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# THE ESTABLISHMENT CLAUSE ARGUMENT FOR CHOICE

David R. Dow\*

## INTRODUCTION

Both courts and commentators have treated the abortion issue primarily as a right to privacy question. In this essay I suggest that legislation interfering with a woman's ability to obtain an abortion prior to fetal viability raises serious establishment clause implications.<sup>1</sup> My argument is purposefully tentative, in part because the idea has been resoundingly neglected by the Supreme Court. Indeed, beginning with its decision in *Roe v. Wade*,<sup>2</sup> and continuing through the recent case of *Webster v. Reproductive Health Services*,<sup>3</sup> the entire Court, with the exception of Justice Stevens' opinion in *Webster*, has ignored the pervasive religious aura that suffuses the abortion debate.

Abortion is not the only area where the Court has danced this dance. In *Griswold v. Connecticut*,<sup>4</sup> when the Court held that Americans enjoy a constitutional right to privacy which permits married couples to obtain and use contraceptives, the Justices similarly avoided any mention of the fact that the anti-

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1. The establishment clause reads: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I, cl. 1.

2. 410 U.S. 113 (1973).

3. 109 S. Ct. 3040 (1989).

4. 381 U.S. 479 (1965).

birth control law that the Court was striking down reflected religious orthodoxy.<sup>5</sup> This silence is dishonest and unfortunate. I argue in this essay that the religious aura that hangs over the issue ought not to be ignored.<sup>6</sup> My thesis is that there is a difference between cultural values and religious values and that only the former may legitimately underlie legislative action. I suggest additionally that the Court's attention in *Roe* to the issue of viability can be understood as an implicit recognition of the validity of my claim.<sup>7</sup>

Although the Court's opinion in *Roe* has been subjected to substantial criticism,<sup>8</sup> with its attention to the issue of viability

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5. Justice Harlan, however, in his dissenting opinion in *Poe v. Ullman*, 367 U.S. 497 (1961), did not blink at — indeed he emphasized — this reality. *Poe*, 367 U.S. at 546-47 n.12, 554 n.15 (Harlan, J., dissenting).

6. The place for this to begin is in litigation brought against legislation that restricts access to abortions. Challenges to religiously motivated laws must emphasize the extent to which they are religiously motivated. Ecclesiastical organizations have not been the least bit shy about acknowledging the authority for their position. See, e.g., *Statement of the National Conference of Catholic Bishops*, N.Y. Times, Nov. 8, 1989, at 10, col. 1 (national ed.) (“No Catholic can responsibly take a ‘pro-choice’ stand when the ‘choice’ in question involves abortion.” While expressing “anguish [for] women who face issues in a way that [they] never will,” the Bishops reaffirmed “the church’s teaching that all human life begins at conception.”).

It is, of course, somewhat difficult to establish that legislation is religious, or that the pro-life movement is a religious movement. See *infra* notes 67-82 and accompanying text. In this essay I argue that legislation purporting to interfere with the right to obtain an abortion prior to fetal viability manifests religious motivation, and I propose a methodology to be employed in distinguishing between religious and cultural values. As support for the proposition that pro-life/anti-abortion legislation might well reflect religious orthodoxy, see, e.g., Note, *Abortion Laws, Religious Beliefs, and the First Amendment*, 14 VAL. U.L. REV. 487 (1980); Greenawalt, *Religiously Based Premises and Laws Restrictive of Liberty*, 1986 B.Y.U. L. REV. 245 [hereinafter Greenawalt, *Premises*]. See also Curran, *Religion, Law and Public Policy in America*, 42 JURIST 14 (1982); Eidsmoe, *A Biblical View of Abortion*, 1983 J. CHRISTIAN JURISPRUDENCE 17; Nelson, *The Churches and Abortion Law Reform*, 1983 J. CHRISTIAN JURISPRUDENCE 29. None of these articles, it should be added, concludes that anti-abortion legislation is necessarily impermissible even if it were demonstrable that the legislation does emerge from religious beliefs. See *infra* note 11.

After substantially completing this essay, I came across two recent articles that explicitly argue that statutes defining life as beginning at conception (as did the statute at issue in the *Webster* case) do violate the establishment clause. See Maddox & Bortnick, *Do Legislative Declarations that Life Begins at Conception Violate the Establishment Clause?*, 12 CAMPBELL L. REV. 1 (1989); Comment, *An Establishment Clause Analysis of Webster v. Reproductive Services*, 24 GA. L. REV. 399 (1990).

7. The basic skeleton of the argument I propose in this essay appeared as *Court Starting to Cater to Zealots on Abortion*, Houston Chron., July 4, 1989, at A23.

8. See, e.g., Ely, *The Wages of Crying Wolf*, 82 YALE L.J. 920 (1973). *Roe* has also had its defenders. See, e.g., Heymann & Barzelay, *The Forest and the Trees*, 53 B.U.L.

coming under attack as an egregious instance of judicial legislation,<sup>9</sup> any constitutional discussion of the abortion issue must begin with *Roe* itself. I do not propose to defend the jurisprudential analysis in *Roe*. Instead, my aim is to suggest that the majority's historical survey of the significance attributed by our culture to the moment of viability adumbrates the distinction between cultural and religious values that I propose in this essay. My argument proceeds as follows. Part I of this essay outlines the holding as well as the structure of the opinion in *Roe v. Wade*. Part II summarizes the weakness of any choice argument that rests entirely on the right to privacy. Finally, Part III identifies a major gap in fourteenth amendment jurisprudence and sketches an argument for choice<sup>10</sup> based on the establishment clause of the first amendment.<sup>11</sup>

Initially, however, it will be salutary to review the requirements of the establishment clause. The establishment clause comprises the opening words of the first amendment, which read: "Congress shall make no law respecting an establishment

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REV. 765 (1973); Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) (suggesting alternative rationale for holding in *Roe*, one linked to who should have decisionmaking authority). Professor Tribe has since altered his views somewhat. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1302-1435 (2d ed. 1988); Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); Tribe, *Childhood, Suspect Classifications, and Conclusive Presumptions*, 39 LAW & CONTEMP. PROBS. 8 (1975).

9. See, e.g., Ely, *supra* note 8, at 926-27; *Roe*, 410 U.S. at 171-72 (Rehnquist, J., dissenting); *Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring in part).

10. What I mean by choice is that the decision whether to terminate a pregnancy ought to belong to the woman who is pregnant.

11. Establishment clause analysis of the abortion issue has attracted only scant interest. In *Harris v. McRae*, 448 U.S. 297, 319-20 (1980), for example, the Court, in less than one page, rejected an establishment clause challenge to a statute precluding the use of Medicaid monies to fund abortions. See also *Women's Servs. v. Thone*, 636 F.2d 206 (8th Cir. 1980), *vacated*, 452 U.S. 911 (1981); *Crossen v. Attorney Gen. of Ky.*, 344 F. Supp. 587 (E.D. Ky. 1972), *vacated*, 410 U.S. 950 (1973); *Rodgers v. Danforth*, 486 S.W.2d 258 (Mo. 1972); *Right to Choose v. Byrne*, 165 N.J. Super. 443, 398 A.2d 587 (1979).

On the other hand, Justice Stevens' opinion in the *Webster* case does apply establishment clause analysis. *Webster*, 109 S. Ct. at 3079 (arguing that there is no secular purpose for portions of the Missouri statute). See also Greenawalt, *Premises*, *supra* note 6, at 253 (arguing that "because rational secular morality is incapable of answering critical questions about abortion, liberal citizens properly rely on nonrational premises, including religious premises, in developing their positions"); Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985); Note, *supra* note 6 (arguing that religiously motivated laws do not violate the first amendment).

of religion . . . ." It has been held to apply to the states through the fourteenth amendment.<sup>12</sup>

The Court's decision in *Everson v. Board of Education*<sup>13</sup> was its first attempt at delineating the constitutional content of the religion clauses.<sup>14</sup> In it, Justice Black's opinion for the Court utilized Jefferson's metaphor of a wall between church and state and iterated that it is the role of the Court to keep that wall "high and impregnable."<sup>15</sup> The establishment clause forbids the government not merely from setting up a church, but also from passing laws "which aid one religion, aid all religions, or prefer one religion over another."<sup>16</sup> Since 1971, the Court has used the so-called *Lemon*<sup>17</sup> test to ascertain whether a challenged action runs afoul of the establishment clause. To survive establishment clause scrutiny, the act must have a secular legislative purpose; its principal or primary effect must neither advance nor inhibit religion; and it must not foster an excessive government entanglement with religion.<sup>18</sup>

The Court's use of history in establishment clause cases has come under attack from various fronts,<sup>19</sup> as has its commitment

12. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

13. *Id.*

14. In addition to the establishment clause, the first amendment also includes the free exercise clause, which requires that Congress make no law prohibiting the free exercise of religion.

15. *Everson*, 330 U.S. at 18. It merits emphasis that the program challenged in *Everson*, a New Jersey statute that authorized reimbursement to parents for costs incurred in transporting their children to parochial schools, was upheld by the Supreme Court against an establishment clause challenge. The wall between church and state, Justice Black wrote, was not breached by New Jersey's action. *Id.* The issue of school funding is perhaps the single most intractable strand of establishment clause jurisprudence. For a powerful rejection of the Court's conclusion in *Everson*, see Buchanan, *Governmental Aid to Sectarian Institutions*, 15 HOUS. L. REV. 783 (1978). Professor Buchanan, following the analysis proposed in his earlier article, has also criticized the Court's recent decisions in the school funding area. See Buchanan, *Governmental Aid to Religious Entities: The Total Subsidy Position Prevails*, 58 FORDHAM L. REV. 53 (1989).

16. *Everson*, 330 U.S. at 15.

17. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

18. *Id.* at 612-13. I have elsewhere argued that the two predominant values reflected in *Lemon*, and establishment clause jurisprudence generally, are the non-coercion principle and the neutrality principle. Dow, *Toward a Theory of the Establishment Clause*, 56 UMKC L. REV. 491 (1988).

19. See, e.g., M. HOWE, *THE GARDEN AND THE WILDERNESS* (1965); T. CURRY, *THE FIRST FREEDOMS* (1986); L. LEVY, *THE ESTABLISHMENT CLAUSE* (1986).

to the *Lemon* test.<sup>20</sup> Nevertheless, it is safe to say that under virtually any acceptable construction of the establishment clause, the government would be forbidden from passing a law *where the purpose or reason for enacting the law is to further a particular religion or religious belief*.<sup>21</sup> This, indeed, is precisely why, in *Edwards v. Aguillard*,<sup>22</sup> the Court struck down a Louisiana law that forbade the teaching of evolution in public schools unless accompanied by the teaching of creation science.<sup>23</sup> With this minimalist understanding of the establishment clause in place, we can turn to the abortion controversy.

## I. THE STRUCTURE OF *ROE v. WADE*

*Roe v. Wade* held that during the first trimester of the pregnancy, the state may not regulate abortion. During the second trimester, the state may impose regulations reasonably related to maternal health. States may outlaw abortion during the third trimester of pregnancy, except where the mother's health would be threatened.<sup>24</sup> The premise in *Roe* was that the fetus becomes viable at or around the beginning of the third trimester.<sup>25</sup> The implication of the trimester analysis is that once the fetus is viable it comes to possess fundamental constitutional rights, and the state has a compelling interest in safeguarding the fundamental rights of an entity, like the fetus, that is impotent to safeguard its own.<sup>26</sup>

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20. See especially Justice O'Connor's opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984); see also *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736 (1976) (White, J., concurring); Note, *The Supreme Court, Effect Inquiry, and Aid to Parochial Education*, 37 STAN. L. REV. 219 (1985).

21. This statement requires inquiry into legislative motive, which is concededly problematic. See *infra* notes 66-82 and accompanying text.

22. 482 U.S. 578 (1987).

23. The decision was seven to two, with Justice Scalia, joined by Chief Justice Rehnquist, dissenting. The dissent did not reject the idea that motive alone may be sufficient to invalidate a law, but argued instead that constitutionally impermissible motive was not established. *Id.* at 610 (Scalia, J., dissenting).

24. *Roe*, 410 U.S. at 164-65.

25. The Court in *Roe* explained that viability ordinarily occurs at around the 28th week of pregnancy, though it may occur as early as the 24th. *Id.* In *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989), the Court upheld a Missouri statute that requires that a doctor determine whether the fetus is viable for all abortions sought to be performed after the 20th week of pregnancy. The Court appears to have double-counted the four-week margin of error. *Id.* at 3055.

26. Alternatively, the significance of viability might lie in the fact that it is that moment when the fetus acquires any rights at all, not necessarily fundamental rights. This alternative interpretation of the import of the moment of viability seems to me

John Hart Ely's early comment on *Roe* succinctly summarized the seven steps of Justice Blackmun's argument for the Court.<sup>27</sup> Distilled somewhat, the steps are as follows: (1) The Constitution includes the right to privacy; (2) this right encompasses the woman's decision whether to terminate her pregnancy; (3) since the abortion right (as an aspect of the privacy right) is fundamental, it is permissible to infringe upon it only when the state's interest is compelling; (4) the state's two interests — protecting life or potential life and protecting maternal health — are legitimate from the outset but not compelling until later; (5) hence, during the first trimester the state cannot interfere at all with the woman's right; (6) but, since the health risks of abortion increase during the second trimester, the state's interest in maternal health becomes compelling at this point, so the state may enforce regulations that are reasonably related to maternal health; (7) then, once the fetus becomes viable, the state's interest in its health is compelling, so the state may further regulate, even prohibit, abortion, except where abortion is necessary to protect the mother's health. (This final "except" clause seems, as Professor Ely indicates, perplexing.)<sup>28</sup>

If one disagrees with the first step of Justice Blackmun's argument — if one believes, as do Justices Rehnquist and Scalia, for example<sup>29</sup> — that the Constitution does not include a right to privacy, then the edifice collapses at the very outset. If one accepts the first step of Justice Blackmun's argument but rejects the notion that the right to privacy touches at all on the decision whether to terminate one's pregnancy, then anti-abortion legislation is not constitutionally problematic despite the existence of the privacy right. If one accepts the first two prongs of Blackmun's argument, then and only then does the issue become intractable.

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unsatisfactory since it is difficult to imagine that the right to life can be anything short of fundamental. Moreover, the fact that the fetus' right is fundamental does not invariably prohibit any abortion if it is conceded that the woman too has a fundamental right.

27. Ely, *supra* note 8.

28. *See id.* at 920-21 & n.19. In fact, this aspect of the holding is not necessarily perplexing if there are competing fundamental rights. *See infra* notes 41-45.

29. *See Webster*, 109 S. Ct. at 3046 (Rehnquist, C.J., concurring); *id.* at 3064 (Scalia, J., concurring).

## II. THE INCOHERENCE OF THE ARGUMENT BASED ON PRIVACY<sup>30</sup>

Even if one does believe that the Constitution protects the right to privacy, the fact remains that additional analysis must be undertaken if the woman's right to choice is to be deemed constitutionally protected. The arguments for choice that have heretofore been offered neglect this analysis.<sup>31</sup> Hence, when Professor Ely called *Roe* "a very bad decision," one that "lacks even colorable support in constitutional text, history, or any other appropriate source of constitutional doctrine,"<sup>32</sup> his focus, as the delineation of Justice Blackmun's argument makes clear, was the privacy analysis.<sup>33</sup> What Professor Ely is unable to fathom about *Roe*, and what he criticizes cogently, is the striking fact that the Court seems to have stopped working once it located the woman's right in the penumbra of the fourteenth amendment.<sup>34</sup> That was a peculiar place to stop working since, as Ely reminds us, locating the woman's right is but the first step of the analysis. Next that right must be scrutinized in the light of and balanced against the state's objective for interfering with it. "[D]ue process' generally guarantees only that the inhibition be procedurally fair and that it have some 'rational' connection . . .

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30. An argument I do not touch on in this essay is that which asserts that laws that interfere with abortion in effect force women into slavery. This argument can be grounded in equal protection doctrine, by focusing on the fact that pregnancy is a gender specific condition, *cf. Geduldig v. Aiello*, 417 U.S. 484 (1974); or it can be tethered to the premise that we prevent people from entering into involuntary servitude, even if they were to do so with full volition, *cf. Kronman, Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763, 774-80 (1983). For reasons not pertinent to this essay, I am not persuaded by either of these claims (nor am I persuaded by the equal protection argument). Perhaps the most cogent elaboration of the slavery argument is Regan, *Rewriting Roe v. Wade*, 77 *MICH. L. REV.* 1569 (1979).

31. See generally *THE RIGHTS AND WRONGS OF ABORTION* (M. Cohen, T. Nagel, & T. Scanlon eds. 1974); *ABORTION: MORAL AND LEGAL PERSPECTIVES* (J. Garfield & P. Hennessey eds. 1984); Law, *Rethinking Sex and the Constitution*, 132 *U. PA. L. REV.* 955 (1984). See also Epstein, *Substantive Due Process by Any Other Name*, 1973 *SUP. CT. REV.* 159. See also *supra* note 8.

32. Ely, *supra* note 8, at 947, 943.

33. See *id.* at 935-36. Professor Ely concedes that the woman has a liberty interest in controlling her body, which thus encompasses the abortion decision. He complains about the degree of protection afforded this interest, particularly since the "super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure" (citation omitted).

34. *Roe*, 410 U.S. at 153.



[to] a permissible governmental goal."<sup>35</sup> As Ely's criticism indicates, even if the first two steps of Justice Blackmun's argument were uncontroversial, a balancing test would *still* be called for. Yet the opinion in *Roe* does not expressly do this balancing; it does not explicate the reason(s) *why* the woman's right triumphs during trimesters one and two.

This criticism is somewhat overstated, for Justice Blackmun's opinion does recite the accepted mode of analysis. After concluding that the abortion decision is within the ambit of the right to privacy, Justice Blackmun acknowledged "that this right is not unqualified and must be considered against important state interests."<sup>36</sup> What the opinion does not do is explain how the balancing procedure in the context of the privacy right is accomplished.

Perhaps the weakness inheres in the way the privacy right is characterized. The privacy right is often said to consist elementally of the right to control one's body.<sup>37</sup> That statement is obviously too broad. Laws forbidding drug use, laws requiring use of seatbelts, and laws prohibiting prostitution all represent substantial intrusions upon an individual's power to treat his or her body as he or she wishes. States may well have compelling interests in passing and enforcing these restrictions, yet this demonstrates precisely how the issue is to be analyzed even once the existence of a privacy right is conceded.<sup>38</sup> More important, unless one is willing to conclude that laws against suicide and prostitution, for example, are unconstitutional, then it is clear that

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35. Ely, *supra* note 8, at 935. Of course, if the woman's right is fundamental, the state's interest must be compelling, not merely permissible. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (opinion of Goldberg, J.); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Skinner v. Oklahoma*, 316 U.S. 535 (1942). Like Ronald Mann, I am left uneasy by the invocation of these adjectives as talismanic, but for the moment, I see no way around it. See Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

36. *Roe*, 410 U.S. at 154.

37. See *id.* at 152-53. See generally Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989). Alternatively, the right might be characterized as the right to control one's reproductive functions. This seems unsatisfying for at least two reasons. First, except for cases of rape, incest, and failed contraception, one can rather easily imagine a "waiver" argument. Second, the choice of level of generality seems extraordinarily (and inexplicably) niggardly.

38. Laws against suicide, which are prevalent in most jurisdictions, are perhaps the most remarkable example of interference with individual autonomy. Moreover, it is especially difficult to articulate a compelling state interest for these laws. Further, laws prohibiting suicide are particularly significant in this context because they may well be

many intrusive interests ostensibly satisfy the appellation “compelling.” (The argument that all these laws are illegitimate has a great deal of appeal to me as a philosophical proposition, but as a doctrinal matter, it is wildly implausible.)<sup>39</sup>

The choice argument that rests on the right to privacy is thus incoherent, not because the existence of the right to privacy is contested, but rather because even once its existence is acknowledged, we must still deal with the issue of which interests the state is permitted to weigh against it and which outweigh it. Simply put, the state’s interest in outlawing abortion, however one chooses to articulate it,<sup>40</sup> may be as compelling as the interests in outlawing suicide or prostitution.<sup>41</sup> The choice argument based on privacy turns out to be not an argument at all, but simply the first step of the analysis; and the Court has not indicated how the latter steps are to be accomplished.

### III. THE ESTABLISHMENT CLAUSE ARGUMENT FOR CHOICE

Balancing privacy rights against asserted state interests is a jurisprudential morass. It seemingly demands that judges act in a manner akin to legislators. My claim is that the quagmire can

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driven by orthodox religiosity. They trace their roots unmistakably to prohibitions in Jewish law against suicide and self-mutilation. See J. Caro, SHULCHAN ARUCH, Yoreh De’ah 345 (suicide), SHULCHAN ARUCH, Hoshen Mishpat 420:31 (self-mutilation). The basis for these laws is that one’s body belongs to God. See Maimonides, MISNEH TORUH, Hilchot Rotseah 1:4. One can plausibly argue that these laws, whatever their origins, have acquired secular content irrespective of any residual religious aura. Cf. McGowan v. Maryland, 366 U.S. 420, 451-52 (1961) (noting that Sunday closing laws have acquired secular content).

39. Even if these laws infringed upon the privacy right, it would not follow that anti-abortion legislation is also infirm because the state’s interest in that context is arguably quite strong. Cf. Ely, *supra* note 8, at 935.

40. The interest might be in maternal health, in fetal life, in potential human life, etc.

41. See *supra* note 38. Furthermore, in addition to its interest in protecting human life, the state might also choose to advance traditionally venerated interests in regulating medicine. When the state’s action appears to reach dramatically beyond its proffered interests, then we might be tempted to conclude that the state has betrayed an illegitimate motivation. Yet some motivations are *not* illegitimate, and it is these that can properly be used to counterbalance the woman’s privacy right.

perhaps be avoided altogether once it is recognized that the asserted state interest in the abortion context is wholly illegitimate.<sup>42</sup>

Three different descriptions of the legal rights and interests implicated in the abortion context are plausible. Each triggers a different level of analysis. (1) If there is no right to privacy, or if there is such a right but if the right does not encompass the abortion decision, then the state may interfere rather freely; its interest need not be compelling. (This statement of the problem rejects either or both of the first two steps in Justice Blackmun's argument in *Roe*.) (2) If there is a privacy right, which is fundamental, and if the privacy right includes the abortion decision, then the state may interfere only if its interest is compelling.<sup>43</sup> (3) If the woman has a fundamental right, and if at some point during the pregnancy the fetus acquires a fundamental right as well (i.e., either a right to life, or a right to potential life),<sup>44</sup> then

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42. Even if the quagmire is altogether unavoidable, the fact is that judges are forced to act as do legislators in a myriad of contexts. When applying the rational relation test in the substantive due process area, for example, judges will sometimes scrutinize the reasons why the legislature *said* it acted, *see, e.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (opinion of Brennan, J., looking to purposes articulated by the state rather than to hypothetical or conceivable purposes); but just as often the judges will search their own minds for possible reasons to support the legislation, *see, e.g.*, *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1911); *Frontiero v. Richardson*, 411 U.S. 677 (1973). When they do this, the Justices are being legislators. Even in the procedural due process context, the Court must act as does a legislature insofar as it must balance various interests against one another. *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (Black, J., dissenting).

At this point of my argument, I should emphasize that I make certain assumptions that are central to my thesis, although, as will become apparent, a rejection of any of my assumptions will not necessarily entail a rejection of the establishment clause argument I outline. I assume the existence of a constitutional right to privacy (though things would certainly be easier if there were a constitutional amendment explicitly recognizing this right). I further assume that at some point during the pregnancy the fetus acquires constitutional rights that are fundamental. I thus assume that at *some* point in the pregnancy there arise competing fundamental constitutional rights. Nevertheless, it merits emphasis that my argument would cast doubt upon the constitutionality of abortion legislation even if it were true that the Constitution recognizes no right to privacy.

43. *See supra* note 35. *See also Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). I assume for purposes of this essay that there is no persuasive way of characterizing the woman's right as a non-fundamental right. If the right were non-fundamental, however, the state would be permitted to interfere even if its interest were less than compelling.

44. The fetus' rights need not be characterized as fundamental in order for a conflict to arise. *See supra* note 26.

competing constitutional rights are implicated, and this tension must be resolved.<sup>45</sup>

The Court, in *Roe v. Wade* and since,<sup>46</sup> has rejected the first description of the problem. If that description were adopted, then the abortion issue would be largely political,<sup>47</sup> although even under those circumstances aspects of the argument sketched in this section would remain relevant. In addition, in *Roe* and since, the Court has suggested that both the second and third descriptions of the context are proper.<sup>48</sup> The Court has

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45. An entirely different essay could be written on abortion focusing on the subject of which institution may intervene when fundamental rights are in conflict. Since rights belong to persons, individuals will periodically hold rights that are in conflict with rights held by others. To say that constitutional rights are in tension is to say that when one individual acts in a way presumably permissible under the Constitution, another individual's supposed constitutional guarantee is interfered with. Who may intervene?

One answer is to say that the problem is entirely political, and that the political processes may balance the competing rights. The political processes (by which I mean legislatures) could decline to do so and opt instead to let the chips lie where they fall. A second answer is that only the courts may balance the rights and resolve (or mitigate) the tension. The final answer is that either institution may do so.

It seems inefficient as well as unwise to say that no institution may act to rectify tension between competing rights until the remedy stage of litigation. It thus seems appropriate to *permit* legislative action. (I have suggested, however, that in the context of the religion clauses, there are instances where the state may not act in advance of litigation. See Dow, *supra* note 18, at 508-10.) I would propose that while the state *may* act to balance competing fundamental rights when such rights are in conflict, it need not act; the state may instead let the chips lie where they fall (meaning, if litigation ensues, that the courts will be called upon to resolve the issue). Further, when a state does choose to act, it may be constitutionally required to do so in a way that produces a pareto-optimal result. "A Pareto-superior transaction is one that makes at least one person in the world better off and no one worse off." R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.2, at 12 (3d ed. 1986). Consequently, it could extinguish a right entirely only when there is no other way to preserve the competing right. Furthermore, state action is obviously cabined by the Constitution. See Dow, *supra* note 18, at 509 & n.66.

This specter of competing rights is ordinarily associated with the race context, where to recognize a black's fourteenth amendment rights appears, at times, to truncate the rights of innocent whites. See, e.g., *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *Firefighters v. Stotts*, 467 U.S. 561 (1984). Paul Gewirtz has addressed the issue of how a court ought to operate under such circumstances. See Gewirtz, *Remedies and Resistance*, 92 *YALE L.J.* 585 (1983). Professor Gewirtz distinguishes "rights maximizing" from "interest balancing." *Id.* at 591. His discussion assumes that resolving the tension is a judicial function; he does not discuss whether the political process is qualified to participate, and if so, what constraints apply.

46. See, e.g., *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Harris v. McRae*, 448 U.S. 297, 312-13 (1980).

47. By which I mean that the problem would be primarily suited to resolution by the political process, i.e., the legislatures. *But see infra* note 72.

48. See, e.g., *Akron*, 462 U.S. at 426-31; *Harris*, 448 U.S. at 312-18.

nevertheless neglected to address a crucial issue pertaining to those descriptions.

Specifically, the notion of “compelling state interest” is not accompanied by any mechanism for ascertaining whether an asserted interest *is* compelling. This is a stunning doctrinal lacuna.<sup>49</sup> Although there is rather substantial jurisprudential discussion of how the Court is to determine whether a right is fundamental,<sup>50</sup> the Supreme Court has never so much as intimated what procedure is to be followed in determining which adjective to apply to the state’s asserted interest. Doctrine, in other words, does not explain how a compelling interest is to be distinguished from an interest that is merely important, or even how a legitimate interest is to be distinguished from one that is illegitimate.

It is uncontroversial, however, that the enterprise of determining whether a state interest *is* compelling — whether it permits the state to interfere with an individual’s fundamental constitutional right — is a judicial function.<sup>51</sup> *I would suggest that the appropriate procedure for determining whether an interest is “compelling” is to replicate the procedure used to determine whether a right is fundamental.*

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49. See *Vlandis v. Kline*, 412 U.S. 441, 460-62 (1973) (Burger, C.J., dissenting) (referring to “the elusive and arbitrary ‘compelling state interest’ concept”). In his dissenting opinion in *Roe*, Justice Rehnquist opined that by utilizing the “compelling state interest” test in a due process context (as distinguished from an equal protection case) the Supreme Court was returning to the discredited *Lochner* mode of adjudication since “the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be ‘compelling.’” *Roe*, 410 U.S. at 174. See generally Schneider, *State Interest Analysis in the Fourteenth Amendment Privacy Law*, 51 LAW & CONTEMP. PROBS. 79, 82-96 (1988).

50. See, e.g., *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989). In a recent article, Professors Farber and Nowak assert that the opinions in *Michael H.* illustrate “the degree of judicial consensus” on the question of whether unwritten fundamental rights exist. I believe that their view is unduly sanguine, and my argument in this section does not assume that these jurisprudential questions are largely resolved. Farber & Nowak, *Beyond the Roe Debate: Judicial Experience With the 1980’s “Reasonableness” Test*, 76 VA. L. REV. 519, 534 (1990).

51. If the woman does have a fundamental constitutional right, which is the first issue for the Court to determine, then the Court must ascertain whether the state’s interest is compelling. There is thus nothing inherently anomalous in the conclusion that at some point in the pregnancy, but not before that point, the state’s interest is compelling. The question that has seemed problematic is whether there is a legitimate way for the judiciary to locate that point.

The Court is routinely called upon to determine whether a right is fundamental, and even whether a right exists.<sup>52</sup> In *Roe*, for instance, the Court concluded that the meaning of “liberty” in the fourteenth amendment includes the right of the woman to decide whether to terminate her pregnancy.<sup>53</sup> How the Court is to determine whether rights exist, and whether those that do are fundamental, is among the most debated issues in constitutional theory,<sup>54</sup> yet not a single member of the Court would dispute that the task must be done.

In fact, the Court’s recent decision in *Michael H. v. Gerald D.*<sup>55</sup> affirms this point while illustrating competing methodologies for determining whether a right is fundamental. The case involved the question of who would have custody rights to a young girl, the biological father or the spouse of the biological

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52. Determining whether rights are fundamental, and whether an individual holds a fundamental right, is acknowledged to be a judicial function. See, e.g., *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989); *United Bldg. & Constr. Trades v. Camden*, 465 U.S. 208 (1984); *Griswold v. Connecticut*, 381 U.S. 479, 486-94 (1965) (opinion of Goldberg, J.); *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (opinion of Harlan, J.). This fact alone may be all that is needed to justify the Court’s inquiry into viability, for insofar as it is the proper province of the Court to determine whether a right is fundamental, then, to the extent that the issue of viability is connected to that determination, the examination of viability is not merely permissible but obligatory.

Relatedly, the question of who is a “person” for constitutional purposes is a judicial function since it is appurtenant to the judicial task of determining whether a particular individual has certain rights. This enterprise is routinely engaged in when the Court confronts questions of standing. See Dow, *Standing and Rights*, 36 EMORY L.J. 1195 (1987). In addition, and importantly, the question of who is a “person” is quite different from the question of what is human, what is sentient, etc. For while the question of what is human is partly scientific, partly philosophical, and partly theological, the question of what is a person is entirely legal. The Court may well decide that it will permit the states to define “person.” See *supra* note 45. Nevertheless, the legislative action will be constrained by the Constitution, so that, for example, it may not use a definition that reflects orthodox religion.

This argument has an analogue in the conscientious objector laws. Congress defines “religion” — a first amendment word — for purposes of the exemption, but it may not do so in a way that contravenes the establishment clause. See *Gillette v. United States*, 401 U.S. 437 (1971); *Welsh v. United States*, 398 U.S. 333 (1969). This point is discussed in Dow, *supra* note 18, at 499-500. This is significant in the abortion context precisely because I suggest that there is an establishment clause limit on how broadly the state may define “person” if the state is indeed permitted to do so at all.

The theme I want to focus on at present, however, is the question of how the Court is to determine whether a proffered state interest is compelling.

53. *Roe*, 410 U.S. at 154.

54. See *supra* note 52. See generally G. GUNTHER, CONSTITUTIONAL LAW 516, 528-32 (11th ed. 1985) (“What are the proper sources of ‘fundamental values?’”). See also Dow, *Hillel’s Dilemma and Wisdom*, 4 NAT’L JEWISH L. REV. 59 (1989).

55. 109 S. Ct. 2333 (1989). See *supra* note 50.

mother. Under California law, a child born to a married woman living with her husband is presumed to be a child of the marriage. The plaintiff, the girl's biological father, challenged this presumption as it affected his custody rights, arguing that it abridged his fourteenth amendment guarantees. In affirming the constitutionality of the statute, Justice Scalia, writing for a plurality, reviewed the Court's practice of looking to "historical traditions" in determining what is protected by the vague language of the fourteenth amendment. Notably, he referred to *Roe* as support for the proposition that societal tradition is critical to understanding the liberty protected by the fourteenth amendment. "[W]e spent about a fifth of our opinion [in *Roe*]," Justice Scalia calculated, "negating the proposition that there was a longstanding tradition of laws proscribing abortion." For Justice Scalia, the Court gives content to the idea of liberty by examining societal traditions.<sup>56</sup>

Justice Brennan rejected the notion that the sole guide to the content of the idea of liberty in the fourteenth amendment is what specific societal tradition endorses.<sup>57</sup> A narrow focus on highly specific tradition will, argued Justice Brennan, transform the Constitution into a "stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past." The better approach "is to ask whether the . . . relationship under consideration is close enough to the interests that we already have protected to be deemed an aspect of 'liberty' as well."<sup>58</sup> Justice Brennan also looked to history, but to a somewhat different history: the history of our cultural values' evolution.

Superficially Justices Scalia and Brennan appear to have little in common. Yet both do look to the past, albeit to rather

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56. Only Chief Justice Rehnquist agreed with Scalia's idea that the judicial role is to locate the most "specific tradition" available rather than a more general one. Justice Scalia's preference for a more specific tradition is based on his belief that "general traditions provide such imprecise guidance [that] they permit judges to dictate rather than discern society's views." *Id.* at 2344 n.6.

57. Justice Brennan recognized that the Court must determine whether the Constitution recognizes the state's asserted interest, but, as is typical of fourteenth amendment jurisprudence, none of the Justices gives any guidance as to how the Court is to classify an interest (how the Court is to discriminate among compelling, important, or merely legitimate interests).

58. *Michael H.*, 109 S. Ct. at 2349. Brennan's argument is not unlike that proposed by Professor Tribe, see Tribe, *Structural Due Process*, *supra* note 8.

different segments of the past. Justice Scalia asks what the people have in the past regarded as within the ambit of vague constitutional language; Justice Brennan asks what the Court has viewed as within the language. Notably, however, neither Justice disagrees with the proposition that, irrespective of which aspect of history provides the appropriate guide, it is the Court's job to do the looking. Furthermore, though they do not agree on what it is that should constrain the Court's examination of history, both Justices Brennan and Scalia do agree that there must be constraints.

The problem with *Roe*, therefore, is not simply that the Court found a privacy right, or even that the Court misweighed it (misjudged, in other words, the applicable constraints). Instead, what has bothered commentators and the more conservative members of the Court about *Roe* was its peculiar reliance on the notion of viability — not its mode of locating fundamental rights. The Court's determination of when the fetus' rights become fundamental and of when the state's interest becomes compelling rested entirely on the notion of viability, yet the Court did not explain why it is that viability matters for constitutional purposes, why it is that the notion of viability can do so much work. That omission is responsible for a great deal of the legal criticism of the *Roe* opinion; yet in that silence resides the core of the establishment clause argument for choice.

The establishment clause commands that the government "shall make no law respecting an establishment of religion . . . ."<sup>59</sup> The first amendment thus limits the societal traditions that can be given constitutional weight. What this means, to either the Justice Brennan model or that of Justice Scalia, is that if we find, when we look, that our conception of the fourteenth amendment is animated primarily by an idea associated with orthodox religiosity, then we are compelled by the establishment clause of the first amendment to revise our conception. (I assume, without arguing, that the fourteenth amendment cannot plausibly be construed to mitigate the force of the establishment clause.)

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59. U.S. CONST. amend. I, cl. 1. On its own terms, the establishment clause applies only to Congress. It was held to apply to the states through the fourteenth amendment in *Everson v. Board of Educ.*, 330 U.S. 1 (1947).



If the question of whether an asserted state interest is compelling is addressed as is the question of whether an asserted right is fundamental (or even existent), as I have suggested it ought to be, then it follows that interests rooted in orthodox religiosity are not even legitimate, and certainly not compelling.<sup>60</sup> This is so simply because the Constitution makes certain reasons illegitimate as bases for government action. It is true, of course, that the question of legislative motivation is enormously problematic,<sup>61</sup> and in some areas the Court has explicitly dismissed the relevance of Congressional motive.<sup>62</sup> In the area of the religion clauses,<sup>63</sup> however, motive is recognized as important.<sup>64</sup> One prong of the *Lemon* test,<sup>65</sup> for example, which is traditionally utilized by the Court in establishment clause challenges, inquires precisely into the *purpose* of the challenged action. This is proper, I think, because the very nature of religious controversy lies in belief and the attempt to impose orthodoxy. When dealing with religious issues, therefore, or issues that are arguably religious, examination of motive, of purpose, is as inevitable as it is imperative.

We are now in a position to appreciate the Court's opinion in *Roe* and its attention to the notion of viability. The critical

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60. The Court has been notoriously disingenuous when confronted with blatantly religious laws. In the Sunday closing cases, for example, the Court closed its eyes to orthodox religiosity that underlay them. See, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961). The Sunday closing cases are discussed in Dow, *supra* note 18, at 500-01. It is one thing to say that if stores could be forced to close on Sundays in 1789 then the establishment clause cannot mean that they must be permitted to remain open; it is quite another to pretend that the laws themselves are not animated by purely religious impulses.

That certain reasons are constitutionally illegitimate is an uncontroversial feature of first amendment doctrine, even though it necessarily incorporates motive analysis. See *supra* notes 12-23 and accompanying text. In the free speech context, see, e.g., *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Perry v. Sinderman*, 408 U.S. 593 (1972).

61. See, e.g., Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141 (1978); Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). See also *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

62. See, e.g., *United States v. Darby*, 312 U.S. 100 (1941).

63. See *supra* notes 11-18 and accompanying text.

64. See *supra* notes 17-23 and accompanying text.

65. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

question (assuming the existence of the privacy right) is whether the state's interest in preserving either fetal life or potential life is compelling. To answer this question, we must look, as we do when determining whether the meaning of "liberty" includes a certain protection, either to societal tradition (Justice Scalia's model) or to the evolution of societal tradition, as that evolution has been understood by the courts (Justice Brennan's model). Either approach reveals the pertinence of Justice Blackmun's focus on viability in *Roe*, for either approach must acknowledge — the establishment clause compels as much — that societal tradition must be understood as something different from orthodox religious doctrine. Further, irrespective of the meaning we affix to the notion of "societal tradition," it alone, in contradistinction to religious mores, serves as the sole appropriate guide. To ascertain, then, whether the state's interest is compelling, we must look to how societal tradition, or the evolution of societal tradition, has regarded the state's interest at issue, and we must be quite careful to separate societal tradition (or what I prefer to denominate cultural values) from religious mores.

Justice Blackmun's opinion in *Roe* purports to demonstrate that despite the ancient *religious* view that life begins at conception and that abortion is therefore sinful, our culture has not abided by that view. Our culture — our "societal tradition," in Justice Scalia's parlance — does not accept the notion that the fetus prior to viability is an entity on whose behalf the state may categorically proscribe abortion. The inquiry into viability is thus a judicial function — and a critical one at that — because it serves to distinguish broad, widely held cultural values from discrete religious dogma. And this distinction is necessary to the determination of whether a proffered state interest is compelling.

Often the state's interest in enforcing moral or ethical values does rise to the level of compelling. The morals or ethics that the political system seeks to enforce, however, must be grounded in cultural values rather than religious values. States can outlaw murder, for example, because there is widespread (which is not to say unanimous) consensus with the notion, say, that Ted Bundy's victims were "persons." On the other hand,

laws purporting to forbid work on the Sabbath, or laws purporting to compel individuals to keep kosher, would be unconstitutional, for laws such as these surely would reflect primarily religious values. Cultural values can supply the predicate for a compelling state interest.<sup>66</sup> Discrete religious dogma cannot.

This argument requires that we be able to distinguish cultural values (which can legitimately underlie moral or ethical legislation) from religious values (which cannot).<sup>67</sup> It also requires that we be able to determine when what was once solely a religious value has become a cultural value.<sup>68</sup> These tasks are difficult, although others have suggested how they might be accomplished.<sup>69</sup> The present point, however, is that there is a difference (for constitutional purposes) between religious values

66. Hence, it has been held that mere administrative convenience is not a compelling interest, *see, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969). Procedural due process must be observed even when it is costly to do so, *see e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). This commitment is certainly connected to the deeply held and prevalent idea in our culture that efficiency or utility are not important enough values to warrant disregard for individual rights. *See* R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 190-92 (1977).

67. A distinction can also be drawn between cultural and political values. Cultural values, I would suggest, might be said to be associated with our essence as a people, whereas political values are merely attributes. Political values are far more ephemeral than cultural values. *Cf.* ARISTOTLE, *METAPHYSICS*, bks. I-IV, VI.

68. *Cf.* Sunday closing cases cited *supra* note 60.

69. *E.g.*, Wellington, *Common Law Rules and Constitutional Double Standards*, 83 *YALE L.J.* 221 (1973); Perry, *Abortion, the Public Morals, and the Police Power*, 23 *UCLA L. REV.* 689 (1976). Governor Cuomo put the point well:

[P]ublic morality . . . depends on a consensus view of right and wrong. The values derived from religious belief . . . should not . . . be accepted as part of the public morality unless they are shared by the pluralistic community at large, by consensus.

Cuomo, *Religious Belief and Public Morality*, 1 *NOTRE DAME J.L., ETHICS & PUB. POL'Y* 13, 18 (1984) (address to the Department of Theology at the University of Notre Dame, September 13, 1984).

Professor Greenawalt, who has addressed the connection between religious values and abortion legislation, *see* Greenawalt, *Premises*, *supra* note 6, at 274, is correct in concluding that the moment of viability has no *rational* connection to the fetus' moral worth. That is not the issue, however. The issue is whether the moment of viability is culturally significant. Governor Cuomo's instinct is that it is, and Justice Blackmun's opinion in *Roe* suggests that Cuomo's instinct is accurate. *See generally*, M.A. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987); Robertson, *In the Beginning: the Legal Status of Early Embryos*, 76 *VA. L. REV.* 437 (1990).

The issue of whether the Supreme Court is competent to discern social consensus is problematic and widely discussed. *See* Brest, *The Fundamental Rights Controversy*, 90 *YALE L.J.* 1063, 1068-71, 1083-86 (1981). My present point, however, is simply that there is a difference, and a constitutionally significant one, between religious values and other

and cultural values, and that only one can provide the predicate for a compelling state interest.

As a preliminary effort to distinguish between them, I would suggest that religious values can be recognized by the presence of truly radical divisiveness surrounding them. Cultural values must perforce be defined tautologically, in terms of the culture whence they emerge, and “[w]hat constitutes a particular culture is the set of statements that are considered to be ‘warrantedly assertable’ within it.”<sup>70</sup> This means that our culture comprises the beliefs of those to whom we appeal when we argue. As Wittgenstein put it:

If I say that my book is meant for only a small circle of people (if it can be called a circle), I do not mean that I *believe* this circle to be the elite of mankind, but it does comprise those to whom I turn (not because they are better or worse than others but) because they form my cultural milieu, my fellow citizens as it were, in contrast to the rest who are foreign to me.<sup>71</sup>

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social values. Cf. K. GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICES* (1988); Audi, *Religion and the Ethics of Political Participation*, 100 *ETHICS* 386 (1990). I have elsewhere argued that ascertaining non-religious cultural values is indeed a distinctively judicial function. Dow, *supra* note 54. I would argue further that our culture has rather deep roots that sanction precisely this resort to judicial instinct, or to what I prefer to denominate judicial wisdom. Rousseau’s remarks, for instance, are edifying:

[T]he first concern of those who plot iniquities is to protect themselves from juridical proofs; it does not do any good to bring them to court. Interior conviction recognizes another type of proof which is governed by the feelings of an honest man.

Letter from J. J. Rousseau to David Hume, *quoted in* C. BLUM, *ROUSSEAU AND THE REPUBLIC OF VIRTUE* 257 (1986). See also *THE FEDERALIST* No. 78, at 467 (A. Hamilton 1788) (C. Rossiter ed. 1961) (“A constitution is, in fact, and must be regarded by the judges, as fundamental law. It therefore belongs to them to ascertain its meaning.”).

70. S. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* 110 (1982). This claim is not unlike Stanley Fish’s argument that what makes an interpretation acceptable is that other interpreters feel obliged to respond to it. See S. FISH, *IS THERE A TEXT IN THIS CLASS?* 344 (1980). Fish’s argument is vulnerable, I think, but it might nonetheless define the outer limits of a given culture.

71. L. WITTGENSTEIN, *CULTURE AND VALUE* 10e (P. Winch trans. 1980) (German ed. 1977, published as *VERMISCHTE BEMERKUNGEN*) (emphasis in original). Relatedly (I think), Wittgenstein added: “I believe that if one is to enjoy a writer one has to *like* the culture he belongs to as well. If one finds it indifferent or distasteful, one’s admiration cools off.” *Id.* at 85e (emphasis in original).

Controversies animated by competing religious views do not partake of the rational discourse ordinarily associated with political debate. Although it is obviously not the role of the Court to intervene in politics where the issue is merely morally controversial,<sup>72</sup> ordinary moral controversy, while often bitter and divisive, typically proceeds at a level of rationality.<sup>73</sup> This is not to say that religiously held beliefs or values are illegitimate, or that they are less worthy of respect than secular beliefs and values; indeed, it is not even to say that non-religious beliefs and values are ultimately rational, for they are not.<sup>74</sup> My point is simply that only non-religious values can, consistently with the Constitution, underlie legislative action.

Further, in an argument not dissimilar from mine, Professor Richard has put forth the provocative suggestion that the very recognition of a right to privacy evinces a principled realization of the Constitution's skepticism toward state enforcement "of

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72. See *Poe v. Ullman*, 367 U.S. 497, 547 (1961) (Harlan, J., dissenting). Politics is characterized, I would argue, by compromise. To this extent, the abortion issue, insofar as at least one set of the disputants is unwilling to compromise, seems, peculiarly, to lie outside the bounds of politics. Because the problem is not compromise-able, it is not a political problem. See *supra* note 47.

73. See generally F. SCHICK, *HAVING REASONS* (1984); D. BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* (1989). Again, Wittgenstein's insights are illuminating:

It strikes me that a religious belief could only be something like a passionate commitment to a system of reference. Hence, although it's *belief*, it's really a way of living, or a way of assessing life. It's passionately seizing hold of *this* interpretation. Instruction in a religious faith, therefore, would have to take the form of a portrayal, a description, of that system of reference, while at the same time being an appeal to conscience. And this combination would have to result in the pupil himself, of his own accord, passionately taking hold of the system of reference. It would be as though someone were first to let me see the hopelessness of my situation and then show me the means of rescue until, of my own accord, or not at any rate led to it by my instructor, I ran to it and grasped it.

L. WITTGENSTEIN, *supra* note 71, at 64e (emphasis in original).

74. Michael Perry has suggested, correctly I think, that the Constitution consists of a complex of value judgments that can themselves be called religious. See Perry, *Noninterpretive Review in Human Rights Cases*, 56 N.Y.U. L. REV. 278 (1981). These values signify the way that the people, the American people as a whole, understand themselves and their culture. The task of the judiciary is to distill and safeguard these values. See *supra* note 69. These values are not, in a logical sense, less arbitrary than religious values. The point, however, is that they are grounded in a distinctly American culture, rather than in a discrete religious doctrine. See also Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

certain conceptions of a perfectionist public morality.”<sup>75</sup> Following William James then, we might define religious values as those connected to the “the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.”<sup>76</sup> James was, of course, defining “religion,” not “religious value”; accordingly, his caveat is particularly appropriate: “[T]he word ‘religion,’” James warned, “cannot stand for any single principle or essence.”<sup>77</sup> Nevertheless, James’ attention to the idea of “divine” is suggestive and salutary.<sup>78</sup> Mencken’s conception of religion was not unlike James’: What all religions share, in Mencken’s view — and this truly distinguishes religions from cultures — is that they aim “to attract the notice of the gods, and . . . to induce them to be amiable.”<sup>79</sup> A value that is tethered inextricably to some concept of the divine is a religious value. Of course, divine inspiration is only a single source of morality. Morality can also come, and does come, from rational inquiry<sup>80</sup> and from the repetition of persistent and prevalent moral injunctions. These injunctions are generated by a culture yet are not divine. They are ethereal, almost mystical, hurdles that individuals in a given culture “think of as more or less insurmountable.”<sup>81</sup> Aborting viable fetuses would exemplify one such hurdle. More generally, in the abortion context, the moment of viability represents the boundary between cultural

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75. Richard, *Liberalism, Public Morality, and Constitutional Law*, 51 LAW & CONTEMP. PROBS. 123, 125 (1988).

76. W. JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 42 (1961). James’ own complex religious views are ably (and accessibly) discussed in G. MYERS, *WILLIAM JAMES: HIS LIFE AND THOUGHT* 446-61 (1986).

77. W. JAMES, *supra* note 76, at 39. “The theorizing mind,” James added, “tends always to the oversimplification of its materials. This is the root of all that absolutism and one-sided dogmatism by which both philosophy and religion have been infested.” *Id.*

78. Here too, however, James was aware that he was on treacherous ground. *See id.* at 43-47. As James conceded, “a chance of controversy comes up over the word ‘divine,’ if we take the definition in too narrow a sense. There are systems of thought which the world usually calls religious, and yet which do not positively assume a God. Buddhism is in this case.” *Id.* at 43. *See also* W. JAMES, *The Will to Believe*, in *THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY* 1-31, especially 30 (Dover ed. 1956; originally published 1897) (noting that decisions based on religious values are quintessentially individual). I am thankful to Ronald Chichester for calling this passage to my attention.

79. H.L. MENCKEN, *A TREATISE ON THE GODS* 101 (1930). *See also id.* at 101-02 (noting that one of the four ideas lying at the bottom of all religion is the belief that the universe is controlled by a supernatural power).

80. *See, e.g.*, R. HARDIN, *MORALITY WITHIN THE LIMITS OF REASON* (1988); R.M. HARE, *ESSAYS IN ETHICAL THEORY* (1989).

81. S. HAMPSHIRE, *MORALITY AND CONFLICT* 88 (1983).

(or social) consensus and radical divisiveness. Viability is our culture's insurmountable hurdle. It, and not the moment of conception, has been vested by our culture with import. Laws prohibiting abortions of viable fetuses would thus not be religious laws (though they would certainly represent a particular moral vision); laws that infringe the right to abortion prior to fetal viability, on the contrary, would be.

Laws that simply reflect or implement religious values, or laws that are primarily animated by religious values, are impermissible under the first amendment.<sup>82</sup> While legislatures may constitutionally enact laws connected to moral or ethical values, the moral or ethical laws that legislatures seek to enforce must be grounded in our cultural values rather than in discrete religious dogma. Laws that outlaw abortion prior to viability reflect orthodox religious values rather than cultural values. Such laws thus traverse the line between permissible moral legislation and forbidden establishment of religion.

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82. This raises problems associated with ascertaining legislative intent. The literature on this subject is extensive. See, e.g., Symposium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978). See also sources cited *supra* note 61. Despite the problems, the inquiry is, as I intimate in the text, imperative where establishment clause challenges are levied. In fact, in addressing and resolving the so-called creation-science issue, the Court has recently reaffirmed the pertinence of motive analysis in religion cases. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987); see also *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). Furthermore, the purpose prong of the *Lemon* test, traditionally used in establishment clause cases, reflects precisely this inquiry into motive. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).