise of religion.”⁹⁵ McConnell in effect argues that establishment (even weak establishment) is incompatible with full religious freedom, which implies that religious freedom and non-establishment are not separate principles. Rather, religious freedom includes non-establishment because part of freedom of religion is freedom from state compulsion to a particular religious or non-religious perspective.⁹⁶

Steven Smith also seems to propound this broad view of religious freedom, contending that any constitutional protection of religious freedom relies on “priority” (that religious convictions and duties take precedence over other types of belief and duties) and “voluntariness” (that compelled religion is not true

92. *Id.*

93. *Id.*

94. See Michael McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 808 (2013). McConnell’s piece critiques a contemporaneous book by Brian Leiter that disapproves of religious exemptions, BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013).

95. McConnell, *supra* note 94, at 808.

96. Then-Justice Rehnquist argued that the Establishment Clause, as originally conceived, requires only that government not prefer one religion to another, not that the state remain neutral between religion and non-religion. See *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting). Other justices have expressed support for this view as well. See *e.g.*, *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting, joined by Chief Justice Rehnquist and Justices White and Thomas). However, Professor McConnell himself does not believe non-preferentialism is a viable theory. See Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 146–47 & n.142 (1992).

or efficacious religion).⁹⁷ The protection of religious freedom entails both freedom to believe and practice (religious freedom), and freedom from state compulsion to particular beliefs and practices (non-establishment). Since freedom to believe and practice includes freedom from compulsion to particular beliefs and practices, the second category is really implied in the first.⁹⁸

One of the fundamental differences between the narrow liberal conception of religious freedom and this broader conception is the acknowledgement that religion is not merely private. Religion is not “simply a matter for the individual,” since opinions can and often do have “influence on actions.”⁹⁹ The exercise of religion is totalizing and “a-jurisdictional”—it cannot simply be excluded from the category of “public” any more than an individual’s other beliefs or convictions can be excluded from his or her public actions.¹⁰⁰ Though the liberal approach is apparently neutral because “public” or “secular” reason applies “as much to atheists as religionists,” “religious vocabulary is absent from public discourse in a way that atheist vocabulary is not.”¹⁰¹ The exclusion of religious arguments is therefore an “asymmetrical constraint on public officials with religious convictions which prevents them from invoking their most cherished beliefs and requires them to subdue aspects of their personality before participating in public life.”¹⁰²

In this way the narrow liberal conception of religious freedom actually severely restricts freedom by unequally excluding religion from the public space and preventing religious citizens from holistic participation in society. Conversely, the broad view of religious freedom allows full and equal participation of both religious and non-religious people in all aspects of public life. It is important to bear in mind that this is not an argument for the broader view of religious freedom on the premise that we should not exclude religious perspectives from public policy (or vice versa). This would make the argument

97. See Steven Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse* 140 U. PA. L. REV. 149, 154–55 (1991).

98. See *id.*

99. AHDAR & LEIGH, *supra* note 40, at 35.

100. *Id.* at 50; see also EBERLE, *supra* note 37, at 144–46.

101. AHDAR & LEIGH, *supra* note 40, at 69.

102. *Id.* at 51.

circular. Rather, it is an observation that the broader view of religious freedom naturally entails including religious arguments in public policy, and so the broader view should be preferred because it more effectively promotes genuine freedom and equality. Recalling that the broad view of religious freedom also incorporates the liberal non-establishment principle, it is appropriate to consider how genuine neutrality can be further entrenched by limiting a strict secularist approach to non-establishment.

B. *Embracing Neutrality by Limiting (Secularist) Non-Establishment*

"[O]ne of the greatest threats to free exercise is establishment, and one of the best guarantees of non-establishment is free exercise."¹⁰³ But "if too strict a view is taken of non-establishment, it could amount to hostility to religion and constitute an infringement of free exercise."¹⁰⁴ While purporting to be neutral, the strict secularist non-establishment principle is actually hostile to freedom, particularly religious freedom.

A typical example of how a strict secularist approach to non-establishment might tend to undermine religious freedom can be provided by briefly considering an article by Wojciech Sadurski. Sadurski claims that the "secular liberal state" should have "neutrality" toward religion, regarding it "as essentially a private matter."¹⁰⁵ He states that an appearance of "coextensiveness" between the principles of religious freedom and non-establishment is "largely illusory," and that the free exercise principle "threatens to undermine the disengagement of the state from religious matters demanded by the Non-Establishment Principle."¹⁰⁶ This indicates assumptions of independence and of non-establishment dominance, resulting in the exclusion of religion from the public space. More explicitly, Sadurski rejects prioritizing free exercise over non-establishment:

103. Joshua Puls, *The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees*, 26 FED. L. REV. 139, 150 (1998).

104. *Id.* at 159.

105. Wojciech Sadurski, *Neutrality of Law Towards Religion*, 12 SYDNEY L. REV. 420, 421 (1990).

106. *Id.* at 423.

If the Free Exercise Principle is to be unconstrained by the Non-Establishment Principle then there is virtually no conceivable limit to official endorsements of religious beliefs and ceremonies The implausibility of the strategy of prioritizing the Free Exercise Principle over the Non-Establishment Principle lies in the fact that such a priority would lead to an undermining of those very values which are to be served by the principle of religious freedom: the values of free choice and pursuit of any religious beliefs (or of rejection of religion) without any governmental inhibition.¹⁰⁷

However, a broader view of religious freedom does not necessarily imply that free exercise is “unconstrained” by non-establishment. Religious freedom incorporates both free exercise and non-establishment; the principles are co-dependent. So as a function of allowing religious freedom (that is, not allowing direct or indirect compulsion by the state towards a particular religious view), non-establishment would operate to prevent the state establishment of a religion (through, for example, limiting “official endorsement of religious beliefs and ceremonies”) even under this broader view. Moreover, a broader view of free exercise preserves free choice and the pursuit or rejection of religion without governmental inhibition *precisely because* of this dependence. A broader view of religious freedom rejects the de facto secularism of traditional neutrality because that secularism effectively involves government inhibition of religious freedom. The pluralist framework proposed in conjunction with the broader view means that all the different religious and non-religious views are free to exist and debate in the public sphere, without government inhibition or government promotion of any particular view. This more effectively satisfies the “principle of religious freedom” stated by Sadurski.

Sadurski also responds to the charge of liberalism’s non-neutrality:

[L]iberalism cannot, without running into hopeless contradiction, allow itself to be neutral between neutral accounts (motivated by non-religious considerations, even if in conflict with *some* precepts of *some* religions) and those articles of faith which themselves implicate a rejection of neutrality as the main part of a liberal vision of political values. The fundamentalist . . . is grounded in a cluster of values which

107. *Id.* at 426.

reject respect for value pluralism, toleration for diverse moral views, an open attitude to the potentialities of human reason, and the equal moral agency of all individuals, regardless of their substantive moral conceptions. These values underlie the constitutional order of a liberal state; their rejection cannot be mandated by liberal neutrality. It does not follow that “religious faith” as such is dangerous for a liberal order, but rather that it can coexist with a liberal order when kept in a private dimension of social interaction. If given political support through state and law, it threatens those very values upon which liberal neutrality (including the toleration for diverse religious beliefs themselves) is erected.¹⁰⁸

Sadurski argues, in effect, that liberalism cannot be neutral when it comes to religious views (“fundamentalism”) that reject liberal political values such as respecting pluralism, tolerating diverse moral views, having an open attitude to reason, and believing in the equal moral agency of all individuals, because all of these are essential for the operation of a liberal democracy. Although one could quibble about whether the “fundamentalist” (however Sadurski understands the term) actually rejects these values, this argument is fine as far as it goes. It is consistent with the general liberal limiting principle described above.

The problem is Sadurski’s equivocation of terms and consequent implications that lead to the conclusion that “religious faith . . . can coexist with a liberal order when kept in a private dimension of social interaction.”¹⁰⁹ This expresses the far stronger and more restrictive principles of liberal secularism. The conclusion first assumes a public-private divide that is unsustainable for many religious people because religious faith necessarily informs external actions, both public and private, which are in turn regulated by the law of a liberal state. As Raymond Plant notes, the alleged protection of religious faith through relegation to the private sphere “fail[s] to understand the internal relationship between religion and what it sees as intrinsic aspects of its claims in the public realm, or, to put the point another way, between belief and the intrinsic forms of its manifestation.”¹¹⁰ Put differently, “[a] religion which is never

108. *Id.* at 441–42.

109. *Id.*

110. Plant, *supra* note 81, at 14.

expressed does not exist; once it is expressed it is communicative and public.”¹¹¹

More importantly, Sadurski refers to “fundamentalist” religion as rejecting liberal values, but then equivocates and extends this to all “religious faith” as part of the argument for privatization. However, not all religious faith can be reduced to the kind of “fundamentalism” that rejects these liberal values, and therefore there is no reason to exclude all religious faith from the public sphere. Indeed, as Fish and Steven Smith identify, secularist liberal “neutrality” would appear to actually run into the “hopeless contradiction” referred to by Sadurski precisely because it is not neutral when it comes to religious views.¹¹² Consequently, Linda Woodhead argues, “secularism is conflicted” because of its “manifest failure to respect the freedom, rights and normal conditions of existence of decent religious people and institutions.”¹¹³

For example, it seems inconsistent with liberal equality that those who adhere to a secular worldview may be able to publicly express themselves in policy debate in terms of their secularism, but those who adhere to a religious worldview may not be able to so express themselves in terms of their religion.¹¹⁴ Reid Mortensen identifies potential problems with the strict separation involved in a secularist “wall of separation,” including that “it is potentially anti-religious. Separating the religious from the sphere of government action privileges the non-religious or the antireligious in the public square.”¹¹⁵ The idea of state neutrality embeds a distinct state preference for particular types of religion and religious expression, and is therefore “not one of neutral evenhandedness,”¹¹⁶ and true neutrality itself is problematic in an arena of moral pluralism.¹¹⁷

111. Linda Woodhead, *Liberal religion and illiberal secularism*, in RELIGION IN A LIBERAL STATE, *supra* note 69, at 93, 96.

112. See SMITH, *supra* note 79, at 36; Fish, *supra* note 82, at 1000; Smith, *supra* note 97, at 149–50.

113. Woodhead, *supra* note 111, at 96.

114. See Reid Mortensen, *The Establishment Clause: A Search for Meaning*, 33 U. QUEENSL. L.J. 109, 124–25 (2014).

115. *Id.* at 124.

116. *Id.* at 124.

117. See *id.* at 124–125; see also Augusto Zimmermann & Daniel Weinberger, *Secularization by Law? The Establishment Clauses and Religion in the Public Square in Australia and the United States*, 10 INT’L J. CONST. L. 208–41 (2012) (arguing that

C. Freedom through Pluralism

It is also worth remembering that secularism is a limited framework in the sense that it overlooks ways in which the dominant religion in a culture can be integrated into government operations. In other words, the political space is not characterized by a strict separation of secular and non-secular, but is instead imbued with religiously informed processes, culture, and social values.¹¹⁸ For example, both the U.S. House of Representatives and the Senate elect Chaplains, House and Senate sessions begin with prayer, and many members of Congress host a yearly National Prayer Breakfast.¹¹⁹ Less obviously, intrinsic ideas of human value, rights and welfare stem from Christian beliefs.¹²⁰ What Thornton and Luker acknowledge of Australia seems true of the United States, too: “Despite a formal commitment to secularism, the heritage of English Protestantism underpins all aspects of socio-political and legal organization . . . and there is an ambivalent response to atheism or agnosticism as an alternative.”¹²¹

This Article also acknowledges such a construction, and therefore seeks the free expression of all religious opinions in the public sphere, to be considered and critiqued in the marketplace of ideas. Secularism, atheism, agnosticism, Christianity, and all other religions and non-religions should freely be able to express and critique each other’s views. Rather than a secularism which excludes religious views from public political discussion, or the simplistic substitution of atheism or agnosticism for traditional Christianity, what is required is a sensible balancing of the different claims, taking into account minority religions, majority religions, and no religion—what Veit Bader

Australian courts should avoid the United States’ tendency to use “secularism” to privatize religion, thereby undermining democracy); cf. Jeremy Patrick, *Religion, Secularism, and the National School Chaplaincy and Student Welfare Program*, 33 U. QUEENSL. L.J. 187 (2014).

118. See H. Randell-Moon, *Section 116: The Politics of Secularism in Australian Legal and Political Discourse*, in RELIGION, SPIRITUALITY AND THE SOCIAL SCIENCES (Basia Spalek & Alia Imtoul eds., 2008).

119. See Francine Kiefer, *Prayer and politics in Congress*, CHRISTIAN SCI. MONITOR (Sept. 17, 2016), <https://www.csmonitor.com/USA/Politics/2016/0917/Prayer-and-politics-in-Congress> [<https://perma.cc/M9QC-3TDT>].

120. See Randell-Moon, *supra* note 115, at 59–60.

121. Thornton & Luker, *supra* note 81, at 78.

calls “Priority for Democracy”¹²² and Eberle calls “Pluralism.”¹²³ This points the way to a system and a culture wherein the state allows all views, religious and non-religious, to be freely and equally proposed and considered—the true liberal democracy.¹²⁴

Since we cannot justify or advocate laws free from attachments to our own perspective of the good life, an authentic approach to public discourse requires that we openly allude to these entrenched perspectives.¹²⁵ This produces a forthright debate containing partisan religious and non-religious moral visions, which is far superior to “an anaemic, least-common-denominator culture lacking in conviction or purpose, or else a deceptive civic culture in which participants disguise their true interests and convictions in a homogenizing public vocabulary that is ‘neutral’ but ineffectual.”¹²⁶ As Plant asks:

If a conception of the good or goods lies at the heart of an account of liberal society and any attempt to banish such ideas will lead to illusion, why should not the religious perspective with its view of the good and human flourishing have a role in deliberating about what the core or essential goods are?¹²⁷

To put it in Rawlsian terms, a system could exist where each reasonable comprehensive doctrine is freely and equally able to contribute to public policy debate using the reasoning of that doctrine. It is obviously unlikely that there would be full agreement, but there may be overlap between doctrines—Rawls acknowledges this much in relation to public reason itself.¹²⁸ Once all views have been freely and equally debated in accordance with the duty of civility, the situation can resolve

122. Veit Bader, *Religious Pluralism: Secularism or Priority for Democracy?* 27 *POL. THEORY* 597, 608 (1999).

123. EBERLE, *supra* note 37, at 215–16.

124. For a broad understanding of what freedom of (public) religion requires, see John Witte, Jr., *From Establishment to Freedom of Public Religion*, *CAP. U. L. REV.* 499–519 (2004).

125. See Dan Kahan, *The Cognitively Illiberal State*, 60 *STAN. L. REV.* 115, 151–154 (2007).

126. Steven D. Smith, *Toleration and Liberal Commitments*, in *TOLERATION AND ITS LIMITS: NOMOS XLVIII* 243, 269 (Melissa S. Williams & Jeremy Waldron eds., 2008).

127. Plant, *supra* note 81, at 28.

128. See RAWLS, *supra* note 9, at 387.

itself through the usual means of a constitutional democracy—elections and implementation.¹²⁹ Of course, the debate would need to be articulated in a publicly comprehensible way using mutually available reasons, but these need not necessarily be disconnected from the reasonable comprehensive doctrines in the stringent way Rawls advocates.¹³⁰ When explaining our views or seeking to persuade our fellow citizens, we should be able to offer whatever views and rhetorical mechanisms we think best, whether that be “a logical syllogism,” “a poem,” “a sacred text,” “a philosopher,” or “our favourite film.”¹³¹

IV. CONCLUSION

Eberle, against the likes of Rawls and Audi, compellingly defends the thesis that “a citizen has an obligation sincerely and conscientiously to pursue a widely convincing secular rationale for her favored coercive laws, but she doesn’t have an obligation to withhold support from a coercive law for which she lacks a widely convincing secular rationale.”¹³² A citizen who has religious reasons for supporting a coercive law is allowed to publicly voice those reasons in policy debate. Rather than public reason, which is effectively secular reason that excludes religious perspectives, Eberle advocates for an “ideal of conscientious engagement” which involves sincerely and genuinely arriving at rationally justifiable views (where rationally justifiable includes reference to religious reasons). He also advocates for respectfully engaging those with different views by articulating those reasons and receiving objections to learn from them, perhaps resulting in refinement of the view.¹³³ Since it is unlikely that there will be sufficient agreement between reasonable persons to provide a public justification for intrinsically contested values, the engagement results in a society of respectful citizens who are reasonably and rationally able to put forth their various religious and non-religious views, or a “pluralist” society.¹³⁴ And pluralism encourages religious vitality

129. See Bader, *supra* note 122.

130. Cf. RAWLS, *supra* note 9, at 226–27.

131. Perry, *supra* note 80, at 230.

132. EBERLE, *supra* note 37, at 10.

133. See *id.* at 104–06.

134. See *id.* at 215–16.

and facilitates freedom of religion.¹³⁵ Bryan McGraw also persuasively argues that the involvement of religion in politics actually results in a freer and more democratic society.¹³⁶

Thus, the arguments of this Article are not intended to deny the fundamental liberal desire to facilitate a free, equal and democratic society. This desire is, of course, of paramount value. Rather, these arguments are intended to suggest that secular liberalism, and its narrow view of religious freedom which denies freedom of public expression and equality of opportunity to religious perspectives, is not the best model for facilitating the neutral, free, and equal society we all aspire to. A broader view of religious freedom combined with a pluralist framework is equally inclusive of both public religion and non-religion, thereby promoting a more authentic political discourse.

135. *See id.* at 41–47.

136. *See generally* MCGRAW, *supra* note 37.

THE PARTIALITY OF NEUTRALITY

The doctrines of neutrality in Establishment Clause and Free Exercise Clause jurisprudence are manipulable standards used more for rhetoric than rigorous legal analysis. The Supreme Court has interpreted the Establishment Clause to require government neutrality “between religion and religion, and between religion and nonreligion.”¹ Yet the Court’s rulings are not neutral towards religion. They instead embrace the secular. The Free Exercise Clause jurisprudence that has developed after *Employment Division v. Smith*² also eschews neutrality. Though the test in *Smith* purports to require courts to apply strict scrutiny to any law that is not neutral, courts often implicitly assume the neutrality of the challenged laws. In fact, those laws make inherent moral judgments, instantiate particular philosophies, and often verge on imposing secularism. The uncritical assumption of neutrality in Free Exercise Clause jurisprudence combined with the Court’s embrace of secularism as neutral in Establishment Clause jurisprudence has created confusion in the approach to and definition of neutrality.

This Note will assess the concept of neutrality in contemporary Establishment Clause and Free Exercise Clause jurisprudence, argue that the supposed neutrality requirements (as applied) do not achieve neutrality, and then suggest drawing on other areas of law to form a more coherent doctrine of neutrality for the religion clauses. Part I will explain how contemporary Establishment Clause jurisprudence has led courts to embrace the secular in the name of neutrality, how that embrace is not neutral, and how some current applications of the neutrality analysis are at odds with other current Supreme Court precedent. Part II will begin by explaining the *Smith* standard, its effect on Free Exercise Clause jurisprudence, and the role of neutrality within that jurisprudence. Next, it will discuss the tension *Smith* created within Free Exercise Clause jurisprudence,³ both generally and specifically in regards to the poorly

1. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

2. 494 U.S. 872 (1990).

3. *Smith* did not overturn, and in fact relied on much of, the existing free exercise precedent. See John P. Forren, *Revisiting Four Popular Myths About the Peyote Case*, 8 U. PA. J. CONST. L. 209, 211 (2006).

defined neutrality analysis. Part II concludes by describing the two ways that contemporary courts fallaciously assume neutrality. Part III explores the ways that discrimination jurisprudence and Free Speech Clause jurisprudence assess neutrality and suggests that Free Exercise Clause jurisprudence incorporate some of those more developed tests into its neutrality analysis.

I. NEUTRALITY AND THE ESTABLISHMENT CLAUSE

At the center of the Court's Establishment Clause jurisprudence is the call for government neutrality. Although "neutrality" in the Establishment Clause context is "not self-defining,"⁴ "recent cases have invested it with specific content: the State may not favor or endorse either religion generally over nonreligion or one religion over others."⁵ The nominal basis of Establishment Clause jurisprudence emerged in *Lemon v. Kurtzman*.⁶ That case announced a three-prong test for determining whether a statute lacked neutrality and thus violated the Establishment Clause: "First, the Statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."⁷

The *Lemon* test⁸ is still held out as the primary Establishment Clause test that "embodies the supposed principle of neutrality between religion and irreligion,"⁹ yet it is "a boundless, and boundlessly manipulable, test."¹⁰ Its application is neither consistent nor compulsory,¹¹ and by 1994 five justices had repudi-

4. *Welsh v. United States*, 398 U.S. 333, 372 (1970) (White, J., dissenting).

5. *Lee v. Weisman*, 505 U.S. 577, 627 (1992) (Souter, J., concurring).

6. 403 U.S. 602 (1971).

7. *Id.* at 612–13 (citations and internal quotation marks omitted).

8. *See id.*

9. *McCreary Cty. v. ACLU*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting).

10. *Weisman*, 505 U.S. at 632 (Scalia, J., dissenting).

11. *See McCreary*, 545 U.S. at 891–94 (Scalia, J., dissenting) (cataloguing the Court's inconsistent uses of the *Lemon* test); *Mitchell v. Helms*, 530 U.S. 793, 807–08 (2000) (recognizing that the *Lemon* test has been "recast" and "modified . . . for purposes of evaluating aid to schools"); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 718–21 (1994) (O'Connor, J., concurring in part and concurring in judgment) (explaining how the *Lemon* test has been ignored and is "so vague as to be useless"); *Wallace v. Jaffree*, 472 U.S. 38, 68–69 (1985) (O'Connor, J., concurring in judgment) ("Despite its initial promise, the *Lemon* test has proved problematic. The required

ated it.¹² Justice Scalia described the *Lemon* test as a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.”¹³ He continued:

Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman* conspicuously avoided using the supposed “test” but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature’s heart (the author of today’s opinion repeatedly), and a sixth has joined an opinion doing so. The secret of the *Lemon* test’s survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs “no more than helpful signposts.” Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.¹⁴

Though the *Lemon* test is of dubious strength in the Court’s contemporary jurisprudence, the “endorsement test” has emerged from it and “has become the foundation of Establishment Clause jurisprudence.”¹⁵

The Court officially adopted the endorsement test, which was first proposed by Justice O’Connor in her *Lynch v. Donnelly*¹⁶ concurrence, in *County of Allegheny v. ACLU*.¹⁷ In *Allegheny*—an Establishment Clause challenge to a government-sponsored holiday display that included religious symbols—the Court extensively discussed Justice O’Connor’s *Lynch* con-

inquiry into ‘entanglement’ has been modified and questioned, and in one case we have upheld state action against an Establishment Clause challenge without applying the *Lemon* test at all. The author of *Lemon* himself apparently questions the test’s general applicability,” and the *Lemon* test has been simply “followed or ignored a particular case as our predilections may dictate.” (citations omitted).

12. See *McCreary*, 545 U.S. at 890 (Scalia, J., dissenting).

13. *Lamb’s Chapel v. Ctr. Moriches Union Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment).

14. *Id.* at 398–99 (citations omitted).

15. *Weisman*, 505 U.S. at 627.

16. 465 U.S. 668, 690–94 (1984) (O’Connor, J., concurring).

17. 492 U.S. 573, 592–94 (1989).

currence and adopted that reasoning. The Court explained that the four *Lynch* dissenters agreed with Justice O'Connor's analysis and only disagreed on how that endorsement test applied to the facts of the instant case.¹⁸ The endorsement test draws on principles from both the first and second prongs of the *Lemon* test. Under *Allegheny* the question is no longer only whether the government's actual purpose is endorsement of religion, but also whether a reasonable observer could interpret it as an endorsement of religion.¹⁹ Thus "for purposes of the Establishment Clause, the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season."²⁰ Under the newly accepted endorsement test, the government must do more than just refrain from any actions that can be perceived as endorsing religion; it must also actively convey secular messages—all in the name of neutrality.

Adhering to only the secular, however, does not equal neutrality. Secular and secularism have many different meanings,²¹ none of which can be equated with neutrality. Professor Rex Ahdar²² defines the terms by breaking the political philosophy of secularism into two distinct strains: benevolent secularism and hostile secularism.²³ Benevolent secularism is "a philosophy obliging the state to refrain from adopting and imposing

18. See *Allegheny*, 492 U.S. at 596–97.

19. See *id.* at 620–21.

20. *Id.* at 620.

21. For example, *Black's Law Dictionary* defines secular as "[w]orldly, as distinguished from spiritual," *Secular*, BLACK'S LAW DICTIONARY (10th ed. 2014), and *Merriam-Webster* defines secular as "of or relating to the worldly or temporal," *Secular*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/secular> [<https://perma.cc/7BR9-CW6E>] (last visited Jan. 18, 2018), and secularism as "indifference to or rejection or exclusion of religion and religious considerations," *Secularism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/secularism> [<https://perma.cc/XT29-EG67>] (last visited Jan. 18, 2018). Several academics have written about the definition of secular and secularism, and those terms will be used and defined throughout this Note.

22. Rex Ahdar was a barrister and solicitor to the High Court in New Zealand and a Fulbright Senior Research Scholar at UC Berkeley. He is currently a law professor teaching, among other things, law and religion. His academic interests include church-state relations and religious liberty, and he has published extensively in those areas. See *Our People in the Faculty of Law: Professor Rex Ahdar*, UNIV. OF OTAGO FACULTY OF LAW, http://www.otago.ac.nz/law/staff/rex_ahdar.html [<https://perma.cc/8SXE-D5F9>] (last visited March 4, 2018).

23. See Rex Ahdar, *Is Secularism Neutral?*, 26 *RATIO JURIS* 404, 408–12 (2013).

any established beliefs," and it does not disparage religious beliefs or strive to keep them out of political discourse.²⁴ Benevolent secularism is also known as "negative" secularism because it is "a freedom 'from' establishmentarian imposition."²⁵ Hostile secularism, on the other hand, is a belief that a "state should actively pursue a policy of established unbelief."²⁶ Although the American government has never explicitly endorsed a policy of established unbelief, many opinionated leaders do espouse tenets of hostile secularism. Such tenets include beliefs like "religious reasons and arguments must be excluded from shaping public policy; . . . religious symbols and practices are relics of a bygone era that continue to exert coercive power and must be vanquished;" and "funding of faith-based entities is divisive," and should thus not be allowed.²⁷ Secularism, whether hostile or benevolent, is thus a philosophy with its own set of truth claims.²⁸ And although "[a] secular baseline is commonly admired by many liberals as a neutral, impartial one . . . that depends entirely upon one's viewpoint."²⁹ Advocates of secularism argue that the "secular" is neutral because it

24. *Id.* at 409–10.

25. Wilfred M. McClay, *Two Concepts of Secularism*, 13 J. POL'Y HIST. 47, 60 (2001).

26. Ahdar, *supra* note 23, at 411; see also *McCreary Cty. v. ACLU*, 545 U.S. 844, 885–86 (2005) (Scalia, J., dissenting) (describing hostile secularism as the type of secularism spread across Europe by Napoleon and codified in the French constitution).

27. Ahdar, *supra* note 23, at 418. A few examples of such comments include Hillary Clinton advocating for abortion by stating "deep seated cultural codes, religious beliefs and structural biases have to be changed," Hillary Clinton, Former Secretary of State, Keynote Address at Women in the World Summit (Apr. 23, 2015), Dianne Feinstein questioning Amy Barrett's ability to be a federal court of appeals judge because of now-Judge Barrett's devout Catholicism, see *Confirmation Hearing on the Nomination of Amy Barrett to be United States Circuit Judge for the Seventh Circuit: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Dianne Feinstein, Member, S. Comm. on the Judiciary), and Chicago Mayor Rahm Emanuel attempting to block Chick-fil-A's opening of a new restaurant in Chicago because Emanuel felt the CEO's biblical worldview did not match contemporary beliefs and thus should not be part of the Chicago community, Michael Patrick Leahy, *Boston Globe and Chicago Sun-Times Take Chick-Fil-A Bashing Mayors to Woodshed*, BREITBART (July 28, 2012), <http://www.breitbart.com/big-journalism/2012/07/28/boston-globe-and-chicago-sun-times-ask-which-part-of-the-first-amendment-do-our-chick-fil-a-bashing-mayors-not-understand/> [https://perma.cc/6UE7-V5NV]. See also *Zelman v. Simmons-Harris*, 536 U.S. 639, 719 (2002) (Breyer, J., dissenting) (asserting that faith-based funding is divisive and should not be allowed).

28. Ahdar, *supra* note 23, at 407–08.

29. *Id.* at 415.

is what remains once one takes away religion.³⁰ Yet two points counter that argument.

First, the determination that the absence of religion is neutral is itself a normatively laden, and thus not neutral, judgment. *Black's Law Dictionary* defines "neutral" in the context of "policy, interpretation, language, etc." as "not inherently favoring any particular faction or point of view; couched so as *not to express a predisposition or preference*."³¹ But embracing the secular and rejecting the religious does "express a predisposition or preference."³² As Paul Horowitz explains in his book *The Agnostic Age*, "Prevailing approaches to law and religion that purport to be neutral, or to hold religious and non-religious beliefs alike in equal regard, routinely fail to do anything of the sort. The perspective they ultimately offer tilts clearly, if (sometimes) unconsciously, in favor of the secular."³³ The legal "insistence upon neutrality . . . border[s] upon religious hostility,"³⁴ which is unsurprising given "how elusive is the line which enforces the Amendment's injunction of strict neutrality, while manifesting no official hostility toward religion."³⁵ By tilting towards the secular and removing religion, legal actors favor one worldview and set of truth claims over another. They

30. See *id.* at 407; cf. *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989) ("The government does not discriminate against any citizen on the basis of the citizen's religious faith if the government is secular in its functions and operations. On the contrary, the Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths.").

31. *Neutral*, BLACK'S LAW DICTIONARY, *supra* note 21 (emphasis added).

32. *Id.*

33. PAUL HOROWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION*, at xxiv (2011); see also William P. Marshall, *What is the Matter with Equality: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 195 (2000) (citing examples of legal subordination of the religious to the secular: "The Establishment Clause's prohibition of state funding of institutions or organizations is unique to religion. There is no comparable limitation on government funding of nonreligious groups and activities," and "the Establishment Clause's nonendorsement principle recognized in the nativity scene cases is also a religion-only limitation. The state may endorse non-religious institutions or ideologies if it so chooses.").

34. *Sch. Dist. v. Schempp*, 374 U.S. 203, 246 (1963) (Brennan, J., concurring).

35. *Id.* at 245.

are thus not acting neutrally.³⁶ Instead, they are creeping closer to imposing hostile secularism.

The courts have also begun embracing a more hostile form of secularism. In his dissent in *Locke v. Davey*,³⁷ Justice Scalia commented:

One need not delve too far into modern popular culture to perceive a trendy disdain for deep religious conviction. In an era when the Court is so quick to come to the aid of other disfavored groups, its indifference in this case, which involves a form of discrimination to which the Constitution actually speaks, is exceptional.³⁸

He then warned that the Court's reasoning could lead to far-reaching consequences, stating, "France has proposed banning religious attire from schools, invoking interests in secularism no less benign than those the Court embraces today."³⁹ France is not alone. Much of Europe has recently increasingly moved away from benevolent secularism and embraced hostile secularism.⁴⁰ That mixing of hostile and benevolent secularism is to be expected in the United States because accepting benevolent secularism makes rejecting the more oppressive tenets of hos-

36. See JONATHAN CHAPLIN, *TALKING GOD: THE LEGITIMACY OF RELIGIOUS PUBLIC REASONING* 23 (2008) ("The religious 'neutrality' or 'evenhandedness' of a procedurally secular state will always be a neutrality 'from the standpoint of some particular, contested political vision.'").

37. 540 U.S. 712 (2004).

38. *Id.* at 733 (Scalia, J., dissenting) (citations omitted).

39. *Id.* at 734. For other examples of how France's secularism and supposed neutrality is hostile and oppressive towards religion, see Angelique Chrisafis, *France's headscarf war: 'It's an attack on freedom,'* *GUARDIAN* (Jul. 22, 2013), <https://www.theguardian.com/world/2013/jul/22/frances-headscarf-war-attack-on-freedom> [<https://perma.cc/K9M5-2NMW>] (showing how in France adherence to secularism and reliance on supposed neutrality has led to banning all religious attire and religious symbols in areas of the public and private sectors and banning mothers from wearing head scarves on school trips with their children); Elizabeth Winkler, *Is It Time for France to Abandon Laïcité?*, *NEW REPUBLIC* (Jan. 7, 2016), <https://newrepublic.com/article/127179/time-france-abandon-laicite> [<https://perma.cc/W42X-HCBH>] (explaining that secularism is "the first religion of the Republic," is taught as its own ideology in schools, and is aimed at removing all religious influences).

40. See Tariq Modood, *Moderate Secularism, Religion as Identity and Respect for Religion*, 81 *POL. Q.* 4, 12 (2010) ("Since the 1960s European cultural, intellectual and political life—the public sphere in the fullest sense of the word—is increasingly becoming dominated by secularism, with secularist networks and organisations controlling most of the levers of power. The accommodative character of secularism itself is being dismissed as archaic, especially on the centre-left.").

tile secularism difficult.⁴¹ Whether that slippage in the United States is good or bad depends on one's perspective. It is, however, decidedly not neutral.

Labeling laws neutral when they are premised on distinct worldviews and assumptions about morality exacerbates polarization. A major strand of contemporary jurisprudential theory advocates neutrality through government restraint in advancing any moral code.⁴² And secularists assert that neutrality towards religion includes neutrality regarding morality.⁴³ Such an approach to law is impossible. Excepting laws designed to solve coordination problems, such as those laws designating on which side of the road people should drive, almost all laws must be premised on basic assumptions, worldviews, and often morality.⁴⁴ Even laws to which people generally agree, such as laws against premeditated murder, are premised on moral assumptions because nearly all laws try to order society in a way the legislators or voters think is "better." The idea of "better" is a value laden judgment and is thus not morally neutral. Even the decision *not* to regulate morally controversial conduct is a morally laden judgment.⁴⁵ And principles, such as the "harm

41. See JULIAN RIVERS, *THE LAW OF ORGANIZED RELIGIONS: BETWEEN ESTABLISHMENT AND SECULARISM* 332, 346–47 (2010); see also CHAPLIN, *supra* note 36, at 23 ("Thus, where society is pervasively secularized—where public life and institutions are principally governed as if transcendent religious authority is irrelevant—it will in practice almost inevitably lean towards programmatic secularism.").

42. See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 14–15 (1963). The argument is often espoused in obscenity cases, see *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 385–90 (1959) (arguing that the state cannot ban films promoting adultery based on desire to promote good morals), as well as in the Court's move away from allowing an interest in morality to justify state legislation in other free speech contexts, compare *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 574 (1942) (upholding arrest for cursing and insulting an officer on the street that was justified by an "interest in order and morality"), with *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818, 827 (2000) (striking down a law regulating indecency on non-broadcast medium because no compelling interest in morality).

43. See Carl H. Esbeck, *Religion and a Neutral State: Imperative or Impossibility?*, 15 *CUMB. L. REV.* 67, 78 (1984).

44. Even coordination rules such as traffic laws can be understood as codifying a moral view. Although the choice of which side of the road to drive on is arbitrary, choosing a side and punishing drivers who endanger others by driving on the wrong side evinces moral concern for human life, health, and safety. See Robert P. George, *Kelsen and Aquinas on the Natural-Law Doctrine*, 75 *NOTRE DAME L. REV.* 1625, 1637–38 (2000).

45. See Esbeck, *supra* note 43, at 68 ("[T]he state cannot retreat from the regulation of certain conduct which is arguably immoral and still claim its neutrality concerning the rightness of the conduct. The very decision by the state to with-

principle,"⁴⁶ that try to avoid the problem of *a priori* moral assumptions still must incorporate basic moral ideas.⁴⁷ Take the harm principle, for example. The underlying assumption that harming another person is "bad" and therefore justifies state intervention, and the definition of "harm" itself, both require moral determinations. The implicit moral underpinnings of most laws do not establish that a community's traditional understanding of morality is enough to uphold a law.⁴⁸ Those unavoidable predispositions do prove, however, that such laws are not neutral according to the *Black's Law Dictionary* definition.⁴⁹

Controversial anti-discrimination laws premised on equality poignantly illustrate that lack of neutrality concerning morality.⁵⁰ Professor Chai R. Feldblum, an openly homosexual LGBT activist and legal scholar, argues that "moral beliefs necessarily underlie the assessment of whether such equality is *justifiably* granted or denied,"⁵¹ and "it is disingenuous to say that voting for a law [about homosexuality] conveys no message about morality at all."⁵² She goes on to say that for people who believe homosexuality is not morally neutral, "[s]uch a[n] [anti-discrimination law] rests on a moral assessment of homosexuality and bisexuality that [may be] radically different from their

draw its regulation, leaving the morality of the conduct up to each individual, is a value-laden choice.").

46. See JOHN STUART MILL, *ON LIBERTY* 22 (Longman, Roberts & Green 1864) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."). For a detailed analysis of the harm principle, see JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* (1984).

47. Cf. J. Kelly Strader, *Lawrence's Criminal Law*, 16 *BERKELEY J. CRIM. L.* 41, 43 (2011).

48. Cf. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). Whether or not morality *should* be an allowable justification for legislation is an interesting topic that falls outside the scope of this Note. Here I assert only that some form of morality must be assumed *a priori* for almost all laws. I take no stance on the role morality should play in the law's justification once that moral worldview has been assumed and accepted.

49. See *BLACK'S LAW DICTIONARY*, *supra* note 31.

50. Equality itself is a problematic concept. Although most people agree to treating like things alike, disagreement is prevalent about which things are like and what treating them alike means. For a discussion on the problems with the idea of equality, see Peter Westen, *The Empty Idea of Equality*, 95 *HARV. L. REV.* 537 (1982) (concluding that the term is so enduring in law because it has no fixed meaning).

51. Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 *BROOK. L. REV.* 61, 86–87 (2006).

52. *Id.* at 85.

own.”⁵³ Yet in courts and in politics these laws and views are repeatedly labeled as neutral.⁵⁴ In actuality, they often reflect the values and moral judgments of the elite few and leave many Americans wondering why their values are being ignored.⁵⁵

A second counter to the argument that the “secular” is neutral, even assuming *arguendo* that absence of religion is neutral,⁵⁶ is that an increasingly popular form of secularism in the United States is openly hostile to religion and thus not neutral in any sense.⁵⁷ For example, Sam Harris’s book *The End of Faith*⁵⁸ was described as a “rallying cry for a more ruthless secularisation of society.”⁵⁹ That hostility to religion is unsurprising because “the secular liberal tradition developed in opposition to the classical [religious] synthesis and the

53. *Id.* at 87.

54. *See, e.g.*, *King v. Governor of N.J.*, 767 F.3d 216, 221, 241–42 (3d Cir. 2014) (deeming as neutral a law outlawing any effort to help minors engage in sexual orientation change except when the minor is seeking to transition from one gender to another); *Catholic League for Religious & Civil Rights v. City & Cty. of S.F.*, 567 F.3d 595, 597, 604 (9th Cir. 2009) (holding as neutral and “well within the Board’s secular purview” a decision to promote adoptions by same-sex couples by passing a resolution condemning the Vatican’s “discriminatory and defamatory directive” that Catholic charities should not place children in homosexual households); *Okwedy v. Molinari*, 150 F. Supp. 2d 508, 511–12, 519 (E.D.N.Y. 2001) (affirming a government action requiring a billboard company to take down billboards quoting Leviticus 18:22, which condemns homosexuality, and stating that the action “furtheres the government’s neutral policy of opposing discrimination based on sexual orientation.” (emphasis added)) *aff’d in part, vacated in part*, 69 Fed. Appx. 482 (2d Cir. 2003); *cf. McCullen v. Coakley*, 134 S. Ct. 2518, 2526–28, 2534 (2014) (labeling as neutral a law that allows speech in favor of abortion and makes criminal speech criticizing abortion); *Christian Legal Soc’y Chapter v. Martinez*, 561 U.S. 661, 669 (2010) (holding as “viewpoint neutral” a law school policy requiring a religious group to abolish its requirement that its members adhere to certain religious principles).

55. *See Ahdar, supra* note 23, at 416.

56. Such an assumption is both contestable and contested. *See, e.g.*, Esbeck, *supra* note 43, at 75–78 (describing how the different groups hold different beliefs about the possibility of a state being neutral and about on which topics a state should be neutral).

57. *See e.g.*, FAMILY RESEARCH COUNCIL, *HOSTILITY TO RELIGION: THE GROWING THREAT TO RELIGIOUS LIBERTY IN THE UNITED STATES* (2017); BRIAN LEITER, *WHY TOLERATE RELIGION* (2013) (arguing that government should not tolerate religion by granting religious exemptions).

58. SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* (2005).

59. Stephanie Merritt, *Faith no more*, OBSERVER (Feb. 5, 2005), <https://www.theguardian.com/theobserver/2005/feb/06/society> [<https://perma.cc/H6YS-XWLS>]; *see also* RICHARD DAWKINS, *THE GOD DELUSION* (2006), CHRISTOPHER HITCHENS, *GOD IS NOT GREAT* (2007).

anthropological assumptions that sustain it,"⁶⁰ and even benevolent secularism eventually morphs into hostile secularism.⁶¹ Secularism never has been and cannot be neutral towards religion.⁶²

Striving for neutrality as the absence of religion has thus led to the contradictory result of embracing the non-neutral secular. That result has fulfilled Justice Goldberg's prediction that "untutored devotion to the concept of neutrality can lead to . . . a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."⁶³ But the embrace of the non-neutral secular also shows disregard of his warning: "Such results are not only not compelled by the Constitution, but . . . are prohibited by it."⁶⁴ Justice Kennedy also admitted in *Lee v. Weisman*,⁶⁵ even as he found a prayer at graduation to violate the Establishment Clause, that excluding religion completely and embracing only the secular could be unconstitutional,⁶⁶ particularly if the "affected citizens [were] mature adults."⁶⁷ That is because secularism is not neutral or impartial.

The Court has held that the exclusion of religion and the idea that the government need not "respect[] the religious nature of [the] people and accommodate[] the public service to [the people's] spiritual needs" impermissibly "prefer[s] those who believe in no religion over those who do believe."⁶⁸ Indeed, the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility

60. GEORGE PELL, *GOD & CAESAR: SELECTED ESSAYS ON RELIGION, POLITICS, & SOCIETY* 168 (M. A. Casey ed., 2007).

61. See RIVERS, *supra* note 41, at 332, 346–47; see also CHAPLIN, *supra* note 36, at 23.

62. Cf. Adrian Vermeule, *Liturgy of Liberalism*, FIRST THINGS (Jan. 2017), <https://www.firstthings.com/article/2017/01/liturgy-of-liberalism> [<https://perma.cc/46VC-KXC2>] (arguing that historically and contemporarily secularist ideologies manifest themselves in religious ways and giving examples such as France's Festival of Reason, where, during the French Revolution, French proponents of secularism placed a goddess of Reason on the holy altar of the Church of Our Lady in Paris to "worship" rationality).

63. Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

64. *Id.*

65. 505 U.S. 577 (1992).

66. See *id.* at 598 ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.").

67. See *id.* at 593.

68. See *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

toward any. Anything less would require the ‘callous indifference,’” which the Court has held is not allowed by the Establishment Clause.⁶⁹ Justice Stewart has recognized in dissent that adhering solely to secularism places religion “at an artificial and state-created disadvantage” and that religious exercises must be permitted for the state “truly to be neutral in the matter of religion.”⁷⁰ Justice Stewart’s dissent explained that rejecting religious concerns is not “the realization of state neutrality, but rather . . . the establishment of a religion of secularism.”⁷¹ And the majority agreed that “of course . . . the State may not establish a ‘religion of secularism.’”⁷² Yet, secularism and the secularist definition of neutrality advocate just that hostility and callous indifference. And the Supreme Court and lower courts have begun to employ that definition with the application of the endorsement test and manipulation of the *Lemon* test. The idea that neutrality in Establishment Clause jurisprudence means the promotion of secularism is anything but neutral and should not be allowed under current Supreme Court precedent.⁷³

II. NEUTRALITY AND THE FREE EXERCISE CLAUSE

A. *The Smith Standard and Its Progeny*

In *Smith*, the Court held that an individual’s right to free exercise does not allow him to disregard criminal, “neutral law[s] of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or pro-

69. See *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (citations omitted).

70. *Sch. Dist. v. Schempp*, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting).

71. *Id.* (emphasis added).

72. *Id.* at 225 (majority opinion).

73. Several courts of appeals have also held that promoting the absence of religion over religion is unconstitutional. See, e.g., *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144, 165 (3d Cir. 2002) (“[T]he Free Exercise Clause’s mandate of neutrality toward religion prohibits government from ‘deciding that secular motivations are more important than religious motivations.’” (quoting *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999))); *Ehlers-Rienzi v. Connelly Sch. of the Holy Child*, 224 F.3d 283, 287 (4th Cir. 2000) (“[A]ccommodation of religion is a necessary aspect of the Establishment Clause jurisprudence because, without it, government would find itself effectively and unconstitutionally promoting the absence of religion over its practice.”).

scribes).⁷⁴ Rational basis review of such claims⁷⁵ replaced the strict scrutiny standard the Court had been applying when a generally applicable law burdened the free exercise rights of an individual.⁷⁶ Justice Scalia reasoned that the Oregon law at issue was seeking to regulate conduct, not belief,⁷⁷ and suggested that the United States might devolve into anarchy if the strict scrutiny test continued to apply to free exercise claims.⁷⁸ In subsequent cases, *Smith's* holding was boiled down into the rule that “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest”⁷⁹ and was expanded to apply outside the criminal context.⁸⁰

Smith repeatedly asserts that a law must be *both* neutral *and* generally applicable for the *Smith* standard to apply. Given Justice Scalia’s penchant for precision, those two phrases must denote two different requirements.⁸¹ But *Smith* fails to clearly delineate what each entails. Since *Smith*, the definition of generally applicable has crystalized, yet the concept of neutrali-

74. *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990) (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

75. *See* *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 289 (Colo. Ct. App. 2015) (“The Court held that neutral laws of general applicability need only be rationally related to a legitimate governmental interest in order to survive a constitutional challenge.” (citing *Smith*, 494 U.S. at 879)), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017).

76. *See* *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

77. *See* *Smith*, 494 U.S. at 882. Interestingly, earlier in the opinion Justice Scalia asserted that “the ‘exercise of religion’ often involves not only belief and profession but the performance of (or abstention from) physical acts.” *Id.* at 877; *see also id.* at 893 (O’Connor, J., concurring in judgment) (“Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like belief itself, must be at least presumptively protected by the Free Exercise Clause.”); *Wisconsin v. Yoder* 406 U.S. 205, 219–20 (1972) (“[B]elief and action cannot be neatly confined in logic-tight compartments,” and “our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause.”).

78. *See* *Smith*, 494 U.S. at 888–89.

79. *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997).

80. *See id.*

81. *See, e.g.*, Transcript of Oral Argument at 27–28, *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (No. 11-398) (showing Justice Scalia arguing that the terms “necessary” and “proper” have distinct meanings that both must be met for an action to be constitutional); *see also* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174–179 (2012).

ty remains unclear. Justice Scalia exacerbated the problem of distinguishing neutrality and general applicability in a later concurrence. He acknowledged that general applicability and neutrality are not the same,⁸² then proceeded to say that although he “agree[d] with most of the invalidating factors” set out in the majority opinion, “it seem[ed] to [him] a matter of no consequence under which rubric (‘neutrality,’ Part II-A, or ‘general applicability,’ Part II-B) each invalidating factor [was] discussed.”⁸³ Justice Scalia thus contributed to the confusion about whether neutrality and general applicability are interchangeable while concurrently acknowledging that they are two distinct requirements.

Of those two distinct requirements, the general applicability analysis is much more defined. A law is generally applicable if it does not single out a particular group against which to apply the law.⁸⁴ If a law applies equally to all groups, allowing for reasonable and carefully tailored exemptions, then it is considered generally applicable.⁸⁵ In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,⁸⁶ a case challenging a law against animal slaughter targeted at a particular religious group that practiced animal sacrifice, Justice Kennedy explained that though general applicability and neutrality are distinct, they are also “interrelated.”⁸⁷ He later clarified, and Justice Souter further elucidated, that any law that is not generally applicable will likely also lack neutrality.⁸⁸ But a law that *is* generally applicable could also lack neutrality.⁸⁹

What determines neutrality independently of the general applicability analysis remains unclear. In *Lukumi*, three years after *Smith*, Justice Kennedy provided a list of characteristics

82. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 557–58 (1993) (Scalia, J., concurring in part and concurring in judgment).

83. *Id.* at 558.

84. See *id.* at 543–45 (majority opinion).

85. Cf. Marshall, *supra* note 33, at 195 n.10 (citing *Sherbert*, 374 U.S. at 404) (explaining that strict scrutiny still applies after *Smith* “in cases in which the state has in place a system of individualized exemptions but refuses to extend that system to cases of religious hardship”).

86. 508 U.S. 520 (1993).

87. See *id.* at 531.

88. See *id.*; *id.* at 561 (Souter, J., concurring in part and concurring in judgment).

89. See *id.* at 565–66 (Souter, J., concurring in part and concurring in judgment).

that would reveal a law's lack of neutrality.⁹⁰ One of those characteristics Justice Kennedy described by writing, "[I]f the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."⁹¹ Yet what *is* to be considered neutral after *Smith* has never been explained. That dearth of explanation has led courts that find a law generally applicable to simply assume neutrality without independent analysis.⁹² In practice, that assumption allows any generally applicable law to stand, both facially and as-applied.⁹³ The assumption that such laws are neutral thus shapes the law, and the lack of any principled (or non-principled) analysis of neutrality leads to confusion.

B. *Tension Created by the Smith Standard*

Ever since its inception, the *Smith* standard has created tension beyond its lack of defined neutrality analysis. In *Smith*, four justices believed the majority opinion "dramatically depart[ed] from well-settled First Amendment jurisprudence . . . and [was] incompatible with our Nation's fundamental commitment to individual liberty."⁹⁴ Three justices dissented because the decision disregarded "the years [that] painstakingly ha[d] developed a consistent and exacting standard to test the constitutionality of a state statute that burden[ed] the free exercise of religion," which required laws burdening religious exercise be "justified by a compelling interest that [could not] be served by less restrictive means."⁹⁵ And at

90. *See id.* at 542 (majority opinion).

91. *Id.* at 533.

92. *See, e.g.,* Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 391–92 (1990) (finding a law generally applicable then going on to hold it did not violate the Free Exercise Clause without even mentioning neutrality), *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1213 (5th Cir. 1991) (asserting law was generally applicable and then holding it did not violate the Free Exercise Clause without conducting two separate analyses or even explicitly mentioning neutrality).

93. In fact, in *Craig v. Masterpiece Cakeshop*, the Colorado Court of Appeals skipped any rational basis analysis and simply held, "We conclude that CADA is a neutral law of general applicability and, therefore, offends neither the First Amendment nor article II, section 4." *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. Ct. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017).

94. *Emp't Div. v. Smith*, 494 U.S. 872, 891 (1990) (O'Connor, J., concurring in judgment).

95. *Id.* at 907 (Blackmun, J., dissenting).

least three times since *Smith* was decided justices have called for it to be reversed or reconsidered.⁹⁶ Some of the tension is caused by the friction between *Smith* and previous precedent that remains good law, and some of the tension flows from the lack of clarity in the opinion and its application in future cases.⁹⁷

That lack of clarity is exemplified in Justice Souter's concurrence in the judgment in *Lukumi*. *Lukumi* is one of the first cases after *Smith* to discuss the concept of neutrality in depth and apart from the concept of general applicability. Justice Souter began discussing the confusion surrounding neutrality in the context of the Free Exercise Clause by stating, "While general applicability is, for the most part, self-explanatory, free-exercise neutrality is not self-revealing."⁹⁸ He then delineated three different types of neutrality: facial neutrality, formal neutrality, and substantive neutrality.⁹⁹ As a free exercise requirement, both facial and formal neutrality "would only bar laws with an object to discriminate against religion."¹⁰⁰ The distinction here is that for facial neutrality only the text and operation of the law would be considered in determining its object, whereas formal neutrality would also consider the intentions of the legislators.¹⁰¹ Substantive neutrality, in contrast, would demand both a neutral object *and* neutral application—a goal that might be achieved through reasonable religious accommodations.¹⁰²

Justice Souter used the example of Prohibition to explain the difference between substantive and formal neutrality. Without any religious exemptions, Prohibition would fail the substan-

96. See *City of Boerne v. Flores*, 521 U.S. 507, 544–65 (1997) (O'Connor, J., dissenting) (calling for *Smith* to be reassessed in light of the historical underpinnings of the inception of the Free Exercise Clause); *Lukumi*, 508 U.S. at 569–77 (Souter, J., dissenting) (calling for *Smith* to be reexamined because its conception of neutrality did not "comfortabl[y] fit with settled law"); *id.* at 577–80 (Blackmun, J., concurring in judgment) (refusing to apply *Smith* because it "was wrongly decided" and arriving at the same conclusion as the majority via a different route).

97. See *Lukumi*, 508 U.S. at 573 (Souter, J., concurring in part and concurring in judgment) ("*Smith* presents not the usual question of whether or not to follow a constitutional rule, but the question of which constitutional rule to follow, for *Smith* refrained from overruling prior free-exercise cases that contain a free-exercise rule fundamentally at odds with the rule *Smith* declared.>").

98. *Id.* at 561.

99. See *id.* at 561–62.

100. *Id.*

101. See *id.* at 562 n.3.

102. See *id.* at 562.

tive neutrality test because it would disproportionately burden some religious adherents by disallowing them from partaking in religious practices involving alcohol, such as Jewish Passover Seder and Catholic Eucharist. Yet such a prohibition would pass the formal neutrality test because its object was not to discriminate against those religions but to reduce alcohol consumption. Concluding the descriptive part of his argument, Justice Souter stated, “If the Free Exercise Clause secures only protection against deliberate discrimination, a formal requirement will exhaust the Clause’s neutrality command; if the Free Exercise Clause, rather, safeguards a right to engage in religious activity free from unnecessary governmental interference, the Clause requires substantive, as well as formal, neutrality.”¹⁰³

Much of the confusion around neutrality in Free Exercise Clause jurisprudence arises because it is unclear what type of neutrality the Free Exercise Clause demands. Though in *Smith* Justice Scalia failed to define neutrality, he tended toward formal neutrality in application by distinguishing between laws that have religious prohibition as their object and laws that prohibit religion only through incidental effects.¹⁰⁴ In a later case, when concurring in judgment, Justice Scalia clarified that neutrality applies to “those laws that *by their terms* impose disabilities on the basis of religion.”¹⁰⁵ In other words, though Justice Scalia did not so hold in *Smith*, he believed that the Free Exercise Clause only requires laws to be formally, even quasi-facially, neutral.¹⁰⁶ The body of law, however, disagrees.¹⁰⁷ And Justice O’Connor vehemently so:

Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice If

103. *Id.*

104. *See Smith*, 494 U.S. at 877–78.

105. *Lukumi*, 508 U.S. at 557 (Scalia, J., concurring in part and concurring in judgment).

106. *Id.* at 562 (Souter, J., concurring in part and concurring in judgment) (“Though [Scalia] used the term ‘neutrality’ without a modifier, [he] plainly assumes that free-exercise neutrality is of a formal sort.”).

107. *See id.* at 534 (majority opinion) (“Facial neutrality is not determinative.”); *see also State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 561 (Wash. 2017) (“‘[T]he Free Exercise Clause forbids any regulation of beliefs as such,’ and that . . . unconstitutional regulation may sometimes be accomplished through a law that *appears* facially neutral.” (citing *Blackhawk v. Pennsylvania*, 381 F.3d 202, 208–09 (3d Cir. 2004))), *petition for cert. filed*, No. 17-108, 2017 WL 3126218 (U.S. July 14, 2017).

the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice. As we have noted in a slightly different context, “[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides.”¹⁰⁸

Thus Justice Scalia’s interpretation would remove any independent protection for religion provided by the Free Exercise Clause because everything his interpretation protects against would already be protected under the Fourteenth Amendment’s promise of equal protection and statutory anti-discrimination.

Such a conception of neutrality in free exercise cases not only makes the Free Exercise Clause superfluous after the Fourteenth Amendment,¹⁰⁹ it also leaves “a free-exercise jurisprudence in tension with itself.”¹¹⁰ *Smith* “refrain[s] from overruling prior free-exercise cases that contain a free-exercise rule fundamentally at odds with the rule *Smith* declared.”¹¹¹ The prior cases make clear “that the Free Exercise Clause embraces more than *mere formal* neutrality, and that formal neutrality and general applicability are not sufficient conditions for free-exercise constitutionality.”¹¹² Prior to *Smith*, “[T]he Court repeatedly . . . stated that the [Free Exercise] Clause set[] strict limits on the government’s power to burden religious exercise, whether it is a law’s object to do so or its unanticipated effect.”¹¹³ *Smith*’s blurry depiction of the neutrality demanded by

108. *Smith*, 494 U.S. at 894 (O’Connor, J., concurring) (quoting *Hobbie v. Unemployment Appeals Comm’n of Florida*, 480 U.S. 136, 141–42 (1987)).

109. If all the Free Exercise Clause offers is that which is already guaranteed by the Equal Protection Clause, there would have been no need to incorporate the Free Exercise Clause against the states. That the Court did specifically incorporate the Free Exercise Clause against the states through the Fourteenth Amendment, see *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), demonstrates that the Court did not think that the Free Exercise Clause was superfluous after the Fourteenth Amendment.

110. *Lukumi*, 508 U.S. at 564 (Souter, J., concurring in part and concurring in judgment).

111. *Id.* at 573.

112. *Id.* at 565 (emphasis added).

113. *Id.* at 569–70; see, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 717 (1981) (“In a variety of ways we have said that ‘[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the exercise of religion.’” (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972))).

the Free Exercise Clause and its refusal to overrule contradictory conceptions of the required neutrality have confused the jurisprudence around what constitutes a neutral law. That confusion is evidenced in part by the arbitrary application of precedent concerning standards of neutrality and the assumption of neutrality absent any standard or critical analysis.

C. *Arbitrary or Absent Standards of Neutrality Applied Today*

In most contemporary free exercise cases, courts assume neutrality in one of two ways. First, courts may state that the law does not fall into one of the categories that would explicitly reveal that the law lacked neutrality and then illogically leap to the conclusion that it is, therefore, neutral.¹¹⁴ Second, courts may conflate neutrality and general applicability, either by completely ignoring neutrality¹¹⁵ or performing the same analysis to find a law both neutral and generally applicable.¹¹⁶

1. *The False Assumption of Neutrality*

First, courts assume neutrality by arbitrarily picking one of many characteristics that reveal when a law lacks neutrality, showing that the law under review does not have that feature, and then assuming neutrality.¹¹⁷ Nearly all cases concerning

114. See, e.g., *Stormans v. Selecky*, 586 F.3d 1109, 1130 (9th Cir. 2009) (asserting that “if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is *not neutral*,” and then holding the law *was neutral* because there was no evidence that the object of the law was to infringe (quoting *Lukumi*, 508 U.S. at 533 (emphasis added))). But see *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1234 n.16 (11th Cir. 2004) (rejecting the argument that law is neutral just because there is no evidence that the law directly targeted religion).

115. See *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391–92 (1990) (finding a law generally applicable then going on to hold it did not violate the Free Exercise Clause without even mentioning neutrality).

116. See, e.g., *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) (conducting only one analysis for both neutrality and general applicability); *Tenafly Eruv Ass’n v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002) (analyzing only whether a law was “uniformly applied” to determine that the law was both neutral and generally applicable).

117. See, e.g., *Nat’l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 844 (9th Cir. 2016) (citing *Lukumi* for the proposition that a law is *not neutral* if it references religion then concluding that because the act did not reference religion the law *was neutral*), *cert. granted sub nom.* *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 464 (2017); *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 556 (4th Cir. 2013) (explaining a law is not neutral if it targets religion and then agreeing with the lower court that under First Amend-

freedom of religion only define neutrality negatively,¹¹⁸ and most choose the negative definition that asserts a law is not neutral if “the object of [the] law is to infringe upon or restrict practices because of their religious motivation.”¹¹⁹ In one of the rare cases where neutrality was defined in a positive sense, the Ninth Circuit Court of Appeals defined a neutral law as one that “references no religious practice.”¹²⁰ But the Court has expressly rejected that positive definition of neutrality.¹²¹ Although a law that “references no religious practice” would be considered facially neutral, “[f]acial neutrality is not determinative. The Free Exercise Clause . . . extends beyond facial discrimination. The Clause ‘forbids subtle departures from neutrality’ and ‘covert suppression of particular religious beliefs.’ Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”¹²²

Though a law *is not* neutral if it purposefully infringes on religion, that definition gives no guidance about what a neutral law *is*; it only determines one characteristic a law cannot have if it is to be neutral. Such a definition does not illuminate what other criteria a law must meet to be neutral. It leaves open the door for infinite other criteria. *Lukumi* makes that distinction clear. The Court stated, “[T]he *minimum requirement* of neutrali-

ment principles the law is neutral unless petitioner demonstrates that the County targeted petitioner).

118. See, e.g., *Lukumi*, 508 U.S. at 546 (“A law burdening religious practice that is *not* neutral . . . must undergo the most rigorous of scrutiny.” (emphasis added)); *id.* at 533 (“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.”) (citing *Emp’t Div. v. Smith*, 494 U.S. 872, 878–79 (1990)); *Stormans v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) (citing *Lukumi*, 508 U.S. at 533); *Priests for Life v. U.S. Dept. of Health & Human Servs.*, 772 F.3d 229, 267 (D.C. Cir. 2014) (“A law is not neutral if it facially ‘refers to a religious practice without a secular meaning discernable from the language or context,’ or if ‘the object of a law is to infringe upon or restrict practices because of their religious motivation.’” (quoting *Lukumi*, 508 U.S. at 533)), *vacated and remanded*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *McTernan v. City of York*, 564 F.3d 636, 647 (3d Cir. 2009) (“Government action is not neutral . . . if it burdens religious conduct because of its religious motivation, or if it burdens religiously motivated conduct but exempts substantial comparable conduct that is not religiously motivated.”); *Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) (“A rule that uniformly bans all religious practice is not neutral.”).

119. *Lukumi*, 508 U.S. at 533.

120. *Nat’l Inst. of Family & Life Advocates*, 839 F.3d at 844.

121. *Lukumi*, 508 U.S. at 534.

122. *Id.*

ty is that a law not discriminate on its face.”¹²³ Likewise, in *Locke v. Davey* Justice Scalia quoted Justice Souter’s concurrence from *Lukumi* where Justice Souter “endorsed the ‘noncontroversial principle’ that ‘formal neutrality’ is a ‘necessary condition for free-exercise constitutionality,’” implying that formal neutrality alone is insufficient.¹²⁴ Although it is therefore clear that a law that purposefully infringes on religion or has religious discrimination as its object is *not* neutral, that fact gives little guidance as to what laws *are* neutral.

Several other conditions reveal a law’s lack of neutrality, though the absence of those conditions does not establish a law as neutral.¹²⁵ *Lukumi* lists some of those conditions, holding that a law is not neutral if it discriminates on its face,¹²⁶ if there is even “slight suspicion” that it is a product of government hostility towards religion,¹²⁷ if “the burden of the [law], in practical terms, falls on [religious observers] but almost no others,”¹²⁸ or if a law “proscribe[s] more religious conduct than is necessary to achieve [its] stated ends.”¹²⁹ Even with these other negative definitions, courts often cite only the first—a law is *not* neutral if its object is to impinge upon religious practices—and then fallaciously conclude that because the law does not base its application upon religious motivation, it *is* neutral.¹³⁰ That type of reasoning is unacceptable, as the Court explained in *Locke*.

In *Locke*, the respondent based his argument on the premise that if a statute was not facially neutral then it was unconstitutional. He tried to infer that premise from the holding in *Luku-*

123. *Id.* at 533 (emphasis added).

124. *Locke v. Davey*, 540 U.S. 712, 726 (2004) (Scalia, J., dissenting) (emphasis added).

125. *See Lukumi*, 508 U.S. at 542.

126. *See id.* at 533.

127. *See id.* at 534, 547.

128. *Id.* at 536.

129. *Id.* at 538.

130. *See State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 561 (Wash. 2017) (citing the definition of when a law is not neutral and concluding that because the WLAD does not explicitly target religion, it *is* neutral), *petition for cert. filed*, No. 17-108, 2017 WL 3126218 (U.S. July 14, 2017); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 291 (Colo. Ct. App. 2015) (citing above definition and from it concluding a law *is* neutral because it does not seem to “discriminate[] against conduct *because of its religious character*” (emphasis added)), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017).

mi based on when a statute *was* facially neutral.¹³¹ The *Locke* Court rejected the respondent's premise, explaining that to make such an inference would extend *Lukumi* "well beyond not only [its] facts but [also its] reasoning"¹³² because the Court's statement about what is true when a statute is facially neutral tells other courts nothing about what is true when the statute is *not* facially neutral. The same logic applied by the respondent in *Locke* has been underlying the assumption of neutrality in the *Smith* progeny. Courts move from a holding establishing that if a law purposefully targets religion, it is not neutral to assuming that if a law does not purposefully target religion, then it is neutral. But the Court has never even implied that possibility. To describe the fallacy another way, lower courts take the Court's holding about a condition sufficient to prove a law lacks neutrality and apply it as a condition necessary for non-neutrality, which is another way of saying that courts apply the absence of that condition as sufficient for neutrality.

In *Grace United Methodist Church v. City of Cheyenne*,¹³³ for example, the Tenth Circuit Court of Appeals cited *Lukumi*'s rule that a "law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context,"¹³⁴ and then derived a rule that "[a] law is neutral so long as its object is something other than the infringement or restriction of religious practice."¹³⁵ In *Olsen v. Mukasey*,¹³⁶ the Eighth Circuit Court of Appeals also concluded that something was neutral from a rule only describing what was not neutral. That court explained, "[a] law is *not neutral* if its object is 'to infringe upon or restrict practices because of their religious motivation'" and inferred that a law *is neutral* absent that prohibited object.¹³⁷ To reach that conclusion courts must commit the same logical fallacy the Court rejected in *Locke*: they must draw a conclusion about a law that *does not* purposefully target religion based on a holding about a law that *does* purposefully target religion.

131. See *Lukumi*, 508 U.S. at 534.

132. *Locke v. Davey*, 540 U.S. 712, 720 (2004).

133. 451 F.3d 643 (10th Cir. 2006).

134. *Id.* at 650 (quoting *Lukumi*, 508 U.S. at 533 (emphasis added)).

135. *Id.* at 649–50 (emphasis added).

136. 541 F.3d 827 (8th Cir. 2008).

137. *Id.* at 832 (emphasis added) (citing *Lukumi*, 508 U.S. at 533).

The *Locke* Court, however, implicitly made the same logical error that it condemned. As Justice Scalia observed in dissent, “[t]he Court makes no serious attempt to defend the program’s neutrality.”¹³⁸ It only found “that the scholarship program was not motivated by animus toward religion.”¹³⁹ Justice Scalia dismissed that finding’s relevance, stating, “The Court does not explain why the legislature’s motive matters, and I fail to see why it should.”¹⁴⁰ The Court ruled that the law is constitutional because there “is not evidence of hostility toward religion”¹⁴¹ nor “anything that suggests animus towards religion.”¹⁴² Evidence of animus or hostility may be a factor in determining neutrality, but lack of evidence of animus cannot be determinative of neutrality,¹⁴³ especially given the other explicit factors relevant to neutrality that Justice Kennedy announced in *Lukumi*.¹⁴⁴

More striking is that the Court in *Locke* concluded the law was constitutional under *Smith*’s rational basis standard without even *once* mentioning neutrality. Even though evidence of animus will show that a law is not neutral,¹⁴⁵ as discussed above, that does not mean that lack of evidence of animus proves the law is neutral. Some courts still assume a lack of animus is sufficient for a law to be neutral instead of correctly reasoning that lack of animus is necessary but not sufficient for a law to be neutral.¹⁴⁶ But many courts are now going beyond

138. *Locke v. Davey*, 540 U.S. 712, 731 (2004) (Scalia, J. dissenting).

139. *Id.* at 732.

140. *Id.*

141. *Id.* at 721 (majority opinion).

142. *Id.* at 725.

143. *See id.* at 732–33 (Scalia, J., dissenting); *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1234 n.16 (11th Cir. 2004) (refusing to find a law neutral when only support for that claim was lack of evidence of hostility or animus toward religion).

144. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 536–38 (1993) (holding a law is not neutral if “the burden of the [law], in practical terms, falls on [religious observers] but almost no others” or if a law “proscribe[s] more religious conduct than is necessary to achieve [its] stated ends”).

145. *See Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (“Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral.”).

146. *See Ill. Bible Coll. v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017) (finding law neutral because “no allegation of underlying religious animus”); *Abdus-Shahid v. Mayor of Balt.*, 674 Fed. App’x 267, 272 (4th Cir. 2017) (concluding a law was neutral because no evidence that the policy had been implemented with an improper motivation had been presented).

that logical flaw: courts remove the middle steps concerning neutrality and completely replace the neutrality analysis with an inquiry into whether the law was enacted with animus or hostility towards religion.¹⁴⁷ Several post-*Locke* cases illustrate that point.

For example, in *Wirzburger v. Galvin*¹⁴⁸ the First Circuit cited both *Smith* and *Lukumi* yet still assessed only whether the law was generally applicable and whether its passage was “motivated by animus towards religion” in its free exercise analysis.¹⁴⁹ The court never mentioned neutrality.¹⁵⁰ More starkly, the court acknowledged that the challenged amendment’s sponsor stated that his motivation was to “protect the initiative and referendum against the religious fanatics and against the professional religionists.”¹⁵¹ Yet the court still found “no evidence that animus against religion was a motivating factor behind the [amendment’s] passage,” and without mentioning neutrality, thus upheld the law.¹⁵²

Similarly, in *Bronx Household of Faith v. Board of Education of New York*,¹⁵³ a case challenging a New York City Department of Education regulation prohibiting the use of otherwise-accessible school facilities by groups “holding religious worship services,” the Second Circuit discussed *Lukumi* at length without once mentioning neutrality.¹⁵⁴ Instead the court framed the *Lukumi* test as one barring only regulations that were either not generally applicable or were motivated by animus towards

147. See *Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184, 196 (2d Cir. 2014) (asserting that “the clear implication” of *Lukumi* is that if a law is generally applicable and not motivated by animus the law should be upheld, and reasoning on that basis that “the Free Exercise Clause would not prohibit the Board[’s] [restriction] . . . so long as the Board’s restriction [was generally applicable] and was not motivated by discriminatory disapproval of any particular religion’s practices,” finding no evidence of animus and thus upholding the regulation); *Prater v. City of Burnside*, 289 F.3d 417, 428–30 (6th Cir. 2002) (conducting an extensive analysis of whether the city’s decision was based on animus, finding insufficient evidence of animus, and holding that the decision did not violate the Free Exercise Clause without any analysis of the decision’s neutrality).

148. 412 F.3d 271 (1st Cir. 2005).

149. See *id.* at 281–82.

150. See *id.*

151. *Id.* at 281.

152. See *id.* at 282.

153. 750 F.3d 184 (2d Cir. 2014).

154. See *id.* at 187–205.

religion.¹⁵⁵ The court stated, “[T]he clear implication of the [*Lukumi*] opinion [was] that, if the prohibition had [been generally applicable] and had not been motivated by hostility to Santeria’s religious practice, the prohibition would have been upheld.”¹⁵⁶ Based on that interpretation of *Lukumi*, which completely disregards any neutrality analysis, the court stated that “the Free Exercise Clause would not prohibit the Board[’s] [restriction] . . . so long as the Board’s restriction [was generally applicable] and was not motivated by discriminatory disapproval of any particular religion’s practices.”¹⁵⁷ Next, the court found that there was “not a scintilla of evidence that the Board disapprove[d] of religion,”¹⁵⁸ and thus rejected the free exercise challenge.¹⁵⁹ In dissent, Judge John Walker, Jr. pointed out that under *Lukumi*’s neutrality requirement, ignored by the majority, the challenged regulation was not neutral for two reasons. First, it lacked facial neutrality, and second, it fell into one of the explicit categories that reveal non-neutrality outlined by the *Lukumi* majority.¹⁶⁰ Some courts have gone as far as admitting a law is not neutral and then explicitly rejecting the neutrality analysis in favor of an animosity inquiry.¹⁶¹ However, that explicit rejection of neutrality and replacement with animosity is contrary to binding Supreme Court precedent.¹⁶²

155. In *Lukumi*, no part of the majority opinion discusses the motivation of the lawmakers as a factor of the neutrality test. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). Five justices who signed onto most of the majority opinion specifically chose to reject the only part of Justice Kennedy’s opinion that discussed the lawmakers’ motivation as relevant to neutrality. See *id.*

156. *Bronx Household*, 750 F.3d at 196.

157. *Id.*

158. *Id.* at 192.

159. See *id.* at 200.

160. See *id.* at 207 (Walker, J., dissenting) (“[I]ts object ‘is to infringe upon or restrict practices because of their religious motivation.’” (quoting *Lukumi*, 508 U.S. at 533)).

161. See *e.g.*, *Eulitt v. Me. Dep’t of Educ.*, 386 F.3d 344, 355–56 (1st Cir. 2004) (acknowledging the law “lacks religious neutrality on its face” then relying on *Locke* to extensively analyze potential animus before concluding no free exercise violation); *KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1050–51 (9th Cir. 1999) (admitting the regulation was “not ‘neutral’” and still holding that it did not “impose an impermissible burden on their free exercise of religion” because there was not “substantial animus”).

162. See *supra* note 155; see also *Hassan v. City of N.Y.*, 804 F.3d 277, 309 (3d Cir. 2015); *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (“[T]he Free Exercise Clause is not confined to actions based on animus.” (citations omitted));

2. *The Failure to Analyze Neutrality*

The second way courts implicitly assume neutrality is by conflating neutrality and general applicability. Most often courts conflate the two requirements either by demonstrating general applicability and then moving on without even mentioning neutrality or by performing only one analysis and then holding the law is both neutral and generally applicable.¹⁶³ One example of the former reasoning occurred just months after *Smith* was decided. In *State v. Hershberger*,¹⁶⁴ the Minnesota Supreme Court asserted that *Smith* had “significantly changed first amendment free exercise analysis.”¹⁶⁵ The court held, contrary to an earlier opinion on the same issue,¹⁶⁶ that a law requiring an Amish man to put an orange, plastic triangle on his cart was constitutional even though using plastic violated the Amish man’s religious beliefs and other materials could have easily been used to achieve the same purpose.¹⁶⁷ Throughout the entire “significantly changed first amendment analysis,” the court did not once mention neutrality; it went straight and only to general applicability. The court reasoned, “The *Smith II* court held a law of general application, which does not intend

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 5–16, at 956 (3d ed. 2000) (“[A] law that is not neutral or that is not generally applicable can violate the Free Exercise Clause without regard to the motives of those who enacted the measure.”).

163. See, e.g., *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, No. 5-12-CV-06744, 2013 WL 1277419, at *2 (3d Cir. 2013) (applying only one analysis to determine law is both neutral and generally applicable); *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 242 (3d Cir. 2008) (claiming Act is “a neutral law of general applicability” and proceeding to perform only one analysis).

164. 462 N.W.2d 393 (Minn. 1990).

165. *Id.* at 396.

166. See *State v. Hershberger*, 444 N.W.2d 282, 289 (Minn. 1989) (“[W]e hold that these appellants have established that each has a sincerely-held religious belief that forbids him from displaying the SMV emblems required by Minn. Stat. § 169.522; that state enforcement of Minn. Stat. § 169.522 which subjects these appellants to criminal prosecution, with resultant potential fines or jail incarceration, burdens the appellants’ rights under the Free Exercise Clause; that the state has a compelling public safety interest which Minn. Stat. § 169.522 seeks to serve; but that the state’s compelling public safety interest can be served by a less restrictive alternative; and that, therefore, Minn. Stat. § 169.522 as applied against these appellants violates the Free Exercise Clause of the First Amendment to the United States Constitution.”), *vacated*, 462 N.W.2d 393 (Minn. 1990).

167. See *Hershberger*, 462 N.W.2d at 396.

to regulate religious belief or conduct, is not invalid because the law incidentally infringes on religious practices.”¹⁶⁸

That disregard of the neutrality and exclusive reliance on general applicability is exemplified by Justice O’Connor’s dissent in *City of Boerne*. Justice O’Connor suggested that through *Smith*, courts have “interpreted the Free Exercise Clause to permit the government to prohibit, without justification, conduct mandated by an individual’s religious beliefs, so long as the prohibition is *generally applicable*.”¹⁶⁹ Later she once again omitted mention of neutrality from her discussion of free exercise and spoke only of general applicability: “[T]he Free Exercise Clause is properly understood as an affirmative guarantee of the right to participate in religious activities without impermissible governmental interference, even where a believer’s conduct is in tension with a law of *general application*.”¹⁷⁰ Finally, Justice O’Connor condemned the idea that the Constitution condones “a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law.”¹⁷¹ Though some other courts have completely ignored neutrality,¹⁷² most courts commit the second type of flawed reasoning: at least mentioning neutrality but performing no analysis beyond that for general applicability, asking only whether the law applies equally.¹⁷³

When courts misapply a negative definition of neutrality or conflate neutrality with general applicability, they will draw a logically flawed conclusion about whether a given law is neutral. Currently, many courts address general-applicability de-

168. *Id.*

169. *City of Boerne v. Flores*, 521 U.S. 507, 546 (1997) (O’Connor, J., dissenting) (emphasis added).

170. *Id.* at 564 (emphasis added).

171. *Id.*

172. *See, e.g.*, *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1305 (9th Cir. 1991) (failing to mention neutrality as a factor in the *Smith* analysis when describing its interpretation of the *Smith* test and ultimately applying the *Sherbert* test instead).

173. *See, e.g.*, *Am. Life League v. Reno*, 47 F.3d 642, 654 (4th Cir. 1995) (“Under the Act . . . [t]he same conduct is outlawed for all. Therefore, the Act is a generally applicable law, neutral toward religion. It does not offend the First Amendment’s Free Exercise Clause.”); *First Assembly of God v. Collier Cty.*, 20 F.3d 419, 423 (11th Cir. 1994) (finding an ordinance neutral and generally applicable based only on reasoning that regulation applied to all homeless shelters).

fenses without mentioning neutrality at all.¹⁷⁴ Yet, if a law burdening religious practice is not neutral, it is subject to strict scrutiny.¹⁷⁵ Determining whether or not a law is neutral is thus of critical importance. Yet, as seen, Free Exercise Clause jurisprudence has largely neglected the concept of neutrality. This raises the question: what should a proper neutrality analysis look like?

III. A PATH FORWARD: NEUTRALITY IN DISCRIMINATION AND FREE SPEECH JURISPRUDENCE

The way the Court interprets neutrality in other contexts should inform how neutrality is interpreted in free exercise cases because the law should be as coherent and consistent as possible.¹⁷⁶ Neutrality is a pervasive and more developed concept in both discrimination and Free Speech Clause jurisprudence, which are both closely related to free exercise law.¹⁷⁷ Because of that kinship, the importance of interpreting like terms consistently is even more crucial. The desire for consistency in the application of neutrality between the Court's Free Speech Clause and Free Exercise Clause jurisprudence is especially important because both of those freedoms are protected by the First Amendment.¹⁷⁸

174. See, e.g., *Okwedy v. Molinari*, 69 Fed. App'x 482, 484 (2d Cir. 2003) (rejecting a Free Exercise Clause claim supposedly under the reasoning in *Smith* and *Lukumi* without ever mentioning neutrality).

175. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

176. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 516 (1996).

177. See *Lee v. Weisman*, 505 U.S. 577, 591 (1992) (explaining that although the Establishment Clause analysis differs from the speech provisions of the First Amendment, the Free Exercise Clause "has close parallels in the speech provisions of the First Amendment"); cf. Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 734–35 (2008) (explaining the similarities between Free Exercise Clause analysis and Equal Protection Clause analysis).

178. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

A. Neutrality in Discrimination Jurisprudence

Justice O'Connor has the view that "the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause,"¹⁷⁹ and "the language of the Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity."¹⁸⁰ Yet, Equal Protection Clause jurisprudence has a more developed view of neutrality, which results in the Court applying heightened scrutiny much more often when assessing discrimination.¹⁸¹ Unlike how neutrality has often been employed in free exercise cases, discrimination jurisprudence does not require a court to implicitly (or explicitly) find animus or hostility on the part of the lawmaker for the law to be "nonneutral."¹⁸² A court may look to the effects of the law when assessing whether discrimination legislation is neutral.¹⁸³ Under an equal protection analysis, one does have to show a discriminatory purpose.¹⁸⁴ That purpose determination, however, is different than proof of animus or hostility.¹⁸⁵ Moreover, in the same case in which the Court asserted that a law's disproportionate impact *alone* will not make that law un-

179. *Emp't Div. v. Smith*, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring in judgment).

180. *Id.* at 901–02.

181. *See id.* at 886 n.3 (majority opinion); *cf. Locke v. Davey*, 540 U.S. 712, 730 n.2 (2004) (Scalia, J., dissenting) ("If [a rational basis] is all the Court requires, its holding is contrary not only to precedent, but to common sense. If religious discrimination required only a rational basis, the Free Exercise Clause would impose no constraints other than those the Constitution already imposes on all government action.").

182. *See Hassan v. City of N.Y.*, 804 F.3d 277, 298 (3d Cir. 2015); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) ("Even in the context of race, where the nondiscrimination norm is most vigilantly enforced, the Court has never required proof of discriminatory animus, hatred, or bigotry." (citations omitted)).

183. *See Rogers v. Lodge*, 458 U.S. 613, 618 (1982) (holding if the effects of a facially race-neutral law "bear[] more heavily on one race than another" it may violate equal protection (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976))).

184. *See Davis*, 426 U.S. at 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."); *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (holding that discriminatory purpose requires that the classification must have been adopted because of, not despite, the disparate impact).

185. *See Shrum v. City of Coweta*, 449 F.3d 1132, 1144–45 (10th Cir. 2006) (distinguishing between purposeful discrimination with an unrelated and unprejudiced aim, such as saving money, and purposeful discrimination based on animus or hostility).

constitutional, the Court clarified that a law's discriminatory impact *is* relevant "in cases involving Constitution-based claims of racial discrimination" because the effects of a formally neutral law may show that the law actually lacks neutrality.¹⁸⁶ Though Equal Protection Clause jurisprudence does ask whether discrimination was a purpose of the law, animus is not necessary for a law to lack neutrality, and the operation of the law is relevant to the law's neutrality.

The Court has developed an even stricter jurisprudence concerning neutrality around Congress's anti-discrimination statutes, such as Title VII of the Civil Rights Act of 1964, and other statutes with anti-discrimination components, such as the Voting Rights Act. Under that jurisprudence, if a law that is facially neutral can be shown to disproportionately burden a distinct group, then it is no longer considered neutral, regardless of whether the legislators had a discriminatory purpose.¹⁸⁷ In fact, "[t]o establish a prima facie case of discrimination a plaintiff must show [only] that the facially neutral employment practice had a significantly discriminatory *impact*"¹⁸⁸ because a discriminatory impact can negate the supposed neutrality.

In coming to that decision, the Court relied on *Griggs v. Duke Power Co.*,¹⁸⁹ which held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if [their effect is] to 'freeze' the status quo of prior discriminatory employment practices."¹⁹⁰ *Connecticut v. Teal*¹⁹¹ also reaffirmed that the effects of a formally neutral law can reveal its discriminatory nature.¹⁹² Although the employment practices in that case were neutral in the sense that the "requirements applied equally to white and black employees and applicants"¹⁹³ and "there was no[] showing that the employer had a racial purpose or invidious intent in adopting the[] requirements,"¹⁹⁴ they were "invalid because they had a

186. See *Davis*, 426 U.S. at 241.

187. *Connecticut v. Teal*, 457 U.S. 440, 448 (1982).

188. *Id.* at 446 (emphasis added).

189. 401 U.S. 424 (1971).

190. *Id.* at 430.

191. 457 U.S. 440 (1982).

192. See *Teal*, 457 U.S. at 451.

193. *Id.* at 446.

194. *Id.*

disparate impact.”¹⁹⁵ The Court has also struck down formally neutral voting practices, such as literacy tests, because they had a discriminatory impact, often disproportionately denying certain races the right to vote.¹⁹⁶ Both the form and operation of the law matter when assessing neutrality in statutory discrimination jurisprudence.¹⁹⁷

Yet, in *Smith*, Justice Scalia, writing for the Court, held that “requirements applied equally,” lacking “invidious intent,”¹⁹⁸ and only “hav[ing] the effect of burdening a particular religious practice[,] need not be justified by a compelling governmental interest.”¹⁹⁹ That assertion implies that such a law fits into the Court’s definition of neutral. Later, Justice Scalia, the author of *Smith*, walked back this position,²⁰⁰ and fervently criticized the Court’s contemporary treatment of burdens to religion:

The Court has not approached other forms of discrimination this way. When we declared racial segregation unconstitutional, we did not ask whether the State had originally adopted the regime, not out of “animus” against blacks, but because of a well-meaning but misguided belief that the races would be better off apart. *It was sufficient to note the current effect of segregation on racial minorities.*²⁰¹

In the years since *Smith*, the Court has also reaffirmed the notion that the effects of a facially race-neutral law could render that law not race-neutral. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,²⁰² the

195. *Id.*

196. *See e.g.*, *Gaston Cty. v. United States*, 395 U.S. 285, 293 (1969).

197. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

198. *See Teal*, 457 U.S. at 446 (citing *Griggs*, 401 U.S. at 431).

199. *Emp’t Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990). Scalia in that footnote also argues that “laws that have the effect of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause.” *Id.* (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

200. *See Locke v. Davey*, 540 U.S. 712, 732 (2004) (Scalia, J., dissenting) (“We do not pause to investigate whether [a law] was actually trying to accomplish the evil the Constitution prohibits. It is sufficient that the citizen’s rights have been infringed. [It does not] matter that a legislature consists entirely of the purehearted, if the law it enacts *in fact* singles out a religious practice for special burdens.” (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559 (1993) (Scalia, J., concurring in part and concurring in judgment))).

201. *Id.* (emphasis added).

202. 135 S. Ct. 2507 (2015).

Court held that to assess the neutrality of an employer's actions under the Fair Housing Act, it must look to the effects of those actions because "the text of [the] provisions 'focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer' and therefore compels recognition of disparate-impact."²⁰³ Similarly, the text of the First Amendment concerns the *effects* that any law passed by Congress has on people's free exercise of religion.²⁰⁴ Because the "text refers to the consequences of actions and not just to the mindset of actors," neutrality "must be construed to encompass disparate-impact."²⁰⁵

To maintain consistency between bodies of law, courts should look to the effects of a statute when determining whether or not it is neutral in the free exercise context. In the free exercise cases, the burden often falls disproportionately on those who have religious beliefs and act on those religious beliefs. Indeed, how can one feel a burden to his or her religious practice if one does not practice religion? For example, the only ordinance that the Court has found not to be neutral involved a prohibition on sacrificing animals.²⁰⁶ The Court reasoned that though the ordinance facially prohibited everyone from sacrificing animals, in application it only affected practitioners of the Santeria religion.²⁰⁷ In other words, "the burden of the ordinance, *in practical terms*, [fell] on the Santeria adherents and almost no others."²⁰⁸ Yet, in other cases a court has explicitly said, "The Free Exercise Clause is not violated, [thus the law must be considered neutral], even though a group motivated by religious reasons may be more likely to engage in the proscribed conduct."²⁰⁹ The meaning ascribed to the word "neutral" in free exercise cases is inconsistent among free exercise decisions and inconsistent with discrimination jurisprudence. Like courts determining neutrality in discrimination cases,

203. *Id.* at 2518 (quoting *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005)).

204. *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring in part and concurring in judgment) ("The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted."); *see also* U.S. CONST. amend. I.

205. *Inclusive Communities Project*, 135 S. Ct. at 2518.

206. *See Lukumi*, 508 U.S. at 536.

207. *See id.*

208. *Id.* (emphasis added).

209. *Stormans v. Selecky*, 586 F.3d 1109, 1131 (9th Cir. 2009).

courts handling free exercise cases should not require proof of animosity to show a law lacks neutrality, and should consistently look to the effects of a law to determine its neutrality. That does not mean that any disparate impact will prove that a law lacks neutrality and trigger strict scrutiny. “Even completely neutral practice will inevitably have *some* disproportionate impact on one group or another.”²¹⁰ But it does mean that impact should be a factor in assessing the neutrality of a law in the free exercise context as it is in the equal protection context.

B. Neutrality in Free Speech Clause Jurisprudence

Free Speech Clause jurisprudence shares many characteristics with Free Exercise Clause jurisprudence.²¹¹ Both bodies of law are rooted in the First Amendment; both doctrines purport that a law burdening its respective right is subject to strict scrutiny unless the law is both neutral and generally applicable. Likewise, neutrality and general applicability are two distinct concepts in both doctrines, though, as described above, Free Exercise Clause jurisprudence often conflates the two. Both doctrines start their neutrality analysis by determining if a law is facially neutral, and if the law fails that test, then, under both doctrines, it is reviewed under strict scrutiny. However, that is where the similarities between the two doctrines’ neutrality analyses end. The neutrality analysis in Free Speech Clause jurisprudence is quite developed,²¹² but in Free Exercise Clause jurisprudence, it is still immature.

The traditional content-neutrality inquiry in Free Speech Clause jurisprudence requires neutrality in each of three respects: “the law’s application, the asserted government justification, and the governmental motive.”²¹³ To be neutral in application, the law cannot “by terms of its application, ha[ve] an

210. *Inclusive Communities Project*, 135 S. Ct. at 2545 (Alito, J., dissenting) (quoting *City of L.A. v. Manhart*, 435 U.S. 702, 711 n.20 (1978)).

211. See *Lee v. Weisman*, 505 U.S. 577, 591 (1992) (“The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment.”).

212. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983) (“[The content-neutrality inquiry is] the most pervasively employed doctrine in the jurisprudence of free expression.”).

213. Mark Rienzi & Stuart Buck, *Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test*, 82 FORDHAM L. REV. 1189, 1191 (2013).

'unconstitutional *effect*' on First Amendment freedoms"²¹⁴ and cannot be applied in a discriminatory way.²¹⁵ To be a neutral government justification, the law must be "justified without reference to the content of the regulated speech."²¹⁶ In other words, the law is not neutral in its justification if the "interest is served only by restricting speech of a particular content."²¹⁷ Finally, to be neutral under the governmental motive inquiry, "the legislature must not have acted with the *motive* of favoring or disfavoring a particular viewpoint or content"²¹⁸ or "designed [the law] to target [specific] speakers and their messages for disfavored treatment."²¹⁹

Although a law must be neutral in all three respects to escape strict scrutiny, the first two parts are more objective and, thus, less subject to manipulation.²²⁰ Though necessary as part of a larger test, "inquiries into congressional motives . . . are a hazardous matter,"²²¹ and "direct inquiry into motives . . . very rarely will prove productive."²²² One reason is that few legislatures would admit to or design a law that explicitly revealed animus or discriminatory intent.²²³ Because of that susceptibil-

214. Kagan, *supra* note 176, at 413 (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)); see *McCullen v. Coakley*, 134 S. Ct. 2518, 2549 (2014) (Alito, J., concurring in judgment) ("While such a law would be content neutral on its face, there are circumstances in which a law forbidding all speech at a particular location would not be content neutral in fact.").

215. See *Hoye v. City of Oakland*, 653 F.3d 835, 850–51 (9th Cir. 2011) (holding that though the statute applied neutrally on its face, it was not neutral because it was enforced in a discriminatory way); Kagan, *supra* note 176, at 463–64 (explaining that laws turning on communicative intent seem content neutral on their face but are actually not content neutral because they allow content based actions in application).

216. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

217. *Rienzi & Buck*, *supra* note 213, at 1207.

218. *Id.* at 1194; see also *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 645–46 (1994) (facially neutral law enacted for the purpose of suppressing speech about a particular topic is not neutral).

219. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2663–64 (2011).

220. See *Rienzi & Buck*, *supra* note 213, at 1200.

221. *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

222. Kagan, *supra* note 176, at 440; see also *id.* at 490 ("The error . . . lies in the decision to evaluate reasons by asking questions about them.").

223. See *Rienzi & Buck*, *supra* note 213, at 1195, 1199; see also Kagan, *supra* note 176, at 437 ("Officials will not admit (often, will not themselves know) that a regulation of speech stems from hostility or self-interest. They will invoke in each case a plausible interest, divorced from ideological disapproval.").

ity to manipulation, relying only on the motive test to determine neutrality is particularly dangerous, yet that is essentially the only test that courts employ to decide neutrality in free exercise cases.²²⁴ When courts focus only on the motive prong, as in free exercise neutrality analysis, or call it the “principal inquiry”²²⁵ as in free speech, they “confuse[] means with ends”²²⁶ and employ “a content-neutrality inquiry that focuses on such direct inquiries into motive [that it is] avoided too easily to do any real work.”²²⁷ Indeed, the Court has repeatedly “rejected the argument that ‘discriminatory . . . treatment is suspect under the First Amendment only when the legislature *intends* to suppress certain ideas,’”²²⁸ and has instead embraced the idea that ostensibly “[i]nnocent motives do not eliminate the danger of censorship.”²²⁹ Like the free speech neutrality analysis, Free Exercise Clause jurisprudence should require neutrality in a law’s application and the government’s asserted justification. Free Exercise Clause jurisprudence should also take heed of the warnings from Free Speech Clause jurisprudence about the motive inquiry when assessing neutrality.

Free Exercise Clause jurisprudence should assess neutrality in a more consistent and robust way. To do so, it should look to the traditional free speech neutrality doctrine as well as the disparate impact assessment used when considering neutrality in discrimination jurisprudence.

224. The use of only the third test is also becoming an issue in determining neutrality in Free Speech Clause jurisprudence through the secondary effects doctrine. See Rienzi & Buck, *supra* note 213, at 1204 (“The secondary effects doctrine, a fertile ground for abuse, insidiously eviscerates free expression by allowing government officials to characterize content-based regulations as content-neutral. In practice, government officials use the doctrine to silence expression they dislike.”); cf. Kagan, *supra* note 176, at 484 (“[T]he secondary effects doctrine fits uneasily with the rest of First Amendment jurisprudence.”).

225. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

226. Rienzi & Buck, *supra* note 213, at 1234.

227. *Id.*

228. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991)).

229. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015).

IV. CONCLUSION

First Amendment Free Exercise Clause and Establishment Clause jurisprudence both incorporate neutrality into their analyses, and in both the neutrality doctrine is inconsistent rhetorically and legally, though in distinct ways. In Establishment Clause jurisprudence, the purported test for neutrality, the *Lemon* test, is often ignored and is inconsistently applied. Though the *Lemon* test has not been formally replaced, it has morphed into the endorsement test. Under that modified test, if a reasonable observer could perceive a government action as an endorsement of anything religious, as opposed to an endorsement of the secular, that government action is unconstitutional. The idea that the absence of the religious and the endorsement of the secular is neutral conflicts with Supreme Court precedents²³⁰ as well as with contemporary philosophical thought²³¹ and common sense.

Free Exercise Clause jurisprudence also looks to neutrality in its analysis. Under *Smith*, neutrality and general applicability are necessary conditions for a law to escape strict scrutiny. Although general applicability is more readily understood, Free Exercise Clause jurisprudence never defines neutrality in the positive, only occasionally providing negative definitions that show what characteristics reveal that a law lacks neutrality. That absence of definition has led lower courts to erroneously assume neutrality either by concluding a law is neutral from a rule about when a law is *not* neutral or by analyzing general applicability and neutrality in the same way. Some lower courts have gone so far as to require a showing of lawmaker

230. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 598 (1992) (“A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the ‘callous indifference’ we have said was never intended by the Establishment Clause.” (citations omitted)); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (“To hold that [the state may not accommodate the public service to the needs of the religious] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion.”).

231. See, e.g., Ahdar, *supra* note 23, at 407–08; Horowitz, *supra* note 33, at xxiv.

animus to find that a law is not neutral. Given the confusion around what neutrality requires, courts should look to Free Speech Clause and Equal Protection Clause jurisprudence to determine what constitutes a neutral law.

Our current Establishment Clause and Free Exercise Clause law concerning neutrality displays a worrisome trend of embracing the secular and excluding the religious. Its own proclamations notwithstanding, that trend is not neutral. And because neutrality is at the core of the meaning of the First Amendment, it is not constitutional either.

Kelsey Curtis

A CONSTITUTIONAL OUTLIER: LEGITIMACY AS A STATE INTEREST AND ITS IMPLICATIONS IN ELECTION LAW

INTRODUCTION

A common theme throughout election law jurisprudence is the idea of *legitimacy*. As one scholar put it, “election law jurisprudence is preoccupied with appearances.”¹ Whether one refers to it as legitimacy or appearances, the idea is the same: because elections undergird a functioning democracy,² people must have trust and confidence in those elections and their results.³ Electoral legitimacy, while always important, is at the center of many important debates unfolding right now. James Clapper, the former director of national intelligence, has reported that intelligence agencies’ assessment of Russian interference in the 2016 election “cast doubt on the legitimacy” of President Donald Trump’s victory.⁴ President Trump added an asterisk of his own to the 2016 election results when he claimed that he lost the popular vote because millions of undocumented immigrants voted against him.⁵ In addition to the concerns about the 2016 election, the Supreme Court’s campaign finance

1. John Copeland Nagle, *The Appearance of Election Law*, 31 J. LEGIS. 37, 39 (2004).

2. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (“Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964))).

3. *Cf. U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973) (noting that the government has an interest in reducing the perception of political influence “if confidence in the system of representative Government is not to be eroded to a disastrous extent.”).

4. Bryan Logan, *JAMES CLAPPER: US intelligence assessment of Russia’s election interference ‘cast doubt on the legitimacy’ of Trump’s Victory*, BUS. INSIDER (Sep. 23, 2017), <http://www.businessinsider.com/trump-legitimacy-russia-election-interference-james-clapper-us-intelligence-assessment-2017-9> [<https://perma.cc/C44E-74MA>].

5. Abby Phillip & Mike DeBonis, *Without evidence, Trump tells lawmakers 3 million to 5 million illegal ballots cost him the popular vote*, WASH. POST (Jan. 23, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/01/23/at-white-house-trump-tells-congressional-leaders-3-5-million-illegal-ballots-cost-him-the-popular-vote/> [<https://perma.cc/Y2FY-8DXH>].

decision in *Citizens United v. FEC*⁶ has resulted in worries about political corruption; one *New York Times* headline read “American Democracy Is Drowning in Money.”⁷ As with any important political debate, legitimacy and its appearance also matter in the Supreme Court. For example, in the oral argument in *Gill v. Whitford*⁸ this Term, Chief Justice Roberts explicitly questioned whether hearing political gerrymandering claims would hurt the legitimacy of the Supreme Court.⁹ In the Court’s oral argument for *Minnesota Voters Alliance v. Mansky*,¹⁰ also this Term, one of the advocates explicitly argued that speech restrictions in polling places could be justified in order to avoid a “perception problem.”¹¹ Although there are many contexts in which legitimacy rears its head in election law,¹² this Note focuses on two: voter ID laws and campaign finance.

Using *Crawford v. Marion County Election Board*¹³ and *Buckley v. Valeo*¹⁴ as case studies, this Note will explore the Supreme

6. 558 U.S. 310 (2010).

7. Celestine Bohlen, *American Democracy Is Drowning in Money*, N.Y. TIMES (Sep. 20, 2017), <https://www.nytimes.com/2017/09/20/opinion/democracy-drowning-cash.html> [<https://perma.cc/H6Y5-LQGH>] (describing the United States’ system of money in politics as “legalized corruption”).

8. 137 S. Ct. 2268 (2017) (mem.).

9. Transcript of Oral Argument at 36–38, *Gill v. Whitford*, No. 16–1161 (U.S. argued Oct. 3, 2017), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1161_mjn0.pdf [<https://perma.cc/5KBS-XKF3>].

10. 138 S. Ct. 446 (2018) (mem.).

11. Transcript of Oral Argument at 51–53, *Minnesota Voters Alliance v. Mansky*, No. 16–1435 (U.S. argued Feb. 25, 2018), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1435_2co3.pdf [<https://perma.cc/KW6Z-3PN2>] (After a question from Justice Kagan asking why a polling place should have a sense of decorum, the advocate responded, inter alia, “[F]or that process to have integrity, the beginning of the process, the act of voting itself has to have integrity. And the integrity is not just actual integrity that somebody—that everybody who is entitled to vote was able to vote. It has to be perceived as having integrity. And one of the problems with allowing campaign or political material into the polling place is it creates a perception problem.”).

12. See Nagle, *supra* note 1 at 39–42 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976); *McConnell v. FEC*, 540 U.S. 93 (2003); *Shaw v. Reno*, 509 U.S. 630 (1993); *Bush v. Gore*, 531 U.S. 98 (2000)) (finding that appearance of legitimacy is a common theme in campaign finance regulation, reapportionment, and vote counting); see also *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548 at 565, 567 (holding that “plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited” based, in part, on a rationale of avoiding erosion of public trust).

13. 553 U.S. 181 (2008).

Court's willingness to accept legitimacy as a government interest in voter ID and campaign finance regimes, respectively. Part I compares legitimacy justifications with public perception justifications in other constitutional contexts, concluding that the Supreme Court's embrace of these justifications in election law is in tension with its rejection of them in other First and Fourteenth Amendment contexts. Part II suggests that treating election law differently from other areas of constitutional law is not easily justified and warrants further discussion. Part III shows that the Court's consideration of legitimacy interests can lead to a lower standard of review, often resembling rational basis. Part IV argues that legitimacy justifications counterintuitively give partisan actors *ex ante* incentives to *damage* electoral legitimacy. Part V contends that legitimacy justifications create a dangerous slippery slope for future election law cases. Part VI concludes that the Supreme Court should take a harder look at allowing public perceptions as a state interest in election law jurisprudence.

I. PUBLIC PERCEPTIONS IN FIRST AND FOURTEENTH AMENDMENT JURISPRUDENCE

The Supreme Court has generally declined to consider public perceptions as a state interest in its constitutional jurisprudence, leaving election law as an outlier in the doctrine. When evaluating Fourteenth Amendment claims, the Supreme Court generally uses three standards of review: strict scrutiny, intermediate scrutiny, and rational basis review.¹⁵ The most exacting review is strict scrutiny, which is generally reserved for classifications based on race or national origin and laws affecting fundamental rights.¹⁶ In order to withstand strict scrutiny, the government actor in question must prove that its actions serve a "compelling interest" and are "narrowly tailored" to that end.¹⁷ At the other end of the spectrum is rational basis review, which applies to non-fundamental social and economic legislation and allows nearly any law to stand so long as there

14. 424 U.S. 1 (1976).

15. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

16. See *id.*

17. *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

is a rational justification for the law, even if the justification is questionable or post-hoc.¹⁸ In between those two extremes lies intermediate scrutiny, which has traditionally been applied to classifications based on sex or illegitimacy and requires that the classification “must be substantially related to an important governmental objective.”¹⁹

This three-tiered standard of review framework is often relevant in election law. Because First Amendment rights are fundamental, classifications affecting political speech or campaign finance trigger a heightened form of scrutiny, sometimes on par with strict scrutiny.²⁰ Although there is some debate over whether voting is a fundamental right,²¹ the Court nevertheless applies a heightened balancing test that weighs the “character and magnitude” of the voting burden against the state’s interests and justifications, while also considering tailoring.²² Thus far, the Court has declined to label this voting rights balancing test with one of the traditional levels of scrutiny.²³ First and Fourteenth Amendment jurisprudence analyzes constitutional

18. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (“The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.”); see also *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (“It is, of course, ‘constitutionally irrelevant whether [the reasoning proffered by the government in rational basis review] in fact underlay the legislative decision . . .’” (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1900))).

19. *Clark*, 486 U.S. at 461.

20. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990) (citing *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976)) (finding that if a law “burdens the exercise of political speech,” it must be “narrowly tailored to serve a compelling state interest.”); see generally Matthew D. Bunker et al., *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL’Y 349 (2011).

21. Compare *Clark*, 486 U.S. at 461 (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 672 (1966), to suggest that voting is a fundamental right worthy of “the most exacting scrutiny”) and *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (citing *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969), a voting rights case, as an example of “personal rights protected by the Constitution.”), with *Bush v. Gore*, 531 U.S. 98, 104 (2000) (“The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.”).

22. See *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

23. See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–91 (2008); *Burdick*, 504 U.S. at 433–34.

rights under this framework in both the election law and non-election law context.²⁴

A. *Fourteenth Amendment*

1. *Strict Scrutiny Review*

Under the strict scrutiny triggered by racial classifications, the Court has refused to consider public perception as a state justification. In *Palmore v. Sidoti*,²⁵ the Supreme Court reviewed a child custody case in which a Florida state court awarded custody to the father instead of the mother, in part because the mother was in an interracial relationship.²⁶ The Florida court believed that having an African American stepfather would cause the child to be “more vulnerable to peer pressures, [and to] suffer from the social stigmatization that is sure to come.”²⁷ The Court did not disagree with the lower court’s premise, noting that one would have to “ignore reality” to suggest that there was no longer racial stigma with which the child might have to contend.²⁸ Nonetheless, the racial classification triggered strict scrutiny, and the Supreme Court concluded that the Florida court’s consideration of race in the custody context was impermissible under the Fourteenth Amendment’s Equal Protection Clause.²⁹ The *Palmore* Court’s reasoning is worth quoting at length, given its relevance:

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. *The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.* Public officials sworn to uphold the

24. See *infra* Section II.A and Part III.

25. 466 U.S. 429 (1984).

26. See *id.* at 430–31.

27. *Id.* at 431.

28. *Id.* at 433.

29. See *id.* at 432–34 (“Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be ‘necessary . . . to the accomplishment’ of their legitimate purpose.” (citations omitted)).

Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.³⁰

Thus, the *Palmore* Court refused to consider private biases and their effects as a justification for limiting an individual's Fourteenth Amendment rights.³¹

2. Heightened Review

Under the heightened review triggered by a fundamental rights deprivation, the Court has refused to consider public perception as a valid state justification. In *O'Connor v. Donaldson*,³² a patient was confined against his will in a mental institution for fifteen years, even though he was not dangerous to himself or others.³³ The patient sued under 42 U.S.C. § 1983, alleging that the mental institution staff had deprived him of his due process right to liberty.³⁴ Finding that the patient's physical liberty had been infringed, the Court considered a possible justification: keeping the patient away from the public, which may harbor stigma against the mentally ill.³⁵ The Court roundly rejected this justification, instead holding: "*Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.*"³⁶ Although the Court did not explicitly state a standard of review, it spoke in terms of "every man's constitutional right to liberty," and rejected multiple rational bases for confinement, suggesting that it was either employing strict scrutiny or some other form of heightened review.³⁷ Thus, *Donaldson* rejects the idea that public distaste for an individual or his practices may constitute an interest sufficient to deprive that individual of a fundamental right.

30. *Id.* at 433 (emphasis added) (footnote omitted) (internal quotation marks omitted).

31. *See id.* at 433–34.

32. 422 U.S. 563 (1975).

33. *See id.* at 564, 573.

34. *See id.* at 565.

35. *See id.* at 575–76.

36. *Id.* (emphasis added) (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *Cohen v. California*, 403 U.S. 15, 24–26 (1971); *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971); *Street v. New York*, 394 U.S. 576, 592 (1969)).

37. *Id.* at 573, 575–76 (rejecting rational bases such as providing the mentally ill with a "living standard superior to that they enjoy in the private community").

The Court's rejection of private biases as a justification for infringing on constitutional rights also applies to property rights. In *Buchanan v. Warley*,³⁸ a white man tried to sell a black man his home, but the transaction was nullified by a city ordinance that forbade African Americans from buying homes in white neighborhoods.³⁹ The white seller sued, arguing that his right to dispose of his property as he saw fit had been abridged.⁴⁰ The city argued that the ordinance "promote[d] the public peace by preventing race conflicts."⁴¹ Working under the premise that the right to use property was a fundamental right under the Fourteenth Amendment, the Court wholly rejected the city's justification.⁴² In doing so, the Court implicitly rejected the use of widely held prejudice as a permissible justification for infringement of constitutional rights.⁴³

3. Rational Basis Review

Under rational basis review, the Court has also refused to consider public perception as a state justification. In *City of Cleburne v. Cleburne Living Center*,⁴⁴ a Texas city denied a permit for the construction of a group home for the intellectually disabled.⁴⁵ The basis for the denial was, among other reasons, negative attitudes and fears about the intellectually disabled held by nearby property owners.⁴⁶ The Supreme Court refused to apply any heightened scrutiny, explicitly conducting mere rational basis review.⁴⁷ Despite this low hurdle, the Court found that the permit denial violated Equal Protection, and, in doing so, rejected the city's justification relating to public perceptions of

38. 245 U.S. 60 (1917).

39. *See id.* at 72–73.

40. *See id.* at 81.

41. *Id.*

42. *See id.*

43. *See id.* ("Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution."); *see also* *Palmore v. Sidoti*, 466 U.S. 429, 433–34 (1984) (citing *Buchanan* for the proposition that the Court will not entertain racial prejudice to justify racial classifications).

44. 473 U.S. 432 (1985).

45. *See id.* at 435.

46. *See id.* at 437, 448.

47. *See id.* at 442–47.

the intellectually disabled.⁴⁸ Citing *Palmore*, the Court held that “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently,” and “the [c]ity may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic.”⁴⁹ Thus, even under the Court’s most deferential standard of review, it has refused to entertain state justifications based on mere public perceptions.

B. First Amendment

In *Forsyth County v. Nationalist Movement*,⁵⁰ the Supreme Court considered a First Amendment challenge that arose when the Nationalist Movement, an openly racist organization, planned a protest of Martin Luther King Jr. Day in a county fraught with recent racially-motivated violence.⁵¹ The county attempted to impose a \$100 fee on the Nationalist Movement pursuant to a local ordinance that allowed local officials to charge event organizers for the security of their public demonstrations.⁵² In order to determine how much security an event needed, and consequently, how much to charge its organizers, the county needed to consider how much controversy the event would spark.⁵³ The county argued that this fee structure was content-neutral “because it [was] aimed only at a secondary

48. See *id.* at 448–50.

49. *Id.* at 448.

50. 505 U.S. 123 (1992).

51. *Id.* at 124–27. The Court recounted that only two years earlier, a civil rights demonstration was disrupted by 400 counterdemonstrators who hurled racial slurs and beer bottles at civil rights activists. In response, civil rights activists and politicians returned with 20,000 marchers and held “the largest civil rights demonstration in the South since the 1960’s.” *Id.* at 125. That subsequent rally was heavily protested and required more than 3,000 police and National Guardsmen to protect the marchers.

52. See *id.* at 126–27.

53. See *id.* at 134 (“In order to assess accurately the cost of security for parade participants, the administrator must necessarily examine the content of the message that is conveyed, estimate the response of others to that content, and judge the number of police necessary to meet that response Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.” (citations omitted) (internal quotation marks omitted)).

effect—the cost of maintaining public order.”⁵⁴ The Court rejected the argument, finding that the ordinance was unconstitutional under the First Amendment.⁵⁵ The Court reasoned that the fees were “associated with the public’s reaction to the speech,” essentially making it a content-based restriction.⁵⁶ In doing so, the Court squarely rejected a public perception-based state interest, finding it impermissible to restrict speech “simply because it might offend a hostile mob.”⁵⁷ Thus, the Court’s First Amendment jurisprudence also rejects public hostility as a valid state interest.⁵⁸

C. Election Law Stands Alone

By relying on legitimacy arguments grounded in public perception, the Supreme Court’s election law jurisprudence is highly unusual. Election law seems to be the only place where the Supreme Court is willing to rely on “mere negative attitudes[] or fear”⁵⁹ to substantiate government interests.⁶⁰ As

54. *Id.*

55. *See id.* at 134–37.

56. *Id.* at 134.

57. *Id.* at 134–35 (footnote omitted) (citations omitted).

58. *See* Cheryl A. Leanza, *Heckler’s Veto Case Law As A Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1311 (2007) (“In case after case, Courts of Appeals and the Supreme Court emphasize that the role of the state is to promote speech despite hostile circumstances.”). The author does note that the state will be allowed to protect speech if the situation becomes “truly dangerous,” so this principle is not an unlimited one. *See id.* However, at the point that a speaker creates a truly dangerous situation, the state interest would seem to no longer be appearances, but preventing violence.

59. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

60. There are two minor caveats to this point. First, the Court entertains appearance-based arguments in the Tenth Amendment context. In *New York v. United States*, 505 U.S. 144 (1992), for example, the Court refused to allow the federal government to commandeer state actors because doing so would diminish “the accountability of both state and federal officials.” *Id.* at 168–69. In other words, if state actors were being used for federal purposes, *the public* would not know who was responsible for the policy being enacted: the state government or the federal government. This caveat is minor because (1) although masked as a federalism argument, this justification is really just an extension of election law, as it is concerned with the electorate knowing who is responsible for enacting policies, *see id.* at 169 (“But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”); and (2) the accountability justification is used to justify limitations on *federal* authority, not *individual* rights, *see id.*

noted earlier, election law relies on the public appearance of legitimacy to justify limitations on fundamental rights. This departure from constitutional jurisprudence is most marked in the voter ID and campaign finance contexts.

In the voter ID context, the Supreme Court, in *Crawford*, held that the government had an interest in “public confidence in the integrity of the electoral process,” *independent* of the actual integrity of the electoral process.⁶¹ In the campaign finance context, the *Buckley* Court held that the government had an interest in preventing the “appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”⁶² Put in the larger context of constitutional law, these arguments are strange. Whereas *Palmore*, *Donaldson*, *Buchanan*, *City of Cleburne*, and *Forsyth County* all firmly rejected the idea that aggregated negative private opinions could serve as a permissible state in-

Second, the Court also uses public perception-based arguments in the Eighth Amendment context in determining what is cruel and unusual. In particular, the Eighth Amendment is informed by “the evolving standards of decency that mark the progress of a maturing society.” *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (citations omitted). Thus, public opinion may affect an individual’s Eighth Amendment rights. This caveat, however, is limited because public opinion generally *expands* Eighth Amendment rights, as opposed to acting as a justification to limit them. See generally Brian W. Varland, *Marking the Progress of A Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency*, 28 *HAMLIN L. REV.* 311 (2005) (collecting cases). After all, given the Court’s statements like “mark[ing] the progress of a maturing society,” *Furman*, 408 U.S. at 242 (emphasis added), and “public opinion becomes *enlightened by a humane justice*,” *Weems v. United States*, 217 U.S. 349, 378 (1910) (emphasis added), it seems unlikely that the Court would entertain arguments that a more enlightened public now finds a more barbaric form of punishment acceptable. Cf. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (illustrating that once an arguably constitutional right is explicitly granted, it is extremely difficult to take it back).

61. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008).

62. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976); see also *McCutcheon v. FEC.*, 134 S. Ct. 1434, 1450 (2014) (“This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption.”).

terest,⁶³ *Crawford* and *Buckley* allow those private opinions to stand as a legitimate interest.⁶⁴

II. NO JUSTIFICATION FOR DIFFERENTIAL TREATMENT

There is no inherent distinction between the Court's consideration of public perceptions in the election law context and its refusal to do so in other Fourteenth Amendment and First Amendment contexts. One could argue that it makes sense to consider public perceptions in the election law context, but *not* in other Fourteenth and First Amendment cases because (1) the public's perception of legitimacy in its elections matters because trust in electoral outcomes is fundamentally important for a democratic society and, as a result, may be used as a basis for limiting constitutional rights,⁶⁵ but (2) the public's hateful perceptions of others, as in *Palmore*, have no value and, as a result, should not be used as a basis for limiting constitutional rights. However, the problem with this distinction is that the *Palmore*-type cases identified significant interests stemming directly from the hostile opinions. In *Palmore*, the Court articulated a child welfare concern, believing that "[t]here [was] a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin."⁶⁶ In *Forsyth County*, the Court identified an interest in covering "the cost of necessary and reasonable protection of persons participating in or observing" a controversial public demonstration.⁶⁷ That hardly seems like a frivolous, hate-based interest, considering that the county had hosted a 20,000-marcher-strong demonstration requiring more than 3,000 police and National Guardsmen only a few years earlier.⁶⁸ Thus,

63. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992); *City of Cleburne*, 473 U.S. at 448; *Palmore v. Sidoti*, 466 U.S. 429, 433–34 (1984); *O'Connor v. Donaldson*, 422 U.S. 563, 575–76 (1975); *Buchanan v. Warley*, 245 U.S. 60, 81 (1917).

64. See *Crawford*, 553 U.S. at 197; *Buckley*, 424 U.S. at 29. *Crawford* and *Buckley* will be more fully discussed in Part III, *infra*.

65. *Crawford*, 553 U.S. at 197 (determining that voter confidence is an important interest because it "encourages citizen participation in the democratic process").

66. *Palmore*, 466 U.S. at 433.

67. *Forsyth Cty.*, 505 U.S. at 134.

68. See *id.* at 125–26.

the *Palmore* and *Forsyth* courts both determined that negative perceptions created serious risks, yet declined to recognize preventing those negative perceptions as a government interest. Therefore, the presence of perceptions-related harms cannot be the distinction between election law and the contexts identified in Part I.

One could make a more limited version of the above argument: perceptions matter *more* in election law than they do in other constitutional contexts. However, the election law cases are not different from the rest of the doctrine because they give *more* weight to public perceptions; they are different because they give *any* weight to those perceptions. In the cases identified in Part I, the Court categorically ruled out even *considering* public perceptions as a state interest.⁶⁹ Thus, this distinction does not work because it turns on how much weight the Court gives to public perceptions in different contexts, yet the underlying difference is giving public perceptions weight in the first place.

Finally, one could blend the first two distinctions and argue that the greater importance of public perception-based interests in election law justifies not conforming with the general categorical exclusion of those interests. Perhaps that is the right answer. Perhaps it is not; the public perception-related interests in *Palmore* and *Forsyth*—child welfare and public safety—both seem quite important. Either way, the distinction is not obvious and, thus, warrants justification.⁷⁰

III. PERMITTING LEGITIMACY ARGUMENTS MAY LEAD TO A LOWER STANDARD OF REVIEW

A. *Crawford's* Legitimacy Interest and Speculative Balancing

In *Crawford*, the Supreme Court's adoption of a legitimacy interest made its heightened balancing test much more speculative. Although voting rights are not reviewed under strict scrutiny, they are generally subject to a balancing test that functions as a form of heightened scrutiny.⁷¹ As the *Crawford* Court put it:

69. See, e.g., *Palmore*, 466 U.S. at 433 (finding that private biases and their effects are not "permissible considerations").

70. See *supra* Parts III–V.

71. See *supra* Part I.

“even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.”⁷² Although this standard has been somewhat pared back over time, the test still purports to apply a higher standard than rational basis, with the current formulation being: “However slight that burden may appear, . . . it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”⁷³

The *Crawford* Court found that the appearance of legitimacy could be just such an interest in upholding a burden on the right to vote. In *Crawford*, the Court reviewed the constitutionality of a state statute requiring in-person voters to present a photographic ID to have their votes counted.⁷⁴ Plaintiffs challenged the law, arguing that it burdened individuals’ right to vote by making voting more difficult.⁷⁵ In analyzing the claim, the Court weighed the voter burden against the state interests.⁷⁶ The Court listed three state interests that it felt merited some weight in the analysis: (1) election modernization; (2) preventing voter fraud; and (3) “safeguarding voter confidence.”⁷⁷ Yet, neither election modernization nor preventing voter fraud seemed to carry much weight on their own.

First, election modernization is merely a vehicle to implement the other two interests. The Court noted that federal election procedure statutes did not require voter ID laws, but merely indicated “that Congress believes that photo identification is one effective method of establishing a voter’s qualification to vote and that the integrity of elections is enhanced through improved technology.”⁷⁸ As the dissent put it, although election modernization and combating voter fraud “are given separate headings, any line drawn between them is unconvincing.”⁷⁹

Second, the Court seriously undercut the *actual* fraud prevention interest when it conceded that “[t]he record contains

72. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 (2008) (citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966)).

73. *Id.* at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)).

74. *Id.* at 185.

75. *See id.* at 186–87.

76. *See id.* at 191–204.

77. *Id.* at 192–97.

78. *Id.* at 193.

79. *Id.* at 224 (Souter, J., dissenting).

no evidence of any such fraud actually occurring in Indiana at any time in its history.”⁸⁰ Although the Court did note that in-person voter fraud *had* occurred and *could* occur in the future, it relied on a threadbare record to do so, including (1) a historical account of voter fraud in New York City over one hundred years before the case at hand; (2) a gubernatorial election in which it was confirmed that *one person* had committed in-person voter fraud; (3) a mayoral election in which a candidate encouraged voters to commit voter fraud, but not *in-person* fraud that voter-ID laws would prevent; and (4) inflated state voter rolls.⁸¹ It makes sense that the record was lacking; the social science literature is in near-unanimous agreement that in-person voter fraud almost never occurs.⁸² Although the Court may have been concerned about the risk of future in-person voter fraud, it simply did not have facts on the record to justify this concern.

Given the weak justifications for both election modernization and preventing voter fraud, most of the work seems to have been done by the legitimacy interest: safeguarding voter confi-

80. *Id.* at 194.

81. *See id.* at 194–97, nn.11–12. The Court concluded that inflated voter rolls, themselves, were a “nondiscriminatory reason supporting the State’s decision to require photo identification.” *Id.* at 197. However, inflated voter rolls are simply not voter fraud. *See* German Lopez, *Trump’s voter fraud commission, explained*, VOX (Jan. 3, 2018), <https://www.vox.com/policy-and-politics/2017/6/30/15900478/trump-voter-fraud-suppression-commission> [<https://perma.cc/596N-TR73>] (“As part of that, the Pew report found that more than 1.8 million registered voters were actually dead, while 2.75 million had registrations in more than one state. . . . But that doesn’t mean that even one of these registrations was used for illegal votes. America has a multi-step system for voting: You register, then vote. The report only shows that people registered and were never taken off the rolls. They didn’t even have to register for the latest election — some of them registered for the 2008 election, then died or moved, and states just didn’t take them off their rolls. So someone could have registered in Ohio in 2008, moved to Pennsylvania by 2012, and simply forgotten to notify Ohio’s elections system that he had moved — even though he never had any intention of voting in Ohio again.”).

82. *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth> [<https://perma.cc/WXJ6-AFGN>] (compiling dozens of studies, all of which conclude that voter fraud almost never occurs); *see also* Peter Nicholas, Carol E. Lee, & Aruna Viswanatha, *Sticking to Unsubstantiated Claim, Donald Trump Seeks Voter-Fraud Inquiry*, WALL ST. J. (Jan. 25, 2017), <https://www.wsj.com/articles/trump-says-he-is-launching-major-investigation-into-voter-fraud-1485347677> [<https://perma.cc/J75G-75RQ>] (noting that “state election officials and independent reviews have undercut the notion that widespread illegal voting has tainted election results.”).

dence. The Court found that the voter confidence interest was “closely related to the State’s interest in preventing voter fraud,” but also carried “independent significance, because it encourages citizen participation in the democratic process.”⁸³ The Court ultimately concluded that this interest, combined with an unproven fear about voter fraud, was sufficiently weighty to justify the burdens of the voter ID law.⁸⁴

The *Crawford* Court’s balancing reveals that reliance on legitimacy justifications can lead to a much more speculative analysis, something more akin to rational basis review. Under rational basis review, courts tend to accept plausible government interests without inquiring into whether those interests are grounded in fact.⁸⁵ For example, in *United States v. Carolene Products Co.*,⁸⁶ the Supreme Court applied rational basis to uphold a regulation on the shipment of skimmed milk,⁸⁷ relying on facts that were demonstrably wrong.⁸⁸ *Crawford* looks a lot like *Carolene Products* in this regard. The *Crawford* Court identified government interests largely based on mere speculation and fear; it ultimately concluded that those unsubstantiated public fears about voter fraud were enough to justify a burden on voter rights. This speculative analysis stands in stark contrast to the Court’s usual refusal to consider public perceptions-based interests.⁸⁹

B. Buckley’s Watered-Down Strict Scrutiny

In *Buckley*, the Supreme Court’s consideration of a legitimacy interest significantly watered down its heightened scrutiny analysis. The *Buckley* Court reviewed the constitutionality of the Federal Election Campaign Act of 1971 (FECA), a campaign finance statute with a litany of provisions that limited election

83. *Crawford*, 553 U.S. at 197.

84. *See id.* at 202–03.

85. *See, e.g.*, *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955).

86. 304 U.S. 144 (1938).

87. *See id.* at 145–46, 153–54.

88. Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 398–99 (1987) (“The purported ‘public interest’ justifications so credulously reported by Justice Stone were patently bogus.”).

89. *See supra* Part I.

spending.⁹⁰ The Court analyzed the statute using two broad categories: (1) *expenditures*, or money spent on campaign activities; and (2) *contributions*, or money given to political candidates.⁹¹ Finding that both the expenditure and contribution limitations “implicate[d] fundamental First Amendment interests,” the Court applied a heightened, but unspecified, form of scrutiny.⁹² The Court found that the First Amendment limitations could be sustained “if the State demonstrate[d] a sufficiently important interest and employ[ed] means closely drawn to avoid unnecessary abridgment of associational freedoms.”⁹³ The Court then identified four state interests for FECA’s First Amendment limitations: (1) preventing corruption; (2) preventing the appearance of corruption; (3) equalizing the ability of citizens to influence elections; and (4) reining in the costs of elections.⁹⁴ The Court rejected the latter two interests, with its focus entirely limited to preventing corruption and its appearance.⁹⁵

In the *Buckley* Court’s balancing test, just as in *Crawford*, the government’s interest in the appearance of legitimacy led to a lower standard of review. When analyzing the constitutionality of FECA’s \$1000 contribution limitation, the Court found that “Congress could legitimately conclude” that it had an interest in avoiding the appearance of corruption.⁹⁶ Importantly, the Court made no attempt at all to substantiate Congress’ possible conclusion, instead finding, without citation, that the reality or appearance of corruption is “inherent in a system permitting unlimited financial contributions.”⁹⁷ At the very least, it is debatable that this purported “inherent” problem is actually a problem because it is far from clear that money can significant-

90. *Buckley v. Valeo*, 424 U.S. 1, 6–7 (1976).

91. *See id.* at 7, 13–23.

92. *Id.* at 23, 25.

93. *Id.* at 25.

94. *See id.* at 25–26.

95. *See id.* at 48–49, 57 (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .” & “In any event, the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending . . .”)

96. *Id.* at 27.

97. *Id.* at 28.

ly alter the outcome of elections.⁹⁸ Each of the derivative harms of that shaky truth—undue influence by the wealthy and appearance of corruption—stem from a *belief* in that truth. That is, the wealthy would not have undue influence if politicians did not *believe* that they needed the money to win, and the public would not think there was an appearance of corruption if they did not *believe* that politicians needed money to win. The appearance of legitimacy, without regard for the underlying truth, was therefore paramount to the Court’s analysis, and, ultimately, it was enough for the Court to uphold the contribution limitation.⁹⁹ That kind of reasoning strongly resembles rational basis review, where the truth holds little relevance, and plausibility is the touchstone.¹⁰⁰ The Court’s reasoning, in invoking what “Congress could legitimately conclude,”¹⁰¹ also shares another hallmark of rational basis review: an exceedingly high level of deference to the legislature.¹⁰² Thus, this analysis contrasts strongly with the rest of the First and Fourteenth Amendment doctrine because the *Buckley* Court had no qualms with giving great weight to “mere negative attitudes, or fear, unsubstantiated”¹⁰³ by any facts on the record.¹⁰⁴

98. In one of the most well-known papers to examine the effect of spending on election outcomes, economist Steven Levitt analyzed repeat elections, those elections where the exact same challengers faced off multiple times. Doing so allowed Levitt to control for the effect of candidate *quality* in addition to spending, incumbency advantage, the partisan makeup of the district, and nationwide partisan shocks. Such controls are important because causality is often tough to disentangle in campaign finance studies: in other words, it is hard to determine whether (1) a candidate wins because of the money or (2) a candidate gets more money because everyone thinks he will win. After controlling for each of these variables, Levitt found that “campaign spending has an extremely small impact on election outcomes regardless of incumbency status.” Steven D. Levitt, *Using Repeat Challengers to Estimate the Effect of Campaign Spending on Election Outcomes in the U.S. House*, 102 J. POL. ECON. 777, 780 (1994). Leaving Levitt’s influential paper aside, there is an active and contentious academic debate over the effect of money on election outcomes. See GUY-URIEL CHARLES & JAMES A. GARDNER, *ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM* 753–58 (2d ed. 2018).

99. See *Buckley*, 424 U.S. at 29.

100. See *supra* Section III.A (discussing *Carolene Products*).

101. *Buckley*, 424 U.S. at 27.

102. See, e.g., *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 487–88 (1955) (“[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new [law].”).

103. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

Although the interest in the appearance of legitimacy was enough to carry the day in the \$1000 contribution limits in *Buckley*, that is not always the case. For example, the *Buckley* Court struck down other parts of FECA, despite the legitimacy interest.¹⁰⁵ Additionally, *Citizens United v. FEC*¹⁰⁶ and *McCutcheon v. FEC*¹⁰⁷ both struck down expenditure limits, despite the presence of legitimacy arguments.¹⁰⁸ These holdings prove that an interest in the appearance of legitimacy does not *necessarily* lead to rational basis review. However, a legitimacy interest that is only sufficient to justify restrictions on First Amendment rights *sometimes* is hardly more comforting than one that *always* justifies them. Indeed, such inconsistency is potentially worse in at least one way: the unpredictable weight of the legitimacy interest makes outcomes harder to predict, creating the possibility of arbitrariness.¹⁰⁹

IV. PUBLIC PERCEPTION ARGUMENTS CREATE INCENTIVES FOR PARTISAN ACTORS TO UNDERMINE DEMOCRATIC LEGITIMACY

A. Partisans Influence Outcomes

By tying the outcome to public perceptions in election law cases, the Court has given partisan actors the ability and incentive to influence its outcomes. All laws create incentives for people,¹¹⁰ many of them unforeseeable. Consider a law prohib-

104. See D. Bruce La Pierre, *Campaign Contribution Limits: Pandering to Public Fears About "Big Money" and Protecting Incumbents*, 52 ADMIN. L. REV. 687, 688 (2000) ("Congress had only scant evidence that very large campaign contributions in the 1972 presidential election had caused either corruption or an appearance of corruption. The Court, nonetheless, upheld a \$1000 limit on contributions in all federal elections largely on the premise that corruption is 'inherent in a system permitting unlimited financial contributions.'").

105. See, e.g., *Buckley*, 424 U.S. at 31–49 (striking down independent expenditure limitations).

106. 558 U.S. 310 (2010).

107. 134 S. Ct. 1434 (2014).

108. See *McCutcheon*, 134 S. Ct. at 1450–53, 1461–62; *Citizens United*, 558 U.S. at 356, 360, 372.

109. Cf. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) ("Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.").

110. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1054 (2000) ("The seminal insight that economics provides to the analysis of law is that people

iting drunk driving. Such a law gives a direct, powerful incentive for individuals to avoid drinking and driving. However, the drunk driving law has effects beyond its direct deterrence impact. For example, taxi drivers may see an uptick in business when the new law is adopted because more people will need rides home as a substitute for drinking and driving. Thus, the law, passed as a public safety measure, may also be a substantial subsidy for the taxi industry. Because courts are the arbiters of what the law means,¹¹¹ their interpretation of the law also creates incentives. If that same drunk driving law contains an ambiguous provision—whether the threshold blood alcohol level is .08% or .06%—a court reviewing the statutory text will be creating incentives. If the level is .06%, then individuals will be less likely to drive after consuming alcohol than they would if it were .08%, and the taxi industry will see a correspondingly larger subsidy. Election law, like any other law, is subject to these basic economic principles.

By allowing governments to justify their election regulations with legitimacy arguments, the Supreme Court has given partisan actors an *ex ante* incentive to undermine democratic legitimacy. For example, imagine that you are a Republican strategist at the Republican National Committee. Because you believe the research that shows voter ID laws benefit Republicans,¹¹² you would like to see voter ID laws enacted across the country.¹¹³ However, you worry that your voter ID laws might

respond to incentives—a generalized statement of price theory. From this insight, two important corollaries follow. First, the law can serve as a powerful tool to encourage socially desirable conduct and discourage undesirable conduct. In the hands of skillful policymakers, the law can be used to subsidize some behaviors and to tax others. Second, the law has efficiency consequences as well as distributive consequences. Intentionally or unintentionally, legal rules can encourage or discourage the production of social resources and the efficient allocation of those resources.” (footnote omitted).

111. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

112. See, e.g., Christopher Ingraham, *New Evidence that voter ID laws ‘skew democracy’ in favor of white Republicans*, WASH. POST: WONKBLOG (Feb. 4, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/04/new-evidence-that-voter-id-laws-skew-democracy-in-favor-of-white-republicans/> [https://perma.cc/GHT9-BDZX]; but see CHARLES & GARDNER, *supra* note 98, at 947–48 (noting that the empirics of voter ID law effects are debatable).

113. See Aaron Blake, *Republicans keep admitting that voter ID helps them win, for some reason*, WASH. POST: THE FIX (April 7, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/04/07/republicans-keep-admitting-that-voter-id-helps-them-win-for-some-reason/>.

get struck down as unconstitutional.¹¹⁴ You then learn that in *Crawford*, the Supreme Court upheld a voter ID law because such laws “protect[] public confidence in the integrity and legitimacy of representative government.”¹¹⁵ So what is a partisan strategist to do when trying to preserve a policy that is dependent upon the “public confidence?” *Crawford*’s reasoning suggests that one way to do so would be to undermine the public confidence: if one managed to convince the public that the government was not adequately combatting widespread voter fraud, those “negative attitudes[] or fear”¹¹⁶ could be used to support a legitimacy interest to uphold voter ID laws.

These bad ex ante incentives also exist in the campaign finance context. If Democrats believe the tentative research showing that campaign finance laws may benefit their party,¹¹⁷ they have an incentive to undermine democratic legitimacy by exaggerating the effects of money in politics. Furthermore, if incumbents believe that campaign finance laws benefit their reelection bids,¹¹⁸ this fearmongering may become a bipartisan enterprise.¹¹⁹

washingtonpost.com/news/the-fix/wp/2016/04/07/republicans-should-really-stop-admitting-that-voter-id-helps-them-win/ [https://perma.cc/9JKD-XVC6].

114. See, e.g., Adam Liptak & Michael Wines, *Strict North Carolina Voter ID Law Thwarted After Supreme Court Rejects Case*, N.Y. TIMES (May 15, 2017), <https://www.nytimes.com/2017/05/15/us/politics/voter-id-laws-supreme-court-north-carolina.html> [https://perma.cc/4HWN-GWMM].

115. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) (internal quotation marks omitted) (citing government’s brief).

116. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

117. See CHARLES & GARDNER, *supra* note 98, *supra* note 96, at 883 (citing Tilman Klump et al., *The Business of American Democracy: Citizens United, Independent Spending, and Elections*, 59 J.L. & ECON. 1 (2016)) (“One study found that *Citizens United* was associated with an increase of approximately 4 percent in the probability of a Republican being elected to a state legislature, with the advantage rising to as much as 10 percent in some states.”).

118. See Ciara Torres-Spelliscy, *The Incumbency Problem Has Everything to do with Money*, HILL (May 19, 2009), <http://thehill.com/blogs/congress-blog/politics/25496-the-incumbency-problem-has-everything-to-do-with-money> [https://perma.cc/6CJW-T4WR].

119. Cf. *Bipartisan Campaign Reform Act of 2002*, FED. ELECTION COMM’N, http://classic.fec.gov/pages/bcra/bcra_update.shtml [https://perma.cc/N9H4-FQNU] (noting that BCRA was signed into law by a Republican president).

B. Uncertain Causality

Although the Supreme Court has given partisan actors incentives to undermine democratic legitimacy, it is not clear if those incentives are the drivers of that behavior. Republicans encourage fears about voter fraud¹²⁰ and Democrats encourage fears about money in politics.¹²¹ It is not clear, however, that the Supreme Court's incentives are the but-for cause of these partisan activities. Republicans and Democrats may genuinely believe that voter fraud and money in politics, respectively, are significant problems worth taking on. Additionally, Republicans may stoke fears about voter fraud as a cover for their voter ID laws in the political realm because a naked desire to disenfranchise voters is not popular.¹²² Democrats may drum up fears about money in politics because it is a popular wedge issue with their base.¹²³ Because of these confounding factors, this paper makes no claims to empirical causality; rather, the argument is simply that the Court has created incentives that further encourage partisan attempts to undermine democratic legitimacy.

120. See Charles Stewart III, *Trump's controversial election integrity commission is gone. Here's what comes next.*, WASH. POST (Jan. 4, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/01/04/trumps-controversial-election-integrity-commission-is-gone-heres-what-comes-next/> [<https://perma.cc/AUV6-2SQT>] (reporting on President Trump's efforts to "improve confidence in the electoral system and to investigate 'those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting'" and noting that "Democrats are more likely to believe that access to the polls is a bigger problem than security; Republicans believe the opposite.").

121. See Ramsey Cox, *Senate GOP blocks constitutional amendment on campaign spending*, HILL (Sept. 11, 2014), <http://thehill.com/blogs/floor-action/senate/217449-senate-republicans-block-constitutional-amendment-on-campaign> [<https://perma.cc/G6Z6-HAVR>] ("Democrats argued the [*Citizens United*] decision has allowed billionaires to flood the campaign spending system with 'dark money' in order to buy election results.").

122. Cf. Roper Ctr. for Pub. Op. Research, *Public Opinion on the Voting Rights Act*, CORNELL UNIV. (2018), <https://ropercenter.cornell.edu/voting-rights-act/> [<https://perma.cc/8D3H-ZSZ4>] (finding majority support for the Voting Rights Act).

123. See Cox, *supra* note 121 ("Democrats up for reelection are expected to use [their vote on campaign finance] on the campaign trail.").

V. A DANGEROUS SLIPPERY SLOPE

A. Poll Taxes

If the Court had considered legitimacy arguments in the state poll tax context, such a practice might still be constitutional today. In *Harper v. Virginia State Board of Elections*,¹²⁴ the Supreme Court declared that state poll taxes were unconstitutional under the Fourteenth Amendment.¹²⁵ The Court weighed the tax's burden on the fundamental right to vote against the purported benefit of increased voter quality, ultimately finding that "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax."¹²⁶ One notable omission from the Court's balancing is any consideration of voter *perception* of how a poll tax affects the electoral system.¹²⁷ The Court's analysis might come out differently with a modern legitimacy interest on one side of the balancing test. If many individuals *thought* that a poll tax (1) prevented voter fraud by imposing a cost on repeat voting; or (2) stopped corrupt candidates from bribing poor voters and busing them to voting stations,¹²⁸ those would seem to be valid justifications under *Crawford* and *Buckley*. Under *Crawford*, those reasons, despite being almost certainly baseless, might justify a poll tax's burden on voting.

B. Freedom of the Press

Legitimacy arguments could justify far more invidious restrictions in the future, including restrictions on the press. Only 32% of Americans trust the media, the lowest level recorded since such a figure has been measured.¹²⁹ The distrust is driven almost entirely by Republicans, who argue that the media gives

124. 383 U.S. 663 (1966).

125. *See id.* at 670.

126. *Id.* at 666.

127. *See generally id.*

128. Cf. Jeane MacIntosh, *Homeless 'Driven' to Vote Obama*, N.Y. POST (Oct. 7, 2008), <https://nypost.com/2008/10/07/homeless-driven-to-vote-obama/> [<https://perma.cc/C67X-US66>]. There is no evidence of *actual* wrongdoing in this article, but that does not preclude a legitimacy argument under *Crawford* or *Buckley*.

129. Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP NEWS (Sept. 14, 2016), <http://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx> [<https://perma.cc/3R4M-S5TE>].

Democrats an unfair advantage.¹³⁰ In addition to the polling figures, the President of the United States has openly ruminated about having the Federal Communications Commission “examine its licensing procedures for major news networks because what they are reporting is not to his liking.”¹³¹ If the President ever attempted this kind of censorship, it is possible that the public’s beliefs about the media and its effect on the electoral process could justify such a policy in the name of maintaining appearances. One might think that an openly content-based restriction on political speech would be absolutely safe from this kind of governmental action, but that is not so under existing law. Although this kind of censorship would probably trigger strict scrutiny,¹³² that is not outcome-determinative for two reasons.

First, the Court in *Buckley*, which upheld speech restrictions, applied “exacting scrutiny applicable to limitations on core First Amendment rights of political expression.”¹³³ Under this exacting standard, “the Government may regulate protected speech only if such regulation promotes a compelling interest

130. *See id.* (“With many Republican leaders and conservative pundits saying Hillary Clinton has received overly positive media attention, while Donald Trump has been receiving unfair or negative attention, this may be the prime reason their relatively low trust in the media has evaporated even more.”). These criticisms are not without some merit. *See, e.g.,* Nate Silver, *There Really Was A Liberal Media Bubble*, FIVETHIRTYEIGHT (Mar. 10, 2017), <https://fivethirtyeight.com/features/there-really-was-a-liberal-media-bubble/> [https://perma.cc/S4ZG-9NZ6] (“The political diversity of journalists is not very strong, either. As of 2013, only 7 percent of them identified as Republicans (although only 28 percent called themselves Democrats with the majority saying they were independents). And although it’s not a perfect approximation—in most newsrooms, the people who issue endorsements are not the same as the ones who do reporting—there’s reason to think that the industry was particularly out of sync with Trump. Of the major newspapers that endorsed either Clinton or Trump, only 3 percent (2 of 59) endorsed Trump.”); Jack Shafer & Tucker Donerty, *The Media Bubble is Worse Than You Think*, POLITICO (May 2017), <https://www.politico.com/magazine/story/2017/04/25/media-bubble-real-journalism-jobs-east-coast-215048> [https://perma.cc/5PKL-ZFUZ] (“The [*New York Times*] thinks of itself as a centrist national newspaper, but it’s more accurate to say its politics are perfectly centered on the slices of America that look and think the most like Manhattan.”).

131. Chris Cillizza, *Donald Trump just issued a direct threat to the free and independent media*, CNN (Oct. 12, 2017), <http://www.cnn.com/2017/10/11/politics/donald-trump-media-tweet/index.html> [https://perma.cc/WE94-9BSD].

132. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”).

133. *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976).

and is the least restrictive means to further the articulated interest.”¹³⁴ Given the similarity between exacting scrutiny and strict scrutiny, the Justices have avoided disentangling them,¹³⁵ and some scholars think they have significant overlap, particularly when it comes to what constitutes a compelling interest.¹³⁶ Although the similarity between exacting scrutiny and strict scrutiny is an indeterminate area of the law,¹³⁷ a court applying strict scrutiny would have ample room to find government speech limitations constitutional using a legitimacy interest, just as the Supreme Court did when applying exacting scrutiny in *Buckley*.

Second, the Supreme Court has upheld content-based restrictions on broadcasters in the past in *Red Lion Broadcasting Co. v. FCC*.¹³⁸ In that case, the FCC had a so-called “fairness doctrine,” which required broadcasters to give reply time to individuals when someone attacked their character during a broadcast.¹³⁹ Broadcasters challenged the rule on First Amendment grounds, and the Supreme Court upheld it, relying on the fact that there were only so many radio frequencies to go around, and, thus, the government had an interest in rationing that scarce resource.¹⁴⁰ Given the rise of the internet and new media, the scarcity of communication resources seems like a more tenuous justification under the First Amendment,¹⁴¹ but *Red Lion* still stands for the proposition that *some* interest may

134. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014).

135. *See id.* at 1445–46 (finding that the tests were similar enough that the Court could apply strict scrutiny without changing the outcome).

136. *See* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207, 210 (2016) (“[T]he strength or importance required of the government interest under exacting scrutiny actually need not be, in a given case, any less than that required under strict scrutiny. The circumstances of a given case may lead judges applying exacting scrutiny to conclude that only a genuinely compelling governmental interest can be sufficiently important. In fact, the logic of exacting scrutiny may well sometimes call for a government interest test that is even more demanding than the classic compelling government interest test under strict scrutiny.”).

137. *See generally id.*

138. 395 U.S. 367 (1969).

139. *See id.* at 370, 373–75.

140. *See id.* at 386–390.

141. *Cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637–40 (1994) (refusing to apply *Red Lion* to cable because it did not suffer from the same physical limitations as broadcasting).

suffice to justify content-based regulations of broadcasters.¹⁴² Under *Buckley*, a legitimacy interest could potentially fill that gap and justify a modern version of the fairness doctrine.

VI. CONCLUSION

There is an unresolved tension in the doctrine: public perceptions are an impermissible state interest in First and Fourteenth Amendment jurisprudence, *except* when it comes to election law. This exception has led to a more speculative analysis in election law jurisprudence, particularly in the voter ID and campaign finance contexts. Additionally, allowing consideration of public perceptions as a government interest in constitutional analysis gives partisans bad incentives to undermine democratic structures and could lead election law down a damaging slippery slope. Despite these drawbacks, neither the courts nor the scholarship have articulated a reason for treating election law cases differently, and there is not an obvious reason for doing so. Because the Court has held that consideration of public perceptions as a state interest is too dangerous in its other constitutional jurisprudence,¹⁴³ it should take a harder look at doing so in election law.

Boyd Garriott

142. Cf. *id.* at 638 (“Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence and see no reason to do so here.” (footnote omitted) (citation omitted)).

143. See *supra* Part I.