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Abortion, Religion, and the Accusation of Establishment: A Critique of Justice Stevens' Opinions in *Thornburgh*, *Webster*, and *Casey*

John M. Breen

Loyola University Chicago, School of Law, jbreen1@luc.edu

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**Abortion, Religion, and the Accusation of Establishment: A
Critique of Justice Stevens' Opinions in *Thornburgh*, *Webster*,
and *Casey***

JOHN M. BREEN*

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* Professor of Law, Loyola University Chicago School of Law; B.A. 1985, University of Notre Dame; J.D. 1988, Harvard University. I wish to thank to thank Bruce Frohnen for inviting me to participate in this symposium at Ohio Northern University School of Law and the editors of the Ohio Northern University Law Review, and in particular, Taylor Beaty. I also wish to thank Michael A. Scaperlanda, Richard W. Garnett, Lee J. Strang and Nora O'Callaghan for commenting on an earlier draft of the piece, and my wife Susan Nelligan Breen and our children Peter and Philip for their patience and understanding during the drafting of this essay.

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I. INTRODUCTION

As a United States Senator, as a presidential candidate, and now as Vice President, Joseph Biden has become famous for his unique brand of extemporaneous remarks and political commentary, so much so that one *Los Angeles Times* columnist dubbed him the nation’s “gaffe machine.”¹ Whether explaining to members of Congress that “If we do everything right, if we do it with absolute certainty, there’s still a 30 percent chance we’re going to get it wrong”; or thanking an Indian-American supporter by remarking that “you cannot go to a 7-Eleven or Dunkin Donuts unless you have a slight Indian accent. And I am not joking!”; or telling a wheelchair bound public official to “Stand up!” and address a campaign rally, Mr. Biden possesses a rare gift for saying the inappropriate and the unexpected.² Given this talent, when Mr. Biden is not cribbing from the speeches of

1. Jonathan Chait, *Joe Biden’s Just a Barrel of Gaffes*, L.A. TIMES., Feb. 4, 2007, available at <http://articles.latimes.com/2007/feb/04/opinion/op-chait4>.

2. These and other unfortunate statements by Mr. Biden are conveniently collected together with video of Mr. Biden speaking at *Top 10 Joe Biden Gaffes*, available at <http://www.time.com/time/specials/packages/completelist/0,29569,1895156,00.html>.

fellow politicians,³ he usually can be counted on to say something original if not especially profound.

During the Vice Presidential Debate that took place on October 11, 2012, Mr. Biden said something that managed to combine the worst aspects of his public speaking: something that was completely unoriginal, entirely expected, and in no way profound. When asked about his views on abortion, he told the audience that his Catholic faith “defines who I am” but that “I refuse to impose it on equally devout Christians and Muslims and Jews, and I just refuse to impose that on others.”⁴ He also insisted that the claim that the life of a human being begins at conception is a theological claim: “Life begins at conception in the church’s judgment. I accept it in my personal life.”⁵ Here, Mr. Biden articulated a wholly unoriginal and unsurprising response to the issue by characterizing opposition to abortion as being religious in nature. As is often the case, Mr. Biden might have stated the point more clearly. Still the audience understood what he was trying to say: Because opposition to abortion is religious, because it depends on theological beliefs like “life begins at conception,” it is wrong as a matter of political morality to impose those beliefs on a religiously diverse society such as ours through the coercive power of the state. Moreover, because using a law to ban or otherwise restrict abortion constitutes an “establishment of religion,” it violates the First Amendment to the Constitution.

Mr. Biden may be forgiven for invoking religion in his answer since the moderator’s question expressly invited him to do so,⁶ but others address the

3. Biden was accused of plagiarism while a student at Syracuse University College of Law. As a presidential candidate he was accused of plagiarizing the speeches of other politicians including John F. Kennedy, Robert F. Kennedy, Hubert Humphrey, and British M.P. Neil Kinnock. See E.J. Dionne, Jr., *Biden Was Accused of Plagiarism in Law School*, N.Y. TIMES (Sept. 17, 1987), available at <http://www.nytimes.com/1987/09/17/us/biden-was-accused-of-plagiarism-in-law-school.html>; David Greenberg, *The Write Stuff?: Why Biden’s Plagiarism Shouldn’t Be Forgotten*, SLATE MAG. (Aug. 25, 2008), available at http://www.slate.com/articles/news_and_politics/history_lesson/2008/08/the_write_stuff.html.

4. Transcript of Vice Presidential Debate Between Joseph Biden and Paul Ryan (Oct. 11, 2011), available at <http://www.debates.org/index.php?page=october-11-2012-the-biden-romney-vice-presidential-debate>.

5. *Id.* For some additional commentary on Mr. Biden’s answer concerning abortion, see John M. Breen, *The Vice Presidential Debate and Abortion: That’s Just Joe Being Joe!*, MIRROR OF JUSTICE (Oct. 16, 2012), <http://mirrorofjustice.blogs.com/mirrorofjustice/2012/10/the-vice-presidential-debate-and-abortion-thats-just-joe-being-joe.html>.

6. The debate moderator, journalist Martha Raddatz, posed the question this way:

And I would like to ask you both to tell me what role your religion has played in your own personal views on abortion. Please talk about how you came to that decision. Talk about how your religion played a part in that. And, please, this is such an emotional issue for so many people in this country . . . please talk personally about this, if you could.

topic in the same manner voluntarily and without any prompting, even where the question discourages such a response. For example, although Mr. Biden's running mate, President Barack Obama, was not asked any questions on the topic of abortion in the 2012 Presidential Debates or elsewhere in the campaign (largely because of the inattention of the press), he did address the topic four years earlier during the 2008 campaign.⁷ At the Democratic Candidates Compassion Forum hosted on April 13, 2008 at Messiah College in Pennsylvania, then Senator Obama was asked "[D]o you personally believe that life begins at conception? And if not, when does it begin?"⁸ In response, Mr. Obama introduced religion: "This is something that I have not, I think, come to a firm resolution on. I think it's very hard to know what that means, when life begins. Is it when a cell separates? Is it when the soul stirs?"⁹ The question of "when the soul stirs," like so many theological controversies, may not be susceptible to resolution in a public forum. The same may not be said of scientific questions, but Mr. Obama's answer suggests that science is not relevant to resolution of the dispute.

Similarly, at the Saddleback Presidential Candidates Forum held on August 16, 2008, Mr. Obama was specifically asked "[A]t what point does a baby get human rights, in your view?"¹⁰ Because the question was framed in terms of "rights" it seemed to call for an answer rooted in legal analysis and for which a specific time or event (e.g. birth) would suffice. Instead, Mr. Obama again suggested that the matter was religious and so incapable of resolution: "Well, you know, I think that whether you're looking at it from a theological perspective or a scientific perspective, answering that question with specificity, you know, is above my pay grade."¹¹ He went on to suggest, like Biden, that those who think they have resolved the question of when life begins have done so on the basis of religion, and this renders the subject incapable of rational discussion: "[I]f you believe that life begins

Id. That Ms. Raddatz framed her question about abortion in relation to religion reveals as much about how many in the media view opposition to abortion, which is to say how successful the claim under review in this essay has been in forming the prism through which the public views the issue. See David Shaw, *Abortion Foes Stereotyped, Some in the Media Believe*, L.A. TIMES (July 2, 1990), available at <http://groups.csail.mit.edu/mac/users/rauch/nvp/media/shaw2.html> (quoting one reporter as saying that "Journalists tend to regard opponents of abortion as 'religious fanatics' and 'bug-eyed zealots'"). The other three articles in the series are available at <http://groups.csail.mit.edu/mac/users/rauch/nvp/media/media.html>.

7. See Transcript of Democratic Candidates Compassion Forum (April 13, 2008), available at <http://transcripts.cnn.com/TRANSCRIPTS/0804/13/se.01.html>.

8. *Id.*

9. *Id.*

10. Transcript of Saddleback Presidential Candidates Forum (Aug. 16, 2008), available at <http://transcripts.cnn.com/TRANSCRIPTS/0808/16/se.02.html>.

11. *Id.*

at conception, then – and you are consistent in that belief, then I can't argue with you on that, because that is a core issue of faith for you.”¹²

John Kerry, Mr. Obama's predecessor as the Democratic Party's presidential candidate in 2004, likewise responded to questions on abortion by invoking religion and then claiming that the religious nature of opposition to abortion precluded legal regulation of the subject.¹³

I'm a Catholic, raised a Catholic. I was an altar boy. Religion has been a huge part of my life. It helped lead me through a war, leads me today. But I can't take what is an article of faith for me and legislate it for someone who doesn't share that article of faith, whether they be agnostic, atheist, Jew, Protestant, whatever. I can't do that.¹⁴

In the final debate of 2004 he reiterated this point once again.¹⁵ “I believe that I can't legislate or transfer to another American citizen my article of faith. What is an article of faith for me is not something that I can legislate on somebody who doesn't share that article of faith.”¹⁶ For Kerry, the notion was that he could not regulate abortion even if he wanted to because to do so would be to impose his religion on others, something that the Constitution forbids.

Proponents of abortion have long seen religion—in particular Christianity and Catholicism—as being at the root of opposition to abortion. Well before elective abortion was legal in any state, Lawrence Lader sought to portray concern for the unborn child as a faith-based concern that amounted to a religious conspiracy against freedom.¹⁷ As one of the founders of the National Association for the Repeal of Abortion Laws, “NARAL,”¹⁸ Lader devised a “Catholic strategy” that identified the Catholic Church as “[t]he major opposition to abortion law repeal” and

12. *Id.*

13. Transcript of the Second Bush-Kerry Presidential Debate (Oct. 8, 2004), available at <http://www.debates.org/index.php?page=october-8-2004-debate-transcript>.

14. *Id.*

15. Transcript of the Third Bush-Kerry Presidential Debate (Oct. 13, 2004), available at <http://www.debates.org/index.php?page=october-13-2004-debate-transcript>.

16. *Id.*

17. See LAWRENCE LADER, ABORTION (1966). Lader continued the theme of characterizing the pro-life cause as a religious movement—one that sought to impose narrow sectarian beliefs on a diverse American public made up of believers and non-believers alike—long after *Roe v. Wade* made abortion a constitutional right. See LAWRENCE LADER, ABORTION II (1973); LAWRENCE LADER, POLITICS, POWER, AND THE CHURCH – THE CATHOLIC CRISIS AND ITS CHALLENGE TO AMERICAN PLURALISM (1987).

18. See DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 350, 360-61 (1994). NARAL later became the National Abortion Rights Action League. Today the organization goes by the name “NARAL Pro-Choice America.” The group's website is available at <http://www.naral.org>.

suggested that abortion proponents portray the Church “as a political force, for the use of anti-Catholicism as a political instrument, and for the manipulation of Catholics themselves by splitting them and setting them against each other.”¹⁹

The Court did not base its decisions in *Roe v. Wade*²⁰ and *Doe v. Bolton*²¹ on establishment clause principles,²² and courts in general have not been receptive to the claim that anti-abortion laws represent an attempt to codify the tenets of religious belief. In the realm of public advocacy, however, the proponents of the abortion license never seem to tire of trying to portray restrictions on abortion as an exercise in theocracy.

For example, Sunsara Taylor at the pro-choice blog *RH Reality Check*, claims that the goal of pro-life organizations, “has NEVER been about ‘protecting fetal life.’ It has always been about insisting that women stay in their place,” a goal she infers from her reading of the Christian scriptures.²³ For Taylor “the movement in this country to restrict, criminalize, and shame women out of their right to abortion is entirely driven by religion.”²⁴ Indeed, “[a]side from openly genocidal rationals [sic] (for example, the

19. BERNARD N. NATHANSON, *THE ABORTION PAPERS: INSIDE THE ABORTION MENTALITY* 177, 181 (1983). As Nathanson, who collaborated with Lader in co-founding NARAL, also wrote, reflecting on the tactic: “I am ashamed of the use of the anti-Catholic ploy. It was grubby, dangerously divisive, and probably superfluous. It was a reincarnation of McCarthyism at its worst.” *Id.* at 200.

20. *Roe v. Wade*, 410 U.S. 113 (1973).

21. *Doe v. Bolton*, 410 U.S. 179 (1973).

22. Shortly after *Roe* was decided, Professor Laurence Tribe argued that the decision of what set of characteristics make a being “human” calls for “a statement of religious faith upon which people will invariably differ widely.” Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 21 (1973). According to Tribe, Justice Blackmun recognized “the highly charged and distinctly sectarian religious controversy” that the abortion issue had become and “though not relied upon by the Court” supports its holding. *Id.* at 22. For Tribe, government becomes entangled with religion in violation of the Establishment Clause “whenever the views of organized religious groups have come to play a pervasive role in an entire subject’s legislative consideration for reasons intrinsic to the subject matter as then understood.” *Id.* at 23. He concludes that banning the destruction of fetal life as the life of a human being cannot be established “in any wholly secular way.” *Id.* at 25. Tribe later repudiated these views in his treatise, saying that

on reflection, that view appears to give too little weight to the value of allowing religious groups freely to express their convictions in the political process, underestimates the power of moral convictions unattached to religious beliefs on this issue, and makes the unrealistic assumption that a constitutional ruling could somehow disentangle religion from future public debate on the question.

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 928 (1st ed. 1978). For a recent, innovative twist on this argument, see Justin Murray, *Exposing the Underground Establishment Clause in the Supreme Court’s Abortion Cases*, 23 REGENT U. L. REV. 1 (2010). Murray argues that Justice Blackmun’s opinion in *Roe* did in fact rely upon a concern for the First Amendment, but that this reliance was tacit, what he terms “the underground Establishment Clause.” He further argues that abortion restrictions can be plausibly supported on secular grounds.

23. Sunsara Taylor, *Abortion, Let’s NOT Leave Religion Out of It!*, *RH Reality Check* (Aug. 27, 2011), available at <http://rhrefrealitycheck.org/article/2011/08/27/abortion-lets-leave-religion/>.

24. *Id.*

Nazis criminalized abortions for ‘Aryan’ women), this Biblical mandate (or similar patriarchal mandates of other religions) is the *only reason* there is to oppose abortion.”²⁵ According to Taylor, the public needs to confront “the theocratic core of the movement to end abortion” in order to bring about an end to the “retrograde, theocratic horror show” that it would institute.²⁶

Others, like Amanda Marcotte, also at *RH Reality Check*, assert that restrictions on abortion violate a woman’s right to the free exercise of religion such that a law restricting abortion is akin to “forcing women to wear the hijab, forcing kids to say the rosary in school, or banning non-kosher food from restaurants — and [sic] outrageous violation of the right to choose your own religious beliefs.”²⁷ For Marcotte, to ignore “all the praying and the Jesus at anti-choice demonstrations” is to throw “women’s rights to the wolves in order to appease people with a theocratic bent.”²⁸

Still others contend that laws which seek to acknowledge that “life begins at conception” or that protect the human embryo or fetus as a “human being” or “person” are attempts to legislate a “religiously held belief.”²⁹ As *New York Times* columnist Gail Collins succinctly stated in a recent column:

If you believe that every fertilized egg is a human being, with the same sacred rights as a newborn baby, then, obviously, you are not going to want it to be aborted, no matter how it came into the world. Politicians who say they oppose all abortions are making perfect sense, except for the part where they try to impose their doctrinal

25. *Id.* (emphasis added).

26. *Id.*

27. Amanda Marcotte, *Banning Abortion: The First Step Toward Theocracy*, *RH Reality Check* (March 11, 2010), available at <http://rhrealitycheck.org/article/2010/03/11/banning-abortion-first-step-toward-theocracy/>.

28. *Id.* It should be noted that writers like Marcotte and Taylor often combine several strands of the “anti-choice laws are religious” theme in a single column or article. Thus, Taylor insists that belief in the humanity of the unborn is not scientific because “[s]cientifically, fetuses are NOT children.” Instead, Taylor asserts that the fetus is “a subordinate part of a woman’s body” that “doesn’t become a human until it is born and becomes an independent social and biological being.” Taylor, *supra* note 23. Similarly, Marcotte asserts that “anti-choicers” are generally “smart enough to realize that making laws based on their beliefs about ensoulment of zygotes would be a direct violation of the standard interpretation of the First Amendment” so that instead they “try to graft cockamamie pseudo-scientific arguments on to their religious beliefs.” Because people disagree about when a fetus becomes a person, Marcotte contends that “[i]deally, the government would stay out of it until the fetus enters the social contract by, you know, being born and actually becoming a separate person from its mother.” Marcotte, *supra* note 27.

29. Rabbi Aaron Alexander, *Abortion: Does My Faith Get a Say?*, *Huffington Post* (July 8, 2013), available at http://www.huffingtonpost.com/rabbi-aaron-alexander/abortion-does-my-faith-ge_b_3552058.html.

beliefs on the vast majority of the country, which does not share that particular religious conviction.³⁰

Regardless which of these particular claims is asserted within the general theme, the conclusion is the same: “The attempt to legislate one set of religious beliefs about women’s ability to control their reproductive lives is an offense to a bedrock commitment of America’s constitutional democracy: freedom of religion and separation of church and state.”³¹

The legal commentary that has taken up the theme of the connection between abortion restrictions and religion has, with some exceptions, not focused on anti-abortion laws as a means of trapping women in religiously defined gender roles, or as a denial of the right to free exercise.³² Instead, the focus has been on the last of these claims—that to argue in favor of legal protection for the entity developing in the womb as a “human being” or “person” is to advance a *religious* argument, such that a judicial opinion or legislative act embracing such an argument should be seen as an “establishment of religion” in violation of the First Amendment.³³

30. Gail Collins, *The Sexual Spirit of '76*, N.Y. TIMES (Aug. 24, 2012), available at http://www.nytimes.com/2012/08/23/opinion/collins-the-sexual-spirit-of-76.html?_r=0.

31. Nancy Northup, *Because of, Not In Spite of, My Faith*, RH REALITY CHECK (Oct. 14, 2008), available at <http://rhrealitycheck.org/article/2008/10/14/because-not-in-spite-my-faith/>.

32. For examples of works that employ these kinds of arguments against restrictions on abortion, see Silvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1028 (arguing that anti-abortion laws attempt to subordinate women to men and so sustain patriarchal society); Stacy A. Scaldo, *Life, Death & the God Complex: The Effectiveness of Incorporating Religion-Based Arguments into the Pro-Choice Perspective on Abortion*, 39 N. KY. L. REV. 421, 463-65 (2012) (arguing that a shift has taken place such that the decision to abort and valuation of the fetus are now seen as expressions of religious liberty and the right to conscience); Gila Stopler, “A Rank Usurpation of Power” – *The Role of Patriarchal Religion and Culture in the Subordination of Women*, 15 DUKE J. GENDER L. & POL’Y 365, 366 (2008) (arguing that religion, through culture and through law, perpetuates the hegemony of patriarchy). See also Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) (arguing that restrictions on abortion and contraception in the nineteenth century were an amalgam of moral and religious norms and a physiological imperative that enforced gender roles, and that the enforcement of those roles is still part of abortion restrictions today even absent the religious rationale).

33. See, e.g., Tribe, *supra* note 22; U.S. COMM’N ON CIVIL RIGHTS, CONSTITUTIONAL ASPECTS OF THE RIGHT TO LIMIT CHILDBEARING (1975); Jane M. Friedman, *The Federal Fetal Experimentation Regulations: An Establishment Clause Analysis*, 61 MINN. L. REV. 961 (1977); David A.J. Richards, *Constitutional Privacy, Religious Disestablishment, and the Abortion Decisions*, in ABORTION: MORAL AND LEGAL PERSPECTIVES (Jay L. Garfield & Patricia Hennessey eds. 1984); Jan D. Feldman, Note, *The Establishment Clause and Religious Influences on Legislation*, 75 NW. L. REV. 944 (1988); Robert L. Maddox & Blaine Bortnick, *Webster v. Reproductive Health Services: Do Legislative Declarations That Life Begins at Conception Violate the Establishment Clause?*, 12 CAMPBELL L. REV. 1 (1989); John Morton Cummings, Jr., Note, *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 CATH. U. L. REV. 1191 (1990); Paul D. Simmons, *Religious Liberty and the Abortion Debate*, 32. J. CHURCH & ST. 567 (1990); Karen F.B. Gray, Comment, *An Establishment Clause Analysis of Webster v. Reproductive Health Services*, 24 GA. L. REV. 399 (1990); David R. Dow, *The Establishment Clause Argument for Choice*, 20 GOLDEN GATE U. L. REV. 479 (1990); PETER S. WENZ, ABORTION RIGHTS AS RELIGIOUS FREEDOM (1992); RONALD DWORKIN, LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993)

As noted above, despite the continuous effort to portray the pro-life position as inherently religious, and thus illegitimate as a basis for law, the claim has received little traction in the courts. The most notable exception to this has been the opinions of Justice John Paul Stevens in three cases: *Thornburgh v. American College of Obstetricians and Gynecologists*,³⁴ *Webster v. Reproductive Health Services*,³⁵ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.³⁶ In the essay that follows I examine the *claim*³⁷ set forth in Stevens' opinions that arguments made on behalf of the developing human embryo or fetus are *theological* arguments that rely upon *religious* premises such that they cannot serve as a legitimate basis for law under the Constitution. My primary method for this examination is to engage in a close textual reading of each of Justice Stevens' opinions in *Thornburgh*, *Webster* and *Casey*.³⁸ Surprisingly, this is something almost entirely absent in the scholarly literature. I also introduce some of the more salient criticisms that have been offered in response to the claim that treating the unborn as subjects of legal concern and respect is inherently religious—criticisms that were clearly available to Justice Stevens but which go unanswered in the three opinions.³⁹ I close the essay with a brief conclusion.⁴⁰

II. STEVENS' OPINIONS IN *THORNBURGH*, *WEBSTER*, AND *CASEY*: MISTAKING A CONCLUSION FOR A SYLLOGISM

In *Roe v. Wade* the Supreme Court created a constitutional right to abortion under the due process clause of the Fourteenth Amendment.⁴¹ Although Justice Blackmun's majority opinion referred to religion on several occasions, these references were not central to the Court's holding.⁴² The Court did not base its decision on either free exercise or establishment

(arguing for abortion based on both free exercise and establishment clause principles); Paul D. Simmons, *Religious Liberty and Abortion Policy: Casey as "Catch-22"*, 42 J. CHURCH & ST. 69 (2000); Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 220 (2005); Larry J. Pittman, *Embryonic Stem Cell Research and Religion: The Ban on Federal Funding as a Violation of the Establishment Clause*, 68 U. PITT. L. REV. 131 (2006).

34. 476 U.S. 747, 772-82 (1986) (Stevens, J., concurring).

35. 492 U.S. 490, 560-72 (1989) (Stevens, J., concurring in part and dissenting in part).

36. 505 U.S. 833, 911-922 (1992) (Stevens, J., concurring in part, dissenting in part).

37. I refer to this argumentative strategy as a "claim" and not simply an "argument" because, as will be seen, what is offered is often little more than a bare assertion—a simple claim that the pro-life position is inherently religious with no analysis as to what constitutes a "religion," what makes a legal proposition "religious" in nature, or how the presence of this purported quality can be demonstrated in a principled fashion.

38. See *infra* Part II.

39. See *infra* Part II.

40. See *infra*. Part III.

41. *Roe*, 410 U.S. 113, 153-55.

42. See generally, *id.*

clause principles.⁴³ Rather, the Court's references to religion were part of Justice Blackmun's strategy in writing an opinion that "place[d] some emphasis upon[] medical and medical-legal history" and what Blackmun understood "that history [to] reveal[] about man's attitudes toward the abortion procedure over the centuries."⁴⁴

Blackmun noted in passing that "[a]ncient religion did not bar abortion."⁴⁵ He also observed that Christian theology and canon law addressed the question of when the fetus became "infused with a 'soul' or 'animated,'" an issue that influenced the development of the common law.⁴⁶ With respect to contemporary religious views on the subject, the outstanding fact for Blackmun appears to have been the lack of "any consensus"⁴⁷ and the "wide divergence of thinking on this most sensitive and difficult question" of when life begins.⁴⁸ Thus, he notes that "the predominant, though not the unanimous, attitude of the Jewish faith" was that life does not begin until live birth, a position he also took "to represent . . . a large segment of the Protestant community."⁴⁹ He further notes that

43. In a recent, fascinating article, Justin Murray argues that in *Roe* and its progeny the Supreme Court "implicitly rel[ie]d upon First Amendment-type arguments to justify abortion rights, but without ever explicitly referring to the First Amendment," an approach he calls the "underground Establishment Clause." Murray, *supra* note 22, at 4.

44. *Roe*, 410 U.S. at 117. Unfortunately, the legal history of abortion that Blackmun set forth was deeply flawed relying heavily and uncritically on a pair of law review articles authored by NARAL's general counsel, Cyril Means. Indeed, in his comprehensive, magisterial study of abortion history, Joseph Dellapenna, with some indignation (backed by voluminous evidence) labels Means' history a "myth." See JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 13-24, 683-695 (2006). According to Dellapenna, "[t]he best way to understand Blackmun's opinion in *Roe* is as an argument from history" and to see that Justice Blackmun "deriv[ed] his version from Cyril Means' specious history of abortion law." *Id.* at 689. See also Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807, 814-839 (1973) (refuting the Court's "distorted and incomplete" history derived from Cyril Means).

45. *Roe*, 410 U.S. at 130. Here, it seems that "ancient religion" refers to the pagan religions of ancient Greece and Rome since that is the context in which this remark appears. The relevance of this absence of prohibition with respect to the constitutionality of abortion is far from clear, however, since "ancient religion" also did not bar infanticide and gladiatorial games.

46. *Id.* at 133.

47. *Id.* at 159. This lack of consensus was not confined to religion. It was, he said, a common feature "in the respective disciplines of medicine, philosophy, and theology." *Id.* What is especially remarkable about this statement is the supposed lack of consensus in "medicine." It is nothing short of astounding for Justice Blackmun to allege such a purported lack of consensus in that Justice Blackmun does not engage in anything even approaching a comprehensive review of the medical literature on the question of when a human life begins. Instead, he confines the authorities he cites to two standard texts. *Id.* at 132 n. 20, 160 n. 59, 60 (citing DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (24th ed. 1965) and L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS (14th ed. 1971)). Moreover, Justice Blackmun made this statement notwithstanding the voluminous medical authorities cited in the Brief for Appellees, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 134281 and the Motion and Brief Amicus Curiae of Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology in Support of Appellees, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), WL 128057, that support the opposite conclusion.

48. *Roe*, 410 U.S. at 160.

49. *Id.*

“the Aristotelian theory of ‘mediate animation’” was “official Roman Catholic dogma until the 19th century” but that now the Church “recognize[s] the existence of life from the moment of conception.”⁵⁰

Perhaps the *Roe* court’s most significant remark with respect to religion was Blackmun’s oblique reference to the religious debate swirling around the issue in which he observed that a person’s philosophy, life experiences, and “religious training . . . are all likely to influence and to color one’s thinking and conclusions about abortion.”⁵¹ Although this passage hints at the theme of religion as a source of political divisiveness—a theme also present in the Court’s Establishment Clause jurisprudence⁵²—the opinion does not suggest that concern for sectarian strife informed the Court’s decision, nor does the opinion indicate that only certain views as to how fetal life ought to be valued are “religious.” All of which is to say that Justice Stevens’ opinions concerning the purportedly religious nature of the pro-life position cannot be traced back directly to *Roe*. They are instead Stevens’ original contribution to the Court’s abortion jurisprudence.⁵³

Justice Stevens set forth his views on the supposedly religious character of laws that seek to protect the entity developing in the womb at some length in both *Thornburgh* and *Webster*, and briefly but significantly in *Casey*. Stevens’ argumentative strategy in these opinions is exemplary of those who subscribe to this point-of-view—in what he says, in what he presumes, and in what he fails to mention. As will be seen, Stevens does not so much *argue* for that which he purports to demonstrate—the religious character of pro-life legislation—as he does *assert* his basic claim to be true and then repeat this assertion as a conclusion.

50. *Id.* at 160-61.

51. *Id.* at 116.

52. *See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 622-623 (1971) (“Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principle evils against which the First Amendment was intended to protect.”); *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 881 (2005) (“We are centuries away from the St. Bartholomew’s Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable.”); *see also* Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 *GEO. L. J.* 1667 (2006) (arguing that divisiveness is more a rhetorical theme and less an operative rule in religion clause jurisprudence).

53. What is surprising is that this contribution did not appear sooner. Justice Stevens joined the Court in 1975 and participated in the Court’s decision in *Harris v. McRae*, 448 U.S. 297 (1980). That case involved an establishment clause challenge to the “Hyde Amendment,” a restriction on the use of federal Medicaid funds to pay for abortions. The plaintiffs in the case clearly presented the argument that the funding restriction was unconstitutional because “it incorporate[d] into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences.” *Id.* at 319. Yet Justice Stevens did not embrace this argument until his opinion in *Thornburgh* in 1986. *See infra* Part II.A.

Stevens' opinions are also significant because the claim that he advances—that the pro-life position is inherently religious—has proven to be a decidedly minority opinion on the Court. Of the eighteen Supreme Court justices with whom Stevens served while on the Court from 1975 to 2010, Stevens is the only justice to author an opinion dedicated to this point-of-view. Three other justices—Blackmun, Brennan, and Marshall—expressed support for this perspective,⁵⁴ but no other justice joined Justice Stevens in his opinions in *Thornburgh*, *Webster*, or *Casey*.⁵⁵ Significantly, none of these four justices is still on the Court. It remains to be seen whether Justice Stevens' successor, Justice Elena Kagan, or any of the other justices who joined the Court since *Casey* will champion this point-of-view.

If a right to abortion is to be explained and defended in future Supreme Court opinions, one would hope that the Court would offer a more plausible account than the Establishment Clause claim put forth by Stevens in *Thornburgh*, *Webster*, and *Casey*. Although Justice Stevens has many admirers,⁵⁶ an honest assessment of these opinions must conclude that they constitute the intellectual low-point of Stevens' tenure on the bench.

A. Justice Stevens' Opinion in Thornburgh v. American College of Obstetricians and Gynecologists

In *Thornburgh* the Court struck down portions of a Pennsylvania statute requiring a woman seeking an abortion to give informed consent to the procedure and to receive certain printed information prior to her giving consent. The Court also invalidated provisions that required the physician performing the abortion to make a report regarding the doctor's determination that the aborted fetus was not viable, as well as a set of provisions that would have required a second physician to be present during

54. See *Webster v. Reproductive Health Services*, 492 U.S. 490, 537, 552-554 (J., Blackmun, concurring in part and dissenting in part) (joined by Justices Brennan and Marshall); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 922, 932 (J., Blackmun, concurring in part and dissenting in part).

55. See *Thornburgh*, 476 U.S. at 772; *Webster*, 492 U.S. at 560; *Casey*, 505 U.S. at 912.

56. For a glowing portrayal of Stevens as the independently minded, moderate yet erudite member of a Court lurching towards the right, see Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. TIMES MAG. (Sept. 23, 2007), available at http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html?pagewanted=all&_r=0. See also Charles Lane, *With Longevity on Court Stevens' Center-Left Influence Has Grown*, WASH. POST (Feb. 21, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/20/AR2006022001196.html>; James Oliphant, *Justice from the South Side*, CHI. TRIB. (Oct. 20, 2008), available at <http://archives.chicagotribune.com/2008/oct/20/nation/chibama-stevensoct20>. Justice Stevens' work on the Court has been the subject of several law review symposia. See *Symposium: The Legacy of Justice John Paul Stevens*, 106 NW. U. L. REV. 409 (2012); *The Finest Legal Mind: A Symposium in Celebration of Justice John Paul Stevens*, 99 GEORGETOWN L. J. 1263 (2011); *Symposium: The Honorable John Paul Stevens*, 43 U.C. DAVIS L. REV. 713 (2010); *Symposium: The Jurisprudence of Justice Stevens*, 74 FORDHAM L. REV. 1557 (2006).

a post-viability abortion and to work to protect the life and health of the unborn child.⁵⁷

Justice Stevens' concurrence in *Thornburgh* appears to have been inspired by a forceful dissent in the case written by Justice Byron White. Although Justice White was one of the two original dissenters in *Roe*, Stevens sees White's *Thornburgh* opinion as being at odds with White's concurrences in earlier decisions in the Court's right to privacy line of precedent: *Griswold v. Connecticut*,⁵⁸ *Eisenstadt v. Baird*,⁵⁹ and *Carey v. Population Services International*.⁶⁰

In *Thornburgh*, Justice White argued that "the time has come to recognize that *Roe v. Wade* . . . 'departs from a proper understanding' of the Constitution and to overrule it."⁶¹ His argument that *Roe* should be overturned was not based on a "plain meaning," originalist approach to constitutional interpretation or a rejection of "substantive due process" as such.⁶² White acknowledged that:

[t]he Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.⁶³

White's fear, however, was that the Court's recognition of fundamental rights "not specifically enumerated in the text of the Constitution"⁶⁴ would reflect "its own controversial choices of value,"⁶⁵ "the philosophical predilections of individual judges" and not "the basic choices made by the people themselves in constituting their system of government."⁶⁶ He concluded that under the two definitions of fundamental rights employed by the Court—"those interests that are 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed'" and those liberties "that are 'deeply rooted in this Nation's

57. See *Thornburgh*, 476 U.S. at 758-772.

58. 381 U.S. 479 (1965).

59. 405 U.S. 438 (1972).

60. 431 U.S. 678 (1977).

61. *Thornburgh*, 476 U.S. at 788 (White, J., dissenting).

62. See *id.*

63. *Id.* at 789.

64. *Id.* at 790.

65. *Id.*

66. *Thornburgh*, 476 U.S. at 791.

history and tradition”⁶⁷—the Court’s decision in *Roe* failed the test of legitimacy.

Justice White’s dissent focused on the *Roe* majority’s treatment of the state’s interest in protecting fetal life.⁶⁸ He distinguished *Roe* and the case at bar in *Thornburgh* from the privacy line of cases involving the use of contraceptives—*Carey*, *Eisenstadt*, and *Griswold*—based on *Roe*’s own words that “[t]he pregnant woman cannot be isolated in her privacy”⁶⁹ insofar as abortion “typically involves the destruction of another entity: the fetus.”⁷⁰ Whereas *Roe* variously referred to “potential life,”⁷¹ “potential human life,”⁷² and “the potentiality of human life,”⁷³ Justice White referred to “the *life*” of the entity in the womb whose “continued existence and development” were “so directly at stake in the woman’s decision whether or not to terminate her pregnancy, that [the] decision [to abort] must be recognized as *sui generis*, different in kind from others that the Court has protected under the rubric of personal or family privacy and autonomy.”⁷⁴ Whereas contraception involves the decision to avoid something from coming into existence, abortion involves a decision to kill something that already exists. Moreover, this thing that already exists

is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of the species from all others, and . . . there is no nonarbitrary line separating [it] . . . from a child, or indeed, an adult human being.⁷⁵

In stating these facts, White eschews what he describes as “the metaphysical or theological question whether the fetus is a ‘human being’ or the legal question whether it is a ‘person’ as that term is used in the Constitution.”⁷⁶ Nevertheless, for White, these facts may serve as the predicate for a subsequent normative decision. The state has an interest “in protecting those who will be citizens if their lives are not ended in the womb.”⁷⁷ Moreover, this interest is “in the fetus as an entity in itself.”⁷⁸

67. *Id.* at 790-791 (quoting *Palko v. Connecticut*, 320 U.S. 319, 325 (1937) and *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

68. *See id.* at 785-814.

69. *Id.* at 792 (quoting *Roe v. Wade*, 410 U.S. 113, 159 (1973)).

70. *Id.*

71. *Roe*, 410 U.S. at 150, 156, 163.

72. *Id.* at 159.

73. *Id.* at 162.

74. *Thornburgh*, 476 U.S. at 792 (White, J., dissenting).

75. *Id.*

76. *Id.*

77. *Id.* at 795.

78. *Id.*

This view stands in sharp contrast to Justice Stevens who would confine the state's interest to only instrumental concerns.⁷⁹

1. *“Proving” the Religious Character of Legislation: Winning an Argument Without Really Having One*

What Justice Stevens finds most troubling in Justice White's opinion is his valuation of nascent human life—a valuation that Stevens views as inherently religious. With respect to White's claim “that the governmental interest in protecting fetal life is equally compelling during the entire period from the moment of conception until the moment of birth,” Stevens says that he “recognize[s] that a powerful theological argument can be made for that position, but I believe our jurisdiction is limited to the evaluation of secular state interests.”⁸⁰ “[T]here is,” says Stevens, “a fundamental and well-recognized difference between a fetus and a human being” that will continue to hold sway “unless the religious view that a fetus is a ‘person’ is adopted.”⁸¹

Like other legal commentators who accuse abortion opponents of wrongfully trying to incorporate a religious viewpoint into law, Justice Stevens never explains why the belief that a nascent human life should be considered a legal “person” or should otherwise enjoy legal protection is “religious” or “theological.”⁸² He simply assumes the point and then employs the assumption rhetorically in order to dismiss an argument he never squarely confronts. On the surface, Stevens appears to win an argument without really having one, but the victory is only apparent since the substance of his argument is a mere *accusation*, not a conclusion drawn from premises with which his opponents agree or which are themselves substantiated on independent grounds that he elaborates.

2. *A Changing State Interest vs. An Increasing State Interest*

For Stevens “it [is] obvious that the State's interest in the protection of an embryo . . . increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to surroundings increases day by day.”⁸³ Because “[t]he development of a fetus – and pregnancy itself – are not static conditions,” Justice Stevens

79. Although this view is implicit in Justice Stevens' opinion in *Thornburgh*, he made it explicit in *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part and dissenting in part). See also *infra* notes 279-284 and accompanying text.

80. *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring).

81. *Id.* at 779.

82. See *id.* at 778-779.

83. *Id.* at 778.

thinks that it is wrong to conceive of the state's interest as simply static.⁸⁴ For him it seems "quite odd to argue that distinctions may not also be drawn between the state interest in protecting the freshly fertilized egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth."⁸⁵

Because this conclusion is "obvious" to Stevens, he never burdens himself with the effort of trying to explain not *whether* the state's interest *changes* over the course of fetal development, but *why* it allegedly *increases*. It is indeed obvious that the state's interest *changes* over this period of growth and maturation, just as the state's interest in the welfare of an infant changes over the time that it develops into a toddler, youth, adolescent, mature adult, and aging senior. Plainly, this extended period of development is not "static" any more than the period of development *in utero* is static, and the state's interest does not remain "static" in the sense of unchanged—wholly fixed and unaltered—during either period. But *change* and *increase* are distinct concepts. It is decidedly *not obvious* that the state's interest in an infant increases as it grows into a toddler—that the state may value toddlers *more than* it values infants, and adolescents more than it values toddlers. Stevens' opinion directly implies this radical conclusion, but because he is enamored with the obviousness of his own assertion, he does not trouble himself with explaining how this can be permissible under our constitutional system of equal protection.⁸⁶

In a similar fashion, Stevens makes note of the growth in capacities that accompanies the physiological changes in the developing organism—the "capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings."⁸⁷ But because it is all so obvious to Stevens, the reader of his opinion is left to wonder how this change in capacity brings about an *increase* in the state's interest in the human being undergoing these changes. Again, it *does* seem plain that the state's interest is *different*, and *not static*, but to say that this interest is *quantitatively greater* is a radical claim sorely in need of argument. Stevens' plaintiff cry of obviousness simply will not do. Indeed, his bare assertion of greater state interest in those who possess these capacities suggests that the state's interest in a human being who is unable to feel pain or experience pleasure—an anesthetized patient, an unconscious or comatose individual—is *less than* its

84. *Id.*

85. *Thornburgh*, 476 U.S. at 779.

86. Under the Court's equal protection doctrine, age is subject to rational basis review. *See, e.g.,* *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); *Vance v. Bradley*, 440 U.S. 93 (1979). Even under this deferential standard it is difficult to conceive of the Court approving of the exclusion of classes of individuals from the benefit of laws against murder and assault based on age.

87. *Thornburgh*, 476 U.S. at 778.

interest in a human being who currently enjoys these capacities. Although he seems oblivious to the fact, the value that Stevens places on the capacity “to feel pain, to experience pleasure, to survive, and to react to its surroundings” raises the question of whether a non-human animal that possesses these capacities ought to be regarded as a subject of concern, respect, and protection by the state.

3. *For and Against the Fetus: The Mutuality of “Religious” Judgment*

Stevens does not bother to address these matters because doing so would require him to question why he believes that these capacities (and even the quality of being “human”) are valuable—why they prompt the state to have an interest in the being who possesses them and why these capacities render such governmental interest legitimate. Facing these sorts of questions, however, would force Stevens to confront his own value preferences—preferences that are, without more, equally susceptible to being characterized as *religious* if by “religious” we mean *normative*.

If describing a claim as “religious” means that the claim depends upon value judgments that are ultimately unprovable from an empirical point of view, then the perspective that regards the unborn as something of incalculable worth is no more or less “religious” than the perspective that regards them as being of no value whatsoever—a trivial item of refuse easily discarded and soon forgotten. Moreover, such an understanding of “religious” could not serve as the standard for the enforcement of the Establishment Clause. As Michael Perry notes, it would be “ridiculous” to claim that the Establishment Clause proscribes moral beliefs “as a basis for political deliberation, justification, or choice.”⁸⁸ Law is ineluctably normative such that government would be stymied in every way if it could not engage in normative deliberation and decision. If the exercise of normative judgment was unconstitutional “[o]n what basis . . . could political deliberation, justification, and choice proceed?”⁸⁹ Similarly, if describing a claim as “religious” means that it is “metaphysical” then both perspectives are “religious” since each adopts an ontological stance with respect to the entity developing in the womb.⁹⁰

88 MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* 112-113 (1991).

89 *Id.* at 113.

90. Furthermore, neither the Establishment Clause nor any other part of the Constitution bars the use of metaphysical premises in the formulation of law. A great deal of our law—such as culpability in criminal law and liability in tort—is premised upon metaphysical beliefs, like “free will,” that cannot be demonstrated on the basis of empirical science. Indeed, the metaphysical presuppositions that underlie the law go even deeper than this. The very idea that the universe is rational and the very notion of material causation—the foundations of all empirical science—are premises that science itself cannot

This is precisely the point that Justice White made in his *Thornburgh* dissent—a point to which neither Justice Stevens nor any of his colleagues have ever responded, either in *Thornburgh* or in any of the Court’s subsequent abortion decisions. White says that “contrary to Justice Stevens” the state’s claim that it has a compelling interest in the life of the entity developing in the womb prior to viability “is no more a ‘theological’ position than is the Court’s own judgment that viability is the point at which the state interest becomes compelling.”⁹¹ It is quite telling, as White notes, that Stevens “omits any real effort to defend this judgment.”⁹² The reason for this absence is plain: Defending this judgment would mean

prove. The continuity of the universe from moment to moment is, as David Hume argued, something that must be supposed, not proven. “It is impossible . . . that any arguments from experience can prove this resemblance of the past to the future; since all these arguments are founded on the supposition of that resemblance.” David Hume, *An Inquiry Concerning Human Understanding* (1748), in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 585, 606 (Edwin A. Burt ed. 1939). With respect to causation, we observe “[o]ne event follows another; but we never can observe any tie between them. They seem *conjoined*, but never *connected*.” *Id.* at 630. We suppose “that there is some connection between them” but this connection is something “which we *feel* in the mind, this customary transition of the imagination from one object to its usual antecedent, is the sentiment or impression from which we form the idea of power or necessary connection.” *Id.* But this is only a supposition. In short, the modern conception of reason in science is what most people today would call “faith.” It assumes that which it cannot prove. Science “presupposes the mathematical structure of matter, its intrinsic rationality” and it maintains that “only the possibility of verification or falsification through experimentation can yield decisive certainty.” Pope Benedict XVI, Lecture of the Holy Father at the Aula Magna of the University of Regensburg, *Faith, Reason and the University: Memories and Reflections* (Sept. 12, 2006) [hereinafter Regensburg Address], available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html. Indeed, “[m]odern scientific reason quite simply has to accept the rational structure of matter and the correspondence between our spirit and the prevailing rational structures of nature as a given, on which its methodology has to be based.” *Id.* In other words, science “presupposes that which it also rejects – something that cannot be verified or falsified through experimentation, namely, the intrinsic rationality of matter and the correspondence and receptivity of the human mind to that rationality.” John M. Breen, *Religion and the Purification of Reason: Why the Liberal State Requires More Than Simple Tolerance*, 33 *CAMPBELL L. REV.* 505, 514 (2011). Insofar as law relies upon science, it relies upon the metaphysical presuppositions upon which science depends.

91. *Thornburgh* 476 U.S. at 795 n. 4 (White, J., dissenting).

92. *Id.* In *Roe* Justice Blackmun declared that “the State’s important and legitimate interest in potential life” becomes “compelling” at viability “because the fetus then presumably has the capability of meaningful life outside the mother’s womb.” *Roe*, 410 U.S. at 163. As Justice White observed, however, saying this was equivalent to saying that the state’s interest becomes compelling at viability because viability is when the state’s interest becomes compelling. It was “to mistake a definition for a syllogism.” John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L. J.* 920, 924 (1973). See *Thornburgh*, 476 U.S. at 795 (White, J., dissenting) (citing Ely). Like every other justice who has voted in favor of the abortion license created in *Roe*, Stevens fails to explain why the state’s interest becomes compelling at viability. But Justice Stevens’ failure goes beyond that of his fellow *Roe* supporters. He fails to explain why the state’s interest in the developing fetus is transformed from a “religious” interest prior to viability into a “secular” interest after viability. Indeed, he fails to explain how to distinguish between an impermissible normative judgment that is “religious” and a permissible normative judgment that is “secular.” In the absence of reasoned deliberation, in the absence of any explanation defending these judgments—judgments that lie at the heart of his opinion—Justice Stevens opts for labels.

acknowledging it to be a *normative judgment*, and indeed a normative judgment that is not mandated by the Constitution, rather than treating it as an axiom of constitutional law that may not be questioned.

Others have elaborated on this point. Indeed, years before the *Thornburgh* decision, John Noonan thoughtfully responded to the argument put forth by Laurence Tribe identifying the pro-life position with religion. Tribe argued that abortion “was a subject of a religious nature because it involved ‘a decision as to what characteristics should be regarded as defining a human being,’ and that the decision ‘depended on a statement of religious faith upon which people will invariably differ.’”⁹³ But Noonan observed that Tribe used this theory in an unmistakably one-sided manner. If the act of designating a particular set of characteristics as constituting a “human being” is “religious” then this act of designation is “religious” no matter which characteristics are selected. That is, if Tribe was correct that the question of which entities count as human beings is inescapably religious, then “any decision as to who is human would be a religious decision.”⁹⁴ On this account, there is no reason to exempt the selection of those criteria that would exclude fetuses and embryos from consideration as “human beings” and dismiss as theological and illicit those criteria that include fetuses and embryos as “human beings.” Rather, an argument must be made that certain criteria are inescapably “religious” and others properly “secular.” Justice Stevens, of course, offers no such argument either in *Thornburgh* or anywhere else.

4. *Disputing the Analogy: Not Human*

A defender of Justice Stevens’ opinion might respond that the analogies offered above rest on a mistaken premise—a premise that Stevens expressly rejects in the body of his opinion, namely, the idea that the fetus is a “human being.” After all, Stevens postulates that “there is a fundamental and well-recognized difference between a fetus and a human being.”⁹⁵ Indeed, for Stevens it is this very difference that explains and justifies the distinctions between “the state interest in protecting the freshly fertilized

93. John T. Noonan, Jr., *A Private Choice: Abortion in America in the Seventies* 23 (1979) (quoting Tribe, *supra* note 22 at 21). See also Francis J. Beckwith, *Gimme That Ol’ Time Separation: A Review Essay*, 8 *Chapman L. Rev.* 309, 325 (2005) (reviewing Philip Hamburger, *Separation of Church and State* (Paperback ed. 2004)) (arguing that “both the pro-lifer and the abortion-choice advocate present” competing anthropologies such that in response to the pro-lifer “the abortion-choice advocate attempts to justify his position by offering what is essentially a different metaphysical account,” but only the pro-life point of view is excluded as “religious”; and concluding that “[t]here seems no good reason, except a kind of crass philosophical apartheid, which would justify the [abortion-choice] account having a rightful place in politics and law, while its pro-life alternative is relegated” to private conversations about theology).

94. *Id.*

95. *Thornburgh*, 476 U.S. at 779 (Stevens, J., concurring).

egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth.”⁹⁶ Thus, a defender of Stevens’ opinion would argue that the analogies above are mistaken because they rely upon a false premise. The state’s interest in an infant is different from (but not more than) its interest in an adolescent, but it is incorrect to compare this change in interests to the state’s interest in an infant and its quite different interest in the fetus for the simple reason that the latter is not a “human being.”

But this is no answer to the criticism posed by the analogies precisely because Stevens merely *postulates* that the entity in the womb is not a “human being” prior to birth. Here, Justice Stevens supposes a meaning for the term “human being” that he does not explain, let alone defend. Just as with Stevens’ claim that the state may value the entity in the womb prior to viability solely based on a “theological argument,”⁹⁷ his claim that the “fetus” is not a “human being” is a mere assertion. He does not offer any argument on behalf of this claim. He simply pre-supposes that it is true. One cannot simply dismiss the analogies as inapt and then claim to have demonstrated that they are false.

5. *Two Meanings of “Human Being”: Descriptive and Prescriptive*

In fact, the meaning of the term “human being” can be equivocal in that the term may be employed prescriptively or descriptively.⁹⁸ This point was alluded to in the discussion above,⁹⁹ and Justice White, in fact, shows how the term may be used in a normative fashion when he refers to the question of “whether the fetus is a ‘human being’” as a “metaphysical or theological question.”¹⁰⁰

When the term “human being” is used in a purely *prescriptive* or normative sense it denotes a meaning. It does not refer to a class of entities existent in the world. It is void of all descriptive content. Instead, the term indicates how those entities that enjoy the designation “human being” are to be treated. Used in this manner the term “human being” refers to a member of the moral community, an entity deserving of dignity and respect, a rights-bearer. To say that something is a “human being” in this prescriptive sense is the same as saying that it is a “person” either in the moral or the legal

96. *Id.*

97. *Id.* at 778; *see also supra* Part II.A.1.

98. The term “person” may also be used in a descriptive manner and in a prescriptive manner. For an excellent discussion of these distinctive kinds of meaning and how they are often employed in the abortion debate *see* Daniel Wikler, *Concepts of Personhood: A Philosophical Perspective*, in *DEFINING HUMAN LIFE: MEDICAL, LEGAL AND ETHICAL IMPLICATIONS* 12 (Margaret W. Shaw & A. Edward Doudera eds. 1983).

99. *See supra* notes 82-85 and accompanying text.

100. *Thornburgh*, 476 U.S. at 792 (White, J., dissenting).

sense. To say that an entity is a “human being” in this sense is to identify the entity as a being to whom certain obligations are owed.

When the term “human being” is used in a purely *descriptive* sense it denotes a class of entities that share a certain set of characteristics. The most basic meaning of the term “human being,” used in this descriptive sense, refers to a distinct, individual human organism—a member of the species *homo sapiens*. This might be called the scientific use of the term. In the alternative, used descriptively the term “human being” might refer to a member of the species *homo sapiens* that has achieved a certain stage in the process of development. This manner of using the term “human being” in a descriptive sense often appears in the abortion debate. For example, the term “human being” may refer to a human organism that has implanted in the uterine wall and so no longer possesses the capacity to undergo “twinning,” or has developed to the point where the “primitive streak” (the foundation of the nervous system) appears, or where the organism has the appearance of primordial human form. In the same way, the presence of a heartbeat, the detection of brainwaves, the mother’s experience of fetal movement or “quickening,” the attainment of viability, or birth itself may be taken as the achievement that marks the beginning of a new “human being.” The term “human being” may even be used to refer to human organisms that possess certain cognitive capacities such as sentience, self-consciousness, the use of language, or the ability to engage in higher reasoning. The difficulty with these uses of the term is that they are not strictly descriptive. Instead, each of these definitions of “human being” contains an element of the prescriptive. Each of these candidates for the descriptive content of “human being” is normative—it attaches value to one or another set of characteristics to conclude that an entity possessing these qualities *ought* to be regarded as a “human being.”

The same could be said of any scientific categorization—the discovery of new a species of mammal,¹⁰¹ the identification of a new element¹⁰² or subatomic particle,¹⁰³ or the classification of a celestial body.¹⁰⁴ In each

101. Bryan Walsh, *Hola, Olinguita! The Smithsonian Discovers a New Mammal*, TIME MAG. (Aug. 15, 2013), available at <http://science.time.com/2013/08/15/hola-olinguito-the-smithsonian-discovers-a-new-mammal/> (describing discovery of new species of carnivorous mammal found in South America).

102. Monica Hesse, *Make Room at the Periodic Table: A New Element Is Born*, WASH. POST (Aug. 29, 2013) available at http://articles.washingtonpost.com/2013-08-29/lifestyle/41578283_1_element-115-periodic-table-applied-chemistry (describing the discovery of ununpentium by Swedish scientists).

103. Brian Greene, *How the Higgs-Boson Was Found*, SMITHSONIAN MAG. (July-Aug. 2013), available at <http://www.smithsonianmag.com/science-nature/How-the-Higgs-Boson-Was-Found-213876841.html?c=y&page=1#Higgs-boson-ATLAS-detector-1.jpg>. (describing the Higgs Boson particle and its discovery).

case, those who are expert within the particular scientific discipline settle upon a set of criteria, the satisfaction of which results in the conclusion that some phenomenon ‘P’ with characteristics ‘ $x_1, x_2, x_3, \dots, x_n$ ’ is a certain kind of thing ‘Q.’ In doing so, scientists are saying that entities that possess the designated characteristics *ought* to be understood as the kind of thing in the defined category. But this judgment is normative only in the sense of how the entity will be regarded *within* the scientific discipline—for example, whether or not Pluto will be regarded as a planet by astronomers, or whether biologists believe that a given animal represents a new species as opposed to one previously discovered. Scientists are, of course, subject to the same failings that we all suffer from—the intrusion of ego, ambition and pride—such that the identification of the relevant characteristics may be infected with concerns extraneous to the exercise of scientific judgment.¹⁰⁵ The “human element,” as it were, is always present in the process of science. Still, it is possible to envision the discernment of criteria and the exercise of scientific judgment in which these extraneous factors are not present.

The selection of criteria may, however, be corrupted in another way. Defining what constitutes a “human being” by designating a given set of observable traits can be “normative” in the sense of how the entity will be treated *outside* the scientific discipline of biology. The presumption in American law is that every “human being” in the descriptive sense also enjoys the benefit of law. Indeed, every being recognized as a “human being” also enjoys the status of a legal “person”—the status of a rights-holder, a being to whom obligations are owed—one who enjoys immunity from certain forms of government coercion and the benefit of government protection from other persons. A “person” is a *subject* under the law and not merely an *object* to be exploited and discarded—“someone” not “something.” The status of legal personhood sets an entity apart from things that have no special dignity and that can be disposed of or otherwise manipulated by those in power. There are of course exceptions in our legal history to the full inclusion of all human beings within the category of legal

104. Steven J. Dick, *Pluto, Classification, and Exploration*, NASA: Why We Explore (Sept. 5, 2006), available at http://www.nasa.gov/exploration/whyweexplore/Why_We_23_prt.htm (discussing the International Astronomical Union’s new definition of “planet” in which such an object must have “cleared the neighborhood around its orbit”).

105. See Shankar Vedantam, *For Pluto, a Smaller World After All*, WASH. POST (Aug. 25, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/24/AR2006082400109.html>. (describing the argument over the new definition of “planet” and quoting one astronomer saying that the controversy “demonstrates how belligerent and self-centered planetary astronomers can be”).

persons—the institution of slavery¹⁰⁶ and cases like *Buck v. Bell*¹⁰⁷ come readily to mind.¹⁰⁸

Justice Stevens makes precisely this sort of move in using the term “human being” in *Thornburgh*. He makes precisely this kind of move when he asserts that it is “obvious” that the state’s interest “increases progressively and dramatically as the organism’s capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day.”¹⁰⁹ Here, Justice Stevens refers to a number of characteristics that a developing human being typically manifests over the course of his or her development. But he does not merely refer to these attributes in a purely descriptive manner. Rather, Stevens believes it is reasonable to attach value to these traits. He suggests that these characteristics may carry moral weight such that it is permissible for the state to take them into account.

Although Justice Stevens criticizes Justice White’s characterization of the state’s interest in limiting abortion as “protecting those who will be citizens” as being “influenced . . . by his own value preferences,”¹¹⁰ Stevens seems oblivious to the fact that he himself is expressing a value preference both in what he says the state may take into account and what it may not. Regardless of whether this value preference is described as “theological” or “metaphysical,” it is mutual. It is present in both instances. It is a quality that each judgment shares with its opposite. Both perspectives—the perspective that sees the entity in the womb as a creature deserving of respect and protection and the perspective that sees it as a mere thing that may be discarded—engage in this process of valuation. In deciding how an entity will be treated outside a given scientific discipline—how it will be treated under the law—there is no neutral middle ground that avoids the exercise of normative judgment.

B. Justice Stevens’ Opinion in Webster v. Reproductive Health Services

In *Webster v. Reproductive Health Services*, Justice Stevens sought to bolster the claims he first made in *Thornburgh*. In the three years that had passed since *Thornburgh*, however, a new majority had emerged on the Court with respect to its review of abortion regulations. In *Webster*, this

106. *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (concluding that under the Constitution human beings of African descent, whether or not emancipated from slavery, were not “citizens,” “members of the political community,” and that they “had no rights that the white man was bound to respect”).

107. *Buck v. Bell*, 274 U.S. 200 (1927) (upholding the power of the state to involuntarily sterilize the mentally retarded).

108. These, of course, are not the kinds of comparisons that proponents of abortion are anxious to draw.

109. *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring).

110. *Id.* at 778 n. 6.

new majority upheld two provisions of a Missouri statute that prohibited abortions from being performed at public facilities or by public employees where the abortion was not necessary to save the life of the mother.¹¹¹ The Court also upheld a third portion of the statute, though without a majority opinion. This provision required the physician performing the abortion to make a determination of viability where the physician had reason to believe that the fetus had attained twenty weeks gestational age.¹¹²

While Justice Stevens disapproved of all of the provisions found in the Missouri statute under review, he took particular exception with that portion of the statute that defined conception as, “the fertilization of the ovum of a female by the sperm of a male’ . . . even though standard medical texts equate ‘conception’ with implantation in the uterus, occurring about six days after fertilization.”¹¹³ Stevens feared that if such a definition were operative, it might limit the right to contraception first established in *Griswold v. Connecticut* to those methods preventing fertilization, but not “those preventing implantation.”¹¹⁴ According to Justice Stevens, “[t]here is unquestionably a theological basis for such an argument, just as there was unquestionably a theological basis for the Connecticut statute that the Court invalidated in *Griswold*. Our jurisprudence, however, has consistently required a secular basis for valid legislation.”¹¹⁵ Stevens then declares that he is “not aware of any secular basis for differentiating between contraceptive procedures that are effective immediately before and those that are effective immediately after fertilization.”¹¹⁶

If this is a true statement—if Justice Stevens is genuinely “unaware of any secular basis for differentiating between contraceptive procedures that are effective immediately before and those that are effective immediately after fertilization”—then all he has succeeded in doing is to demonstrate how exceedingly narrow the limits of his mind truly are. Science and only science—pristine science, science shorn of any hint of religious faith—indicates that the thing acted upon post-fertilization—a human zygote—is a radically different kind of thing from the sperm and ovum that come together to bring it into existence.

These differences are manifest—if in nothing else—in how science says one should treat these distinct things if one wishes to do them harm. Indeed, these differences are, to use a favorite word of Justice Stevens, *obvious*. If you want to kill the human zygote—if you want to prevent it

111. *Webster v. Reproductive Health Services*, 492 U.S. 490, 507-511 (1989).

112. *Id.* at 513-522 (opinion of Rehnquist, C.J.).

113. *Id.* at 563 (Stevens, J., dissenting in part) (quoting Mo. Rev. Stat. § 188.05(3)).

114. *Id.* at 565.

115. *Id.* at 565-66.

116. *Webster*, 492 U.S. at 566.

from developing—then you prevent it from implanting in the uterine wall. Science tells us that neither the sperm, nor the ovum, has a path of development. They are incapable of development. Neither the sperm nor the ovum seeks to implant itself in the uterus in order to grow, or for any other purpose. Their only purpose is to come together to make something new, unique, and original—a new human being. Neither the sperm nor the ovum is “part” of this new organism. In conjoining to make the zygote they have ceased to exist and a new life has begun—a point recognized in the embryological texts used in the nation’s medical schools.¹¹⁷ That citation to these basic scientific sources is wholly absent from Stevens’ opinion is, I would suggest, some indication of the appalling lack of thoroughness in Stevens’ search for the secular basis that purportedly eludes him.

Of course Justice Stevens does understand that the act of preventing the implantation of a zygote is different from the act of preventing a sperm and ovum from conjoining, though each act may be accomplished by use of the same instrumentality.¹¹⁸ The real difference is the value placed on the thing acted upon. Here, Justice Stevens has simply declared that placing greater value on the human zygote than on human sperm and ova is “theological” or “religious.” However, he has not demonstrated how this is the case. Just as in his opinion in *Thornburgh*, he simply presumes it to be so. Moreover, just as in *Thornburgh*, Justice Stevens does not pause to consider how his own valuation of these entities is vulnerable to the same criticism, namely, that it is “religious.”

Later in *Webster*, Justice Stevens repeats the claim he made in *Thornburgh*, that the state’s interest differs as the unborn child develops:

As a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth. There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet exist; respecting a developed fetus, however, that interest is valid.¹¹⁹

117. See, e.g., KEITH L. MOORE, BEFORE WE ARE BORN: BASIC EMBRYOLOGY AND BIRTH DEFECTS 23 (2nd ed. 1983) (“The zygote is the first cell of a new human being.”); KEITH MOORE & T.V.N. PERSAUD, THE DEVELOPING HUMAN 18 (6th ed. 1998); WILLIAM J. LARSEN, HUMAN EMBRYOLOGY 1 (3rd ed. 2001); RONAN O’RAIHILLY & FABIOLA MUELLER, HUMAN EMBRYOLOGY AND TERATOLOGY 8 (3rd ed. 2000); SCOTT F. GILBERT, DEVELOPMENTAL BIOLOGY 185 (6th ed. 2000).

118. See *Webster*, 492 U.S. at 563 n. 7 (Stevens, J., concurring in part and dissenting in part) (discussing the IUV, morning after pill, and other oral contraceptives).

119. *Id.* at 569.

As in *Thornburgh*, here Stevens highlights certain qualities that appear late in gestation or even years after birth¹²⁰ and to which Stevens attaches some value. He does not show that these qualities—sentience, the capacity for physical pain or mental anguish—are “secular” or that they are the only possible basis for valuing the unborn. Once again, he has only declared it to be the case. Even if one were to agree with this declaration, for the sake of argument, Stevens has not demonstrated what he purports to show. That the state has a secular interest in protecting a fetus at 9 months does not mean that the state’s interest in protecting a fetus prior to this time—including prior to viability—is religious. That the state may enact a law protecting 4 year olds on “secular” grounds does not mean that a law protecting 2 year olds is “religious.”

1. Laws That Coincide with Religion: Affirming McGowan v. Maryland and Harris v. McRae

Justice Stevens’ apparent bewilderment—his professed inability to conceive of any “secular basis” for distinguishing between procedures that operate before and after human fertilization—that is to say, between contraceptive acts and abortifacient acts—serves as prologue for his critique of the preamble to the Missouri statute at issue in *Webster*. The statutory preamble set forth certain findings made by the Missouri legislature including the proposition that “[t]he life of each human being begins at conception,” and that “[u]nborn children have protectable interests in life, health, and well-being.”¹²¹ Here, Stevens continues to employ the technique of proof by declaration: “I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution.”¹²²

He assures us, however, that the basis for this conclusion is not “the fact that the statement happens to coincide with the tenets of certain religions;”¹²³ an assurance followed by a citation to *McGowan v. Maryland*.¹²⁴ In *McGowan*, the Court upheld a Maryland “Sunday closing” law reasoning that the Establishment Clause “does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or

120. The capacity to experience “mental anguish” is not a trait associated with newborn infants, or toddlers, or even young children. It is an experience that calls for some substantial self-reflection.

121. *Webster*, 492 U.S. at 504.

122. *Id.* at 566 (Stevens, J., concurring in part and dissenting in part).

123. *Id.*

124. *McGowan v. Maryland*, 366 U.S. 420 (1961).

harmonize with the tenets of some or all religions.”¹²⁵ Under this principle, the Court reasoned, statutes banning murder, adultery, and polygamy are constitutional notwithstanding the fact that these prohibitions agree “with the dictates of the Judaeo-Christian religions” and disagree with the tenets of other religions.¹²⁶ As the Court explained, “[t]he same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.”¹²⁷ In citing *McGowan*, Justice Stevens appears to forthrightly embrace the notion that the agreement of law and religion with respect to a particular proposition is not a basis for concluding that the law violates the Establishment Clause.

This impression is immediately underscored by Justice Stevens’ citation to the Court’s decision in *Harris v. McCrae*.¹²⁸ If Stevens had been inclined to challenge the application of the *McGowan* principle in the context of laws that regulate abortion, *Harris* surely served as a strong disincentive. The case involved a constitutional challenge to the “Hyde Amendment,” an appropriations act prohibiting the public funding of abortions under Title XIX of the Social Security Act. One of the arguments against the act was that “the Hyde Amendment violates the Establishment Clause because it incorporates into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences.”¹²⁹ Following *McGowan*, the *Harris* court found that the Hyde Amendment had a secular legislative purpose in that the statute was “as much a reflection of ‘traditionalist’ values toward abortion, as it [was] an embodiment of the views of any particular religion.”¹³⁰ Thus, the majority concluded that while “the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church [it] does not, without more, contravene the Establishment Clause.”¹³¹ The mere alignment of a statute with the beliefs of a given religion is not in itself a source of constitutional infirmity. Although Justice Stevens filed a dissent in the case, the basis of his dissent was unrelated to the Establishment Clause. Instead, he rejected Congress’ decision to restrict Medicaid funds to pay for abortions based upon his broad reading of the right created by the Court in *Roe*.¹³²

125. *Id.* at 442.

126. *Id.*

127. *Id.*

128. 448 U.S. 297 (1980).

129. *Id.* at 319.

130. *Id.* at 319.

131. *Id.* at 319-320. The Court did not indicate what the “something more” that, if present, would be grounds for finding the statute to be in violation of the Establishment Clause.

132. *Id.* at 349-57 (Stevens, J., dissenting).

Justice Stevens' citations to *McGowan* and *Harris* in his *Webster* opinion also seem to have been a somewhat belated response to Justice White's opinion in *Thornburgh*. There Justice White argued that it was

self-evident that neither the legislative decision to assert a state interest in fetal life before viability nor the judicial decision to recognize that interest as compelling constitutes an impermissible "religious" decision because it coincides with the belief of one or more religions. Certainly the fact that the prohibition of murder coincides with one of the Ten Commandments does not render a State's interest in its murder statutes less than compelling, nor are legislative and judicial decisions concerning use of the death penalty tainted by their correspondence to varying religious views on the subject. The simple, and perhaps unfortunate, fact of the matter is that in determining whether to assert an interest in fetal life, a State cannot avoid taking a position that will correspond to some religious beliefs and contradict others.¹³³

Justice Stevens' opinion in *Thornburgh* is completely silent on this point. At least on a rhetorical level, Stevens' opinion in *Webster* seems to make amends for this deficiency by appearing to concede the point that a law's mere coincidence with the religious tenets of one or another faith group does not bring with it constitutional invalidity.

2. *Washington v. Davis* and the Irrelevance of Religious Motivation

Following his citations to *McGowan* and *Harris*, Justice Stevens further assures us that his conclusion that the Missouri statute in *Webster* violates the Establishment Clause does not rest "on the fact that the legislators who voted to enact it may have been motivated by religious considerations."¹³⁴ He then cites to his concurrence in *Washington v. Davis*.¹³⁵ *Washington* involved the Court's review of a test used to select candidates for the District of Columbia's police officer training program. To qualify for acceptance, an applicant "was required to satisfy certain physical and character standards, to be a high school graduate or its equivalent" and "to receive a grade of at least 40 out of 80" on a civil service exam that "was 'designed to test verbal ability, vocabulary, reading and comprehension.'"¹³⁶ A higher percentage of blacks failed the exam than whites, and two officers

133. *Thornburgh*, 476 U.S. at 795 n. 4 (1986) (White, J., dissenting).

134. *Webster*, 492 U.S. at 566 (Stevens, J., concurring in part and dissenting in part).

135. 426 U.S. 229 (1976).

136. *Id.* at 234-235.

filled suit claiming racial discrimination.¹³⁷ Writing for the majority, Justice White stated that the central purpose of the Equal Protection Clause was “the prevention of official conduct discriminating on the basis of race.”¹³⁸ In reviewing the Court’s prior decisions he concluded that the Court had never held “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 discriminatory impact.”¹³⁹ Consistent with this line of precedent, the Court in *Washington* declined to hold that “a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”¹⁴⁰

Justice Stevens filed a concurring opinion in *Washington* in which he stressed that requiring proof of purposeful discrimination may involve “differing evidentiary considerations” in different contexts.¹⁴¹ In citing to this opinion in *Webster*, in support of his conclusion that the Missouri statute was “religious” *and* that this conclusion was not based “on the fact that the legislators who voted to enact it may have been motivated by religious considerations,”¹⁴² Justice Stevens likely had in mind this observation:

It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.¹⁴³

Plainly, Justice Stevens recognizes that discovering the motive of even a single lawmaker may, as a practical matter, prove to be exceedingly difficult. These practical challenges are further complicated by the fact that identifying the motive behind a law is not like pointing to a simple fact laid bare since laws and other official governmental actions are “frequently the product of compromise, of collective decisionmaking, and of mixed motivation.”¹⁴⁴

137. *Id.* at 235.

138. *Id.* at 239.

139. *Id.* (emphasis original).

140. *Washington v. Davis*, 426 U.S. at 242.

141. *Id.* at 253 (Stevens, J., concurring).

142. *Webster*, 492 U.S. at 566 (Stevens, J., concurring).

143. *Washington*, 426 U.S. at 253 (Stevens, J., concurring).

144. *Id.*

Beyond these practical and theoretical concerns—even when governmental motive can be identified—it seems that Stevens does not see motive as the touchstone of unconstitutionality, and with good reason. The motives behind even a single vote may, as Stevens says, be “mixed” and of an almost infinite variety.¹⁴⁵ What really matters is the substance of what is enacted, not why a particular legislator was inspired to vote in support of a measure. What is “relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.”¹⁴⁶ As Andrew Koppelman has put it, what really matters are “legislative outcomes rather than legislative inputs,”¹⁴⁷ what the duly enacted law says and accomplishes,¹⁴⁸ not the motivation behind the act of voting.¹⁴⁹

145. A lawmaker may be motivated to vote for a piece of legislation because, after reviewing the legislation, conferring with his constituents, and deliberating over the matter with his legislative colleagues, he concludes that the bill is right and just, that it will contribute to the common good and so ought to become law. By contrast a lawmaker may vote for the legislation because the party whip pressures him to do so; or to avoid a primary challenge in the next election from one or the other wing of his party; or because a majority of his constituents favor the bill even though he thinks it unwise; or because some wealthy donor-constituents urge him to do so; or (more boldly) because he receives a bribe to do so; or because of some “logrolling” or “backscratching” arrangements with other legislators in which he agrees to support the bill in exchange for their support on some other proposed legislation; or because the legislation coincides with his religious faith or that of his constituents and will advance what they believe is God’s will; or some combination of all these things. Even if the lawmaker’s motivations were utterly corrupt, even if he was guilty of a crime—motivated by the payment of a bribe in voting for a law—so long as the law satisfied the constitutional requirements for enactment (e.g. majority bicameral support and presentment) this would not constitute grounds for voiding the law. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

The validity of a law cannot be questioned because undue influence may have been used in obtaining it. However improper it may be, and however severely the offenders may be punished, if guilty of bribery, yet the grossest corruption will not authorize a judicial tribunal in disregarding the law. This would open a source of litigation which could never be closed.

Id. Legislatures and other lawmaking bodies do not enact motives. They enact statutes and other laws, and it is these products of the lawmaking process that must withstand constitutional scrutiny, not the often complex motives of those who participate in that process.

146. *Westside Community Bd. of Ed. v. Mergens*, 496 U.S. 226, 249 (1990).

147. Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 118 (2002); see also PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* 268-270 (2011) (arguing from the perspective of “constitutional agnosticism” with respect to religious truth that there can be “no bar to religious participation in public debate, including the use of explicitly religious arguments by citizens and lawmakers” but “there are important restrictions on particular outcomes” such that the state “may not make official statements that take sides on questions of religious truth”).

148. The meaning of legislation may also be understood in terms of what it actually accomplishes—its effect in the world. In his concurrence in *Washington v. Davis*, Justice Stevens observed that “[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor” since “normally the actor is presumed to have intended the natural consequences of his deeds.” *Washington*, 426 U.S. at 253 (Stevens, J., concurring). On this account, a facially neutral statute can be shown to be a product of racially discriminatory intent on an empirical basis (i.e. disparate impact). There is, however, no comparable metric for the impact of an allegedly religious law that serves as proof of the purported religious intent behind it. Proof of intent differs in the two cases in that *race* is introduced into the analysis of the racially-neutral law by use of empirical data showing a disparate impact on the members

Accordingly, just as Justice Stevens' hypothetical conscription law is not invalid because the atheist lawmaker is motivated to vote for the measure out of anti-religious zeal (i.e. a desire to see clerics pressed into military service), so the law restricting abortion in *Webster* is not invalid because the Christian lawmaker is motivated to support the measure out of religious zeal (i.e. a desire to prevent the death and destruction of the tiniest human souls created by God).

of an identified racial group, whereas *religion* is not introduced into the analysis of a religiously-neutral law by any empirical proof of what the law has accomplished. This can only be done by way of assumption, and assumption is not proof. In the case of a law restricting abortion, it cannot be the case that the "objective evidence of what actually happened"—that a woman was discouraged from an abortion, or found it more difficult to obtain one—constitutes "probative evidence" of an *intent* to "establish religion" without first assuming this intent, that is, without first assuming what this objective evidence is offered to show. If a law that prohibits gambling, or prostitution, or polygamy is effective, then there will be "objective evidence" showing that the law has a "disparate impact" on individuals who wish to engage in these activities, but these sorts of statistics will not be "probative evidence" of a religious purpose behind these laws. The would-be gambler, prostitute or polygamist may convincingly show that he or she disagrees with the normative judgment embodied in the law, but this disagreement, however plain it may be, will not show that the government's normative judgment is religious, only that some portion of the public does not agree with it.

After its decision in *Washington v. Davis*, the Supreme Court later clarified what a plaintiff must do to show that a facially neutral law that has a disparate impact on an identifiable group is discriminatory in a way that violates the Equal Protection Clause. *See, e.g., Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 232, 266-268 (1977) (holding that plaintiffs may show invidious discriminatory purpose through the impact in "a clear pattern, unexplainable on grounds other than race," or through "[d]epartures from the normal procedural sequence" of decision-making, or through the contemporary statements of lawmakers set forth in "legislative or administrative history"); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (holding that lawmaker's mere awareness of disparate impact is not sufficient to show discriminatory purpose; plaintiff must show that the legislature "selected or reaffirmed a particular course of action at least in part 'because of' not 'in spite of,' its adverse effects upon an identifiable group"). To the extent that racially-neutral laws are thought to be analogous to religiously-neutral laws, such that discriminatory purpose in violation of the Equal Protection Clause in the case of the former and religious purpose in violation of the Establishment Clause in the case of the latter can be shown through empirical proof of the impact of each law, these subsequent cases make proof of religious purpose even more difficult to sustain.

149. A comprehensive argument in support of the views set forth in this paragraph is beyond the scope of this essay. Briefly put, however, one may examine a statute or ordinance in light of the Establishment Clause by (1) reviewing the *motive* of one or more lawmakers in enacting the law, (2) the *language* of the act itself, (3) the *intent or purpose* behind of the legislation, and (4) the *effect* that the law has in the world. All but the first of these can be derived from the Supreme Court's much criticized but still frequently invoked *Lemon* test. *Cf. Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) (for a statute to satisfy the demands of the Establishment Clause it must "have a secular legislative purpose," that its "principal or primary effect must be one that neither advances nor inhibits religion," and that it "must not foster 'an excessive government entanglement with religion'"). Interpreting the language used and construing the purpose (the "legislative intent") behind this language is an unavoidable part of the hermeneutic task confronting every court. In fulfilling this task, a court may or may not consult the legislative history of the statute, but when it does, the aim of this inquiry is to understand the meaning of the language employed—to construe the legislative outcome. The point is not to discern the reasons why a legislator voted for the statute—the operative incentives and disincentives in legislative machinations—to fixate on legislative inputs. The proper subject of this inquiry is *what* was said (meaning) not *why* it was said (motive). Motive may explain *how* a certain meaning came to be adopted, not what that meaning is. It is this meaning that must conform to the Constitution, not the calculus worked out inside each legislator's head as he or she decides to vote for or against a proposed statute.

3. *The Covert Repudiation of McGowan and Harris Under the Endorsement Test*

So if, as Justice Stevens says, the statutory preamble to the Missouri statute at issue in *Webster* is not “religious” because the legislative statement that life begins at conception “happens to coincide with the tenets of certain religions” (following *McGowan* and *Harris*), or because “the legislators who voted to enact it may have been motivated by religious considerations” (as per his opinion in *Washington v. Davis*), then what is it that renders the law “religious” and unconstitutional?

Having overtly rejected these weak though plausible routes to his conclusion, Justice Stevens then covertly seeks to reinstate them. At this point in the opinion Stevens makes a rather astonishing claim. He says that his conclusion that the Missouri statute violates the Establishment Clause “rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose” and that this “fact alone compels a conclusion that the statute violates the Establishment Clause,”¹⁵⁰ citing for support his majority opinion in *Wallace v. Jaffree*.¹⁵¹

This statement, which serves as the linchpin for Stevens’ entire *Webster* opinion, is remarkable in many respects, none of which are a credit to its author. First, one might say, candidly though somewhat uncharitably, that Justice Stevens seems unaware that he has contradicted himself. That is, Stevens says in effect that the preamble statements—that “[t]he life of each human being begins at conception” and that “[u]nborn children have protectable interests in life, health and well-being”—are *not religious* because they happen to coincide with the beliefs of a particular religion (citing *McGowan* and *Harris*), except that they *are in fact religious* because they are the religious tenets “of some but by no means all Christian faiths.”¹⁵²

a. Proving the Religious Nature of the Thing Endorsed

Stevens claims that the State of Missouri has “unequivocally” endorsed a “religious tenet” in its statute regulating abortion, meaning that both the endorsement and the religious character of the thing endorsed are in no way open to doubt. His use of the term “endorsement” in referring to the Missouri statute and his citation to *Wallace v. Jaffree* are at best a cryptic invocation of the so-called “endorsement test,” a means of assessing alleged

150. *Webster*, 492 U.S. at 566-67 (internal citations omitted).

151. 472 U.S. 38 (1985).

152. *Webster*, 492 U.S. at 566.

violations of the Establishment Clause first introduced by Justice Sandra Day O'Connor in her concurring opinion in *Lynch v. Donnelly*.¹⁵³ From the time of O'Connor's opinion in *Lynch* to the present day, the endorsement test has been the focus of substantial criticism, both by academic commentators and by other members of the Court.¹⁵⁴ Putting these criticisms to one side, however, and assuming the test's applicability, one cannot even entertain the question of "whether the government intends to convey a message of endorsement or disapproval of religion"¹⁵⁵ without first showing that the thing endorsed or disapproved is "religious."

Defining "religion" and the quality of being "religious" has proven to be a notoriously difficult, even illusive task for scholars.¹⁵⁶ The Supreme Court has largely succeeded in avoiding the question by resisting the urge to set forth an authoritative definition of "religion" under the Constitution. This is somewhat surprising given that the word "religion" is part of the constitutional text, and the Court has not been able to follow a similar path of avoidance with respect to defining other constitutional terms such as "speech," "search and seizure," and "due process." The question of defining "religion" has arisen more often in the context of the Free Exercise Clause¹⁵⁷ than in the case of the Establishment Clause. As Steve Smith notes, because Establishment Clause cases typically involve some form of governmental support for institutions that claim a religious identity,¹⁵⁸ courts have been able to avoid the problem of definition by relying upon

153. 465 U.S. 668, 687-694 (1984) (O'Connor, J., concurring).

154. For academic criticism of the endorsement test, see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 147-157 (1992). For criticism of the endorsement test by other members of the Court, see *County of Allegheny v. ACLU*, 492 U.S. 573, 668-677 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

155. *Lynch v. Donnelly*, 465 U.S. at 691.

156. Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEORGETOWN L. J. 1519 (1983); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989); Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L. J. 791 (1997); Jeffrey L. Oldham, Note, *Constitutional "Religion": A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117 (2001).

157. See, e.g., *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

158. See, e.g., *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (law giving church veto power over granting of alcoholic beverage licenses); *Bd. of Ed. of Kiryas Joel Village v. Grumet*, 512 U.S. 687 (1993) (creation of special school district for followers of Jewish sect); *Grand Rapids School Dist. v. Ball*, 474 U.S. 373 (1985) (program involving public school teachers providing remedial education at religious schools), *overruled*, *Agostini v. Felton*, 521 U.S. 203 (1997); *Lemon*, 403 U.S. 602 (state program providing salary supplements to parochial school teachers); *Zorach v. Clausen*, 343 U.S. 306 (1952) (program involving release time for public school students to attend religious classes off site); *Everson v. Bd. of Ed. of Township of Ewing*, 330 U.S. 1 (1946) (state payment of transportation costs for children to and from religious school).

relatively uncontroversial views of what is “religious” and what is “secular” that “correspond to conventional views held by people in the community.”¹⁵⁹ The Court has likewise been able to avoid defining “religion” in cases involving challenges to government-sponsored activities that nearly everyone regards as unquestionably religious, such as prayer and devotional Bible reading.¹⁶⁰ By contrast, in Free Exercise Clause cases courts must often grapple with an individual’s claims of what is “religious” that lie outside this consensus or are otherwise controversial.¹⁶¹ Because the endorsement test focuses on the claimed perception of government support for things that may fall outside the conventional understanding of what is “religious” it forces courts to confront the definitional question directly as never before.¹⁶²

Under the endorsement test, as first articulated by Justice O’Connor in *Lynch* and as refined in subsequent opinions, there are two ways in which the “religious” nature of the thing endorsed can be shown, namely, through proof of government intent or through proof of what some observer perceives the government’s actions to be.

i. Finding Religion in the Government’s Intent

First, one can show that the government intended to endorse something that it acknowledges as “religious.” Justice O’Connor refers to this as the “subjective” meaning of a statement, one that “depends on the intention of the speaker.”¹⁶³ There are, of course, a host of well-known practical challenges attendant to any attempt to discern a single, coherent intent from a collective body by examining the text of the statute or resolution adopted, in the context in which it appears, together with any legislative history that

159. Smith, *supra* note 154, at 296-97.

160. See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962) (recitation of “nondenominational” prayer composed by school board); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (reading of Bible passages and recitation of the Lord’s Prayer); *Lee v. Weisman*, 505 U.S. 577 (1992) (clergy-delivered prayers at public school graduations); *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000) (student council chaplain delivering prayer before public high school football games).

161. See, e.g., *Africa v. Pennsylvania*, 662 F. 2d 1025 (3rd Cir. 1981) (whether the MOVE movement constituted a religion entitling adherent to special diet in prison); *Malnak v. Yogi*, 592 F. 2d 197 (3rd Cir. 1979) (whether course on transcendental meditation in public high school was teaching religion); *United States v. Meyers*, 95 F. 3d 1475 (10th Cir. 1996) (rejecting claim defendant’s claim the Church of Marijuana was a religion that commanded him to use, possess, and distribute the drug for the benefit of mankind and the planet earth); *Founding Church of Scientology of Washington, D.C. v. United States*, 409 F. 2d 1146 (D.C. Cir. 1969) (concluding the Founding Church of Scientology is a religion); *Glenside Center, Inc. v. Abington Township Zoning Hearing Bd.*, 973 A. 2d 10 (Pa. Commw. 2009) (use of space for Alcoholics Anonymous meeting not constitute exercise of religion).

162. See Smith, *supra* note 154, at 299.

163. *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring).

might be available.¹⁶⁴ There may be no legislative history that speaks to the point of legislative intent. Where there is, the legislature or other governmental actor may “express[] a plausible secular purpose” for its action and may even “disclaim[] an intent” to convey a message of endorsement of religion.¹⁶⁵ In such a case “courts should generally defer to that stated intent.”¹⁶⁶ At the same time, it is “possible that a legislature will enunciate a sham secular purpose,” in which case the court hearing the matter is free to ignore the stated intent and discern the “sincere one.”¹⁶⁷ Although the Court gives no indication as to when a judge may abandon the stated purpose as a sham and begin his or her search for the real one, the Court has expressed its confidence in the ability of judges to distinguish one from the other.¹⁶⁸ What is less clear is whether the governmental act that constitutes a prohibited endorsement of religion must be “entirely motivated by a purpose to advance religion,”¹⁶⁹ or if instead the religious purpose may simply “predominate”¹⁷⁰ over some legitimate, secular purpose, and if so by how much. It is clear, however, that when a judge wants to affirm the government’s stated purpose or dismiss it as mere subterfuge he or she may invoke any number of conclusory expressions that appear throughout this line of cases: “evident purpose,”¹⁷¹ “preeminent purpose,”¹⁷² “primary purpose,”¹⁷³ “manifest objective,”¹⁷⁴ “commonsense conclusion.”¹⁷⁵

Obviously a great deal more could be said about governmental intent and the endorsement of religion. The problem is that Justice Stevens’ statement that the Missouri statute under review in *Webster* constituted “an unequivocal endorsement of a religious tenet” is that it is *only* a conclusion.

164. See Smith, *supra* note 154, at 284-285; B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 503 (2005).

165. *Wallace v. Jaffree*, 472 U.S. at 74 (O’Connor, J., concurring in the judgment).

166. *Id.* at 74-75; see also *Santa Fe*, 530 U.S. at 308 (“When a governmental entity professes a secular purpose for an arguably religious policy, the government’s characterization is, of course, entitled to some deference. But it is nonetheless the duty of courts to ‘distinguis[h] a sham secular purpose from a sincere one.’”) (quoting *Wallace*, 474 U.S. at 75).

167. *Wallace*, 472 U.S. at 75; cf. *Stone v. Graham*, 449 U.S. 39, 41 (1980) (prohibiting the display of the Ten Commandments in public school classrooms and insisting that “no legislative recitation of a supposed secular purpose can blind us” to the religious quality of the display).

168. See *Wallace*, 472 U.S. at 75.

169. *Id.* at 56.

170. *Edwards v. Aguillard*, 482 U.S. 578, 599 (Powell, J., concurring, joined by O’Connor, J.) (“A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate.”); see also *id.* at 614 (Scalia, J., dissenting) (citing authority providing that legislation may be struck down on Establishment Clause grounds only if it is “wholly” or “entirely” or “solely” motivated by religious considerations).

171. *Lynch*, 465 U.S. at 668 (O’Connor, J., concurring).

172. *Edwards*, 482 U.S. at 591.

173. *Id.* at 593, 594.

174. *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 855 (2005).

175. *Id.* at 863.

Stevens offers nothing by way of any citation to the legislative history of the act.¹⁷⁶ He offers nothing that can rightly be called analysis of the legislative text. He offers his conclusion and only his conclusion that the language of the statute “serves no identifiable secular purpose.”¹⁷⁷

(A) *Wallace v. Jaffree* and Dismissing the Government’s
Alleged Secular Purpose

In *Wallace v. Jaffree*, a decision authored by Justice Stevens and cited by him in his *Webster* opinion, Stevens showed a determined ingenuity in finding legislative intent of a religious nature where others might not. In *Wallace* the Court applied the endorsement test to strike down an Alabama statute that authorized a one minute period of silence “for meditation or voluntary prayer” at the beginning of each school day.¹⁷⁸ Alabama already had in place a statute that authorized a one minute period of silence “for meditation,” a statute that the district court upheld and that the parties agreed was constitutional.¹⁷⁹ Writing for the majority, Justice Stevens concluded that the purpose of the statute was to endorse religion, finding that “[t]he addition of [the phrase] ‘or voluntary prayer’ indicates that the State intended to characterize prayer as a favored practice.”¹⁸⁰ This conclusion was surprising in part because of the high standard for invalidation that the Court set forth. Relying on Justice O’Connor’s concurrence in *Lynch*, Justice Stevens said that in applying the purpose prong of the *Lemon* test “it is appropriate to ask ‘whether the government’s actual purpose is to endorse or disapprove of religion.’”¹⁸¹ But it is not enough that this purpose simply be present. It must be comprehensive. A statute that is “motivated in part by a religious purpose” is not for that reason unconstitutional in that “the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.”¹⁸²

Notwithstanding this seemingly exacting standard, the Court struck down the Alabama statute finding that it was *affirmatively* supported by a religious purpose, namely, “to convey a message of state approval of prayer

176. By way of contrast, the majority, concurring and (most especially) dissenting opinions made numerous citations to the legislative history behind the Louisiana statute at issue in the case. See *Edwards*, 482 U.S. at 587, 591-592; *id.* at 599-600 (Powell, J., concurring); *id.* at 619-626, 629-633 (Scalia, J., dissenting).

177. *Webster*, 492 U.S. at 566-567 (Stevens, J., concurring in part and dissenting in part).

178. *Wallace*, 472 U.S. at 75.

179. *Id.* at 40-41.

180. *Id.* at 60.

181. *Id.* at 56.

182. *Id.*

activities in the public schools.”¹⁸³ Justice Stevens located this illicit religious intent in two post-enactment statements by a single legislator.¹⁸⁴ Stevens offered no reason—no argument—as to why it was appropriate to assume that the post-hoc comments of this one lawmaker represented the views of the entire Alabama legislature. His libertine assumption in this regard simply “underscor[es] the factual and conceptual problems of ascertaining the intent of a collective body.”¹⁸⁵

As “troublesome” as this conclusion was,¹⁸⁶ even more disturbing was the *Wallace* court’s conclusion that the statute “was not motivated by any clearly secular purpose,” that “the statute had *no* secular purpose.”¹⁸⁷ This was disturbing because two plausible secular purposes were plainly before the Court. As Justice White noted in his dissent, the statute authorizing a one minute period of silence “for meditation or voluntary prayer” may have been enacted notwithstanding the presence of another statute already in place providing for a one minute period of silence “for meditation” in order to make clear that a student could in fact use the time for prayer.¹⁸⁸ This clarification is all the more plausible if read within the wider cultural context of the cessation of prayer in the public schools as ordered by the Supreme Court.¹⁸⁹ Although the Court had elsewhere made clear that students do not “shed their constitutional rights . . . at the schoolhouse gate,”¹⁹⁰ many read the Court’s Establishment Clause decisions as manifesting a “latent hostility toward religion,” “sending a clear message of disapproval,” and “requir[ing] a relentless extirpation of all contact between government and religion.”¹⁹¹ In later decisions the Court would uphold the practice of voluntary, organized prayer by students in a public school

183. *Wallace*, 472 U.S. at 61.

184. *Id.* at 56-57 (quoting Senator Donald Holmes in a statement entered into the legislative record after the statute was enacted, and testimony by the same individual given at the preliminary injunction hearing on the statute held in the district court).

185. Smith, *supra* note 154, at 284-285.

186. In her opinion concurring in the judgment, Justice O’Connor criticized the majority opinion remarking that it was “particularly troublesome to denigrate an expressed secular purpose due to postenactment testimony of particular legislators or by interested persons who witnessed the drafting of the statute.” *Wallace*, 472 U.S. at 75 (O’Connor, J., concurring in the judgment); *see also id.* at 77 (saying that she “would give little, if any, weight to this sort of evidence of legislative intent”). Justice O’Connor nevertheless concluded that the purpose of the statute was “to convey a message of state encouragement and endorsement of religion.” *Id.* at 78.

187. *Id.* at 56.

188. *Id.* at 91 (White, J., dissenting).

189. *See Engle*, 370 U.S. 421; *see Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

190. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969) (addressing students’ right to freedom of speech and allowing students protesting the Vietnam War to wear black arm bands).

191. *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

setting.¹⁹² But the statute in *Wallace* was enacted prior to these decisions—prior to the Court’s reassurance that “nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday.”¹⁹³ In this context, a state could concede the correctness of the Court’s decision in *Engle v. Vitale*¹⁹⁴ forbidding state-sponsored school prayer, and at the same time wish to clarify that private, voluntary prayer was not so obnoxious to the order of public education that it could not be undertaken in a moment of silence at the beginning of the school day.

Second, the statute at issue in *Wallace* did more than add the words “or voluntary prayer” to the already existent statute authorizing a period of silence for “meditation.” The challenged statute also expanded the scope of the earlier act. Whereas the “meditation” statute applied only to grades one through six, the “meditation or voluntary prayer” statute applied to “all grades,” that is, grades one through twelve.¹⁹⁵ The purpose of making the admittedly constitutional period of silence available to a greater number of students is plainly secular and may have been “the statute’s primary objective, with the words ‘meditation or voluntary prayer’ added to clarify a point that the earlier statute failed to address.”¹⁹⁶ In response to this purpose, the majority, through Justice Stevens, offered a shallow, dissembling and grossly misleading argument. Stevens asserted that this difference was “of no relevance”¹⁹⁷ because of none the plaintiff children in the case were in the new grades to which the revised law applied. But the ages of the Jaffree children had nothing to do with the judicial determination of legislative intent. On the contrary, the expansion of the minute of silence to grades seven through twelve speaks to a plausible secular purpose behind the new law. Rather than confront this purpose directly, Stevens simply ignored it.

The wanton ease and prevarication with which the Court dismissed the plausible secular reasons explaining the statute at issue in *Wallace* do not inspire confidence. Notwithstanding the Court’s language in *Wallace* and elsewhere suggesting judicial deference to plausible statements of secular legislative purpose and an unwillingness to strike down laws that enjoy *some* secular purpose, it seems that when the Court is determined to find “no secular purpose,”¹⁹⁸ none will be found and the law in question will be

192. See *Westside Community Bd.*, 496 U.S. 226; *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).

193. *Santa Fe*, 530 U.S. at 313.

194. 370 U.S. 421 (1962).

195. *Wallace*, 472 U.S. at 58.

196. Smith, *supra* note 154, at 285.

197. *Wallace*, 472 U.S. at 59.

198. *Id.* at 56.

voided. This is not, of course, a weakness peculiar to the endorsement test. An inconvenient element can always be gotten around by a clever judge determined to reach the result he knows is right. In *Wallace* and in *Webster*, Justice Stevens dispenses with the cleverness and simply declares the test satisfied: an absence of secular purpose.

(B) Not Much Effort: Justice Stevens and the Easily Identifiable Secular Purpose in *Webster*

Had Justice Stevens wished to investigate the possibility of a plausible secular legislative purpose behind the legislation at issue in *Webster*, he need not have looked far. Indeed, discerning the purpose behind the preamble would have demanded very little effort. In its brief before the Court, the State of Missouri made clear that the legislature's purpose was to set forth "the established biological fact that the life of an *individual* human being . . . begins at conception."¹⁹⁹ The State acknowledged that "it is of no consequence whether a legislature or court pronounces as true or false a fact of nature" as it will be true in any case, but that "it is not improper for a government or a court to recite findings in making or interpreting law."²⁰⁰ Indeed, the prefatory section to the statute "constitutes an effort by the General Assembly of Missouri to recognize a truth justifying the substantive legislation that follows."²⁰¹ In its reply brief Missouri further explained that the provisions Justice Stevens finds objectionable "simply explain why the State of Missouri chooses to regulate abortion to the full extent permitted by this Court's abortion precedents."²⁰² Plainly, a plausible account for the statutory language was readily at hand. Rather than attempt to prove that this stated purpose was a mere "sham" by citations to legislative history or other proof, Justice Stevens instead chose to ignore it. In its place he supposes an illicit purpose of his own invention.

199. Brief of Appellants, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (No. 88-605) 1989 WL 1127643 at 26. Missouri cited a number of medical texts in support of this empirical claim. In the court below, the Eighth Circuit thought that the best response to Missouri's contention was no response at all. That is, in response to Missouri's argument that the *Roe* court was mistaken in its declaration that science has not resolved the question of when human begins the Court of Appeals did not engage the scientific literature presented. Instead it simply said: "We see no point in addressing this contention." *Reproductive Health Services v. Webster*, 871 F. 2d 1071, 1076 n. 7 (8th Cir. 1988). Apparently the plaintiffs in the case did not wish to debate the science behind the State's findings. This can be gleaned from the fact that the plaintiffs filed a "motion in limine prohibiting the defendants from presenting any testimony or evidence regarding the constitutionality of §§ 1.205.1(1) or 1.205.1(2)" which the district court granted. Brief of Appellants, *supra* note 199, at 3.

200. Brief of Appellants, *supra* note 199, at 26.

201. *Id.* at 26-27.

202. Reply Brief of Appellants, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (No. 88-605) 1989 WL 1115242 at 11.

This is perhaps the most pitiable aspect of Justice Stevens' opinion in *Webster*. It is not just that Stevens fails to demonstrate a "religious" intent on the part of the Missouri legislature under the endorsement test, but that he seems unable to tell the difference between making an argument and announcing a conclusion. That is, Justice Stevens says that he is "persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception . . . makes the relevant portion of the preamble invalid under the Establishment Clause" and that "[t]his conclusion [sic] . . . rests on the fact that the preamble . . . serves no identifiable secular purpose."²⁰³ Justice Stevens is an intelligent man and so one may presume he knows what a syllogism is. He must know the difference between making an argument in support of a conclusion and simply declaring a proposition to be true. He must know that "repetition" is not a synonym for "proof," "demonstration," or "argument," but on the face of his opinion one would be hard pressed to see that Stevens grasps the difference.

ii. Finding Religion in the Perception of the Reasonable Observer

The second way in which something can be shown to be "religious" under the endorsement test is to look at what Justice O'Connor referred to in *Lynch* as "the 'objective' meaning of [a] statement in the community."²⁰⁴ That is, some members of the public will not try to discern the government's intent to endorse religion "by examining the context of the statement or asking questions of the speaker."²⁰⁵ They will instead rely "on the words themselves."²⁰⁶ Admittedly, the meaning received by such a person may be quite different from that which was "actually intended" by the speaker.²⁰⁷

When Justice O'Connor first set forth the endorsement test, her formulation of the test in this manner immediately raised the critical question "Whose perceptions count?"²⁰⁸ In a series of subsequent opinions, O'Connor later clarified that the individual interpreting the government's action was not an actual person but a judicially crafted heuristic norm, an

203. *Webster*, 492 U.S. at 566-567 (Stevens, J., concurring in part and dissenting in part).

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

205. *Id.*

206. *Id.*

207. *Id.*

208. Smith, *supra* note 154, at 291; see also McConnell, *supra* note 154, at 150-151 (arguing that what constitutes "endorsement" depends upon a person's intuitions as to where the line should be drawn between religion and state and that the concept of endorsement "detracts from the analysis" and "serves only to mask reliance on untutored intuition"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1293 (2d. ed. 1988) ("When deciding whether a state practice makes someone feel like an outsider, the result often turns on whether one adopts the perspective of an outsider or that of an insider.").

“objective observer”²⁰⁹ or “reasonable observer”²¹⁰ who is knowledgeable about the official act under review.²¹¹ For Justice O’Connor “[t]o ascertain whether [a] statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute.”²¹² By investing the reasonable observer with this background knowledge, O’Connor largely resolves the possible tension between the “objective” and “subjective” meanings of government action that she described in *Lynch*. Indeed, such a reasonable observer would be so sensitive as to “take into account the values underlying the Free Exercise Clause in assessing” whether a challenged government accommodation to an otherwise applicable law “conveyed a message of endorsement.”²¹³

While Justice Stevens has embraced the endorsement test as a means of assessing alleged Establishment Clause violations, he has also criticized O’Connor’s “reasonable observer” for being overly sophisticated—an “ultrareasonable observer”²¹⁴ that impairs the purpose for which the test was devised. In *Capital Square Review and Advisory Board v. Pinette*, the Court, without a majority opinion, held that the government could not deny the Ku Klux Klan a permit to exhibit a large unattended Latin cross in the plaza across from the Ohio State Capitol. In his dissenting opinion, Justice Stevens ridiculed Justice O’Connor’s “reasonable observer” as “a well-schooled jurist, a being finer than the tort-law model” of the reasonable person.²¹⁵ For Stevens, the problem with envisioning such a keen and well-informed observer was that such a construct limited the reach of the endorsement test. It strips away constitutional protection under the Establishment Clause from “every reasonable person whose knowledge happens to fall below some ‘ideal’ standard.”²¹⁶ In place of O’Connor’s highly sophisticated observer, Stevens proposed a man of the street, the casual “passerby, including schoolchildren, traveling salesmen, and tourists” all of whom are “members of the body politic” and so “equally

209. *Wallace*, 472 U.S. at 76 (O’Connor, J., concurring in the judgment).

210. *County of Allegheny*, 492 U.S. at 631 (O’Connor, J., concurring in part and concurring in the judgment).

211. Indeed, Justice O’Connor explicitly rejected the idea that “the endorsement test should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge.” Her reasonable observer is “more informed than the casual passerby.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O’Connor, J., concurring in part and concurring in the judgment).

212. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O’Connor, J., concurring in the judgment).

213. *County of Allegheny*, 492 U.S. at 632.

214. *Capitol Square*, 515 U.S. 753, 807 (1995) (Stevens, J., dissenting).

215. *Id.* at 800 n. 5.

216. *Id.*

entitled to be free of government endorsement of religion.”²¹⁷ Under this less demanding standard “it is enough that *some* reasonable observers would attribute a religious message to the State.”²¹⁸ Such a revised standard may well lower the bar sufficiently that many more laws would be open to Establishment Clause challenge since, as Justice O’Connor observes, “[t]here is always someone who, with a quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion.”²¹⁹ Justice Stevens dismissed these concerns in *Capitol Square* since the apprehension of endorsement must still be “objectively reasonable” such that someone “who view[ed] an exotic cow at the zoo as a symbol of the government’s approval of the Hindu religion cannot survive this test.”²²⁰

Again, much more could be said about the “reasonable observer” aspect of the endorsement test, how the concept should be defined, and even whether it should be part of our jurisprudence. The problem with the “reasonable observer” with respect to Justice Stevens’ opinion in *Webster* is that it allows Stevens to do covertly that which he expressly denies. It allows him to publicly affirm the principle recognized by the Court in *McGowan v. Maryland* and *Harris v. McRae* while reaching a result that in fact repudiates this principle.

Under the reasonable observer aspect of the endorsement test—whether Justice O’Connor’s well-schooled version or Justice Stevens’ more pedestrian model—the religious character of the thing endorsed is a function of the reasonable observer’s perception. That is to say, the reasonable observer is an *observer*, not a *participant*. He or she does not invest the image, place, object or text with special significance. The observer does not regard the thing in question as sacred or normative, but observes others doing so. Thus, the reasonable observer’s perception that something is “religious” is not a direct interpretation of the thing itself but a response to how other people—religious believers—interpret the thing in question.

The depiction of a woman and her infant son huddled together is not inherently religious. Rather, it is “religious” because some believers—Christians—see it as an image of the “Madonna and Child,” Jesus Christ and his mother, Mary. To the non-believer, a lampstand with seven lights may appear to be only a decorative candelabrum, but for a believing Jew it is a “menorah,” a symbol of the faith and a reminder of the light given to God’s people in the Torah. For a Hindu, the *Bhagavad Gita* is not simply

217. *Id.* at 808 n. 14.

218. *Id.* at 807.

219. *Capitol Square*, 515 U.S. at 780 (O’Connor, J., concurring in part and concurring in the judgment).

220. *Id.* at 808 n. 14 (Stevens, J., dissenting).

an account of the battlefield exchange between a warrior-prince and his charioteer but a source of divine wisdom, a text whose verses are chanted as mantras. And for those who follow Islam, the Kaaba in Mecca is not simply an ancient cube structure made of granite, but a place of pilgrimage—the first place where Allah was worshiped, built by Abraham and later purified by Mohammad, the very place where heaven and earth meet.

In each case the reasonable observer's perception of religiosity is derivative. It is derived from the fact that a community of religious believers regards the image, place, object or text as *religious*—they invest it with special meaning and hold it in high regard as something sacred, deserving of care, reverence and devotion, worthy of imitation, and normative for the life of a believer within the faith tradition. In other words, a thing is perceived as religious precisely for the reasons that Stevens ostensibly rejects in *Webster* and which the Court disavowed in *McGowan v. Maryland* and *Harris v. McRae*, namely that it “happens to coincide with the tenets of certain religions.”²²¹

In *Harris*, the Court concluded that “the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.”²²² The fact of mere coincidence was insufficient for the law to violate the anti-establishment principle—“something more” was required. While the *Harris* court did not indicate what this “something more” was, the endorsement test provides a plausible answer: It is the act of endorsement itself.

(A) Defining Government “Endorsement”

Somewhat surprisingly, however, what it is precisely that makes a government action qualify as an “endorsement” is far from clear.²²³ This lack of clarity is odd given the centrality of governmental “endorsement” in the endorsement test—that is, as the very act that the Constitution presumably prohibits. In *Wallace v. Jaffree*, Justice Stevens offered that an endorsement is not the act of government “acknowledging a religion” or “taking religion into account in making law and policy” but the act of government “conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.”²²⁴ In *County of Allegheny v. ACLU* Justice Blackmun noted that “the word ‘endorsement’ is

221. *Webster*, 492 U.S. at 566 (Stevens, J., concurring in part and dissenting in part).

222. *Harris*, 448 U.S. at 319-320.

223. Smith, *supra* note 154, at 276-283 (identifying four distinct possible meanings of “endorsement”).

224. *Wallace*, 472 U.S. at 70 (1985).

not self-defining,” and so he looked to “other words that th[e] Court ha[d] found useful over the years in interpreting the Establishment Clause.”²²⁵ He concluded, however that “[w]hether the key word is ‘endorsement,’ ‘favoritism,’ or ‘promotion,’ the essential principle remains the same,” namely, that “[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from ‘making adherence to a religion relevant in any way to a person’s standing in the political community.’”²²⁶

To the extent that the endorsement test is desirable at all, it is perhaps best suited to cases involving displays of religious imagery and symbols—a point that some justices may, of late, have come to recognize.²²⁷ As noted above, the test first appeared in *Lynch v. Donnelly*, a case involving a city-owned Christmas display of Santa Claus and his sleigh, reindeer and candy-striped poles, together with a nativity scene that included the traditional figures of “the Infant Jesus, Mary and Joseph, angels, shepherds, kings and animals.”²²⁸ In her concurrence introducing the endorsement test, Justice O’Connor found that the crèche display carried “religious and indeed sectarian significance”²²⁹ but that given “the overall holiday setting” the purpose of the display was the “celebration of a public holiday with traditional symbols.”²³⁰ Thus, she concluded that “[i]t cannot fairly be understood to convey a message of government endorsement of religion.”²³¹ Applying the same test five years later in *County of Allegheny v. ACLU*, the majority found that a crèche—not in a park surrounded by the Christmas kitsch of Santa and his reindeer, but standing alone on the Grand Staircase of the Allegheny County Courthouse, tastefully framed by an arrangement of poinsettias—reflected the government’s decision “to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory

225. *County of Allegheny*, 492 U.S. at 593.

226. *Id.* at 593-594 (quoting Justice O’Connor’s opinion, *Lynch*, 465 U.S. at 687). Justice Blackmun later added that since *Lynch* the standard for “evaluating the effect of government conduct under the Establishment Clause” is “whether ‘the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.’” *Id.* at 597 (quoting *Grand Rapids School Dist. v. Ball*, 474 U.S. 373, 390 (1985)).

227. *Board of Ed. Of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 720-721 (1994) (O’Connor, J., concurring in part and concurring in the judgment) (identifying different categories of Establishment Clause cases, including those involving “government speech on religious topics” and that different categories “call for different approaches” and not a single test); *Capitol Square*, 515 U.S. at 807 (Stevens, J., dissenting) (stating that the Establishment Clause “prohibits government from appearing to take a position on questions of religious belief” and that “[a]t least when religious symbols are involved, the question whether the State is ‘appearing to take a position’ is best judged from the stand-point of the ‘reasonable observer’”) (quoting *County of Allegheny*, 492 U.S. 573).

228. *Lynch*, 465 U.S. at 671.

229. *Id.* at 692 (O’Connor, J., concurring).

230. *Id.* at 692-693.

231. *Id.* at 693.

to God for the birth of Jesus Christ,²³² a conclusion with which O'Connor concurred.²³³

(B) Religious Images and the Absence of Government Endorsement

The disparate outcomes in the two cases serve to highlight the subjectivity and lack of predictability that critics charge are endemic to the endorsement test.²³⁴ What is predictable in almost any decision applying the test, however, is the appearance of some dicta recognizing the possibility of government use of a religious image or symbol in a manner that is constitutionally permitted. Indeed, judicial opinions applying the endorsement test often claim that the religious image or symbol in question—whether a crèche, a cross,²³⁵ a copy of the Ten Commandments,²³⁶ or a Chanukah menorah²³⁷—could be placed in a context that would *not* violate the Establishment Clause. While this context does not erase or “neutralize” the religious content of the image or symbol, it may “negate[] any message of endorsement of that content.”²³⁸

The example of government use of a religious image that does not constitute an unconstitutional endorsement most often cited in these decisions is the display of religious art in a state-sponsored museum.²³⁹

232. *County of Allegheny*, 492 U.S. at 601.

233. *Id.* at 626 (O'Connor, J., concurring in part and concurring in the judgment).

234. Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J. L. & POL. 499, 514 (2002) (the ad hoc, fact-based analysis prompted by the test “fails to afford government officials with the degree of predictability needed to craft legislation that will withstand constitutional scrutiny”).

235. *Capitol Square*, 515 U.S. 753.

236. *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

237. *County of Allegheny*, 492 U.S. 573.

238. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

239. *Id.* at 676-677 (noting that “[a]rt galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith” and the National Gallery “has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages”); *id.* at 683 (arguing that “the exhibition of literally hundreds of religious paintings in governmentally supported museums” may benefit “one faith or religion” or all religions but that this benefit is “indirect, remote, and incidental”); *id.* at 712-713 (Brennan, J., dissenting) (arguing that the crèche at issue does not “play[] the same role that an ordinary museum display does”; that studying the Bible or Milton’s *Paradise Lost* is permitted because “[t]he purpose is plainly not to single out the particular religious beliefs that may have inspired the authors”; that the crèche might be permitted if it “were displayed in a museum setting, in the company of other religiously inspired artifacts, as an example, among many, of the symbolic representation of religious myths” since “[i]n that setting, we would have objective guarantees that the crèche could not suggest that a particular religious faith had been singled out for public favor and recognition”); *County of Allegheny*, 492 U.S. at 573 (citing to O’Connor’s reference to the museum setting of a religious article in *Lynch*); *id.* at 624 (O’Connor) (citing to Burger’s discussion of state supported museums *Lynch*); *id.* at 635 (citing to her argument in *Lynch* that the museum setting does not neutralize religious content but negates the message of endorsement); *see also* *Marsh v. Chambers*, 463 U.S. 783, 811 (1983) (Brennan, J., dissenting)

Thus, Justice David Souter insists that “the Government of the United States does not violate the Establishment Clause by hanging Giotto’s Madonna on the wall of the National Gallery,”²⁴⁰ and Justice Stevens asserts that it would be “absurd” to invoke the Establishment Clause “to exclude religious paintings by Italian Renaissance masters from a public museum.”²⁴¹ Notwithstanding their obvious differences, in this respect, the display of the exotic cow in the public zoo that Stevens hypothesizes²⁴² is akin to the art museum’s display of Giotto’s Madonna. Although each item might be perceived as “religious” by some observer (because the observer notes that others invest the item with special significance), neither display could be perceived by a reasonable observer as an “endorsement” of religion by the government “conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.”²⁴³

The Court, however, has not confined the application of the endorsement test to cases involving displays of religious images or symbols. Indeed, members of the Court have made use of the endorsement test in reviewing a law exempting religious employers from an anti-discrimination statute,²⁴⁴ the practice of school sanctioned prayer before high school football games,²⁴⁵ a policy excluding religious student groups from the use of public school facilities,²⁴⁶ a law authorizing the teaching of “creation science” along side the theory of evolution,²⁴⁷ and a statute authorizing a minute of silence in public schools for “meditation or voluntary prayer.”²⁴⁸

(arguing that the acts of legislative prayer under review in the case “are not museum pieces on display once a day for the edification of the legislature”); *Pleasant Grove City v. Summan*, 555 U.S. 460, 477 n. 5 (2009) (arguing that “a painting of a religious scene may have been commissioned and painted to express religious thoughts and feelings. Even if the painting is donated to a museum by a patron who shares those thoughts and feelings, it does not follow that the museum, by displaying the painting, intends to convey or is perceived as conveying the same ‘message.’”).

240. *Van Orden*, 545 U.S. at 742 (asserting that “the Government of the United States does not violate the Establishment Clause by hanging Giotto’s Madonna on the wall of the National Gallery” but that, contrary to the majority’s description of the Texas Capitol grounds “17 monuments with no common appearance, history, or esthetic role scattered over 22 acres is not a museum”).

241. *County of Allegheny*, 492 U.S. at 653 (saying that it would be “absurd to exclude” images of Moses, Confucius and Mohammed from a courtroom display of “great lawgivers” such as Augustus, Blackstone, Napoleon and John Marshall, just as it would be absurd “to exclude religious paintings by Italian Renaissance masters from a public museum”).

242. *Capitol Square*, 515 U.S. at 808 n. 14 (1995) (Stevens, J., dissenting).

243. *Wallace*, 472 U.S. at 70.

244. *Corporation of Presiding Bishop*, 483 U.S. at 348 (O’Connor, J., concurring in judgment).

245. *Santa Fe*, 530 U.S. at 308.

246. *Westside Community Bd.*, 496 U.S. at 249-250; *id.* at 268-269 (Marshall, J., concurring in judgment).

247. *Edwards*, 482 U.S. at 585.

248. *Wallace*, 472 U.S. 38.

(C) Substantive Legislation That Coincides with Religion
and the Lack of “Something More”

But substantive works of legislation are not like works of art. Whereas an image or symbol can be presented by the government in a context that preserves its religious content but “negates any message of [government] endorsement of that content”²⁴⁹ (as in the case of religious art displayed in a museum), the same cannot be said of a statute that governs the conduct of others. The endorsement of the religious idea that allegedly animates a regulatory statute cannot be separated from the religious idea itself. This is because the act of endorsement is intrinsic to the very act of legislation. The ideas and beliefs behind a duly enacted statute are always “preferred” over their alternatives. They are always “favored” and “promoted” over their rivals. As such, a statute necessarily communicates “disapproval” of the opposite view.²⁵⁰

According to *McGowan v. Maryland* and *Harris v. McRae*, in order for a statute to violate the Establishment Clause it must do “something more”²⁵¹ than merely “coincide or harmonize with the tenets of some or all religions.”²⁵² But in the case of a regulatory statute—like the anti-abortion law at issue in *Webster*—the act of “endorsement” cannot be the “something more” that is needed to transform a mere coincidence into an establishment of religion. Indeed, where the challenged governmental action is a law that proscribes or prescribes a given form of conduct, the act of “endorsement” is not “something more”—only more of the same.

That is to say, the conclusion that the government has “endorsed” something adds nothing to the conclusion that the thing endorsed is “religious” insofar as both derive from the same source, namely, the perception of the “reasonable observer.” Every statute is animated by a set of beliefs—both normative and descriptive—and the government endorses these beliefs when it enacts a given law.²⁵³ In applying the endorsement test to a statute, there is no judgment of governmental “endorsement” separate and apart from the judgment that one or more of these beliefs is “religious” in character. If the reasonable observer perceives that the idea driving the challenged legislation is a religious belief, then the law cannot help but be

249. *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring in judgment).

250. See *County of Allegheny*, 492 U.S. at 593-594 (describing the act of “endorsement” variously in terms of “favoring,” “preferring,” and “promoting” religious beliefs and expressing “disapproval” of contrary views).

251. *Harris*, 448 U.S. at 320.

252. *McGowan*, 366 U.S. at 442.

253. Smith, *supra* note 154, at 310 (“Government cannot act without making judgments; and such judgments will inevitably conflict with, and thereby imply disapproval of, the beliefs of some citizens.”).

seen as an endorsement of that belief, that is, as “appearing to take a position on [a] question[] of religious belief.”²⁵⁴

In the absence of “something more” the conclusion that a statute is “religious” and so violates the Establishment Clause turns entirely upon the reasonable observer’s perception that it is “religious,” and this in turn is a function of the fact that the statute “happens to coincide or harmonize with the tenets”²⁵⁵ of a religious faith. Thus, when applied to a substantive, regulatory statute, the endorsement test repudiates the principle announced by the Court in *McGowan* and *Harris*.

Accordingly, although Justice Stevens appears to acknowledge the authority of *McGowan* and *Harris* in his *Webster* opinion, this acknowledgement is only rhetorical. His conclusion that the Missouri statute is “an unequivocal endorsement of a religious tenet”²⁵⁶—his proof that the Missouri legislature’s finding that the life of a new human being begins at conception is a “theological ‘finding’”²⁵⁷—rests entirely upon the fact that this premise “happens to coincide with the tenets of certain religions.”²⁵⁸ Appearances notwithstanding, Justice Stevens in fact repudiates the law embodied in *McGowan* and *Harris*. His application of the endorsement test in *Webster* rejects the very law that he purports to uphold.

b. Finding Religion in That Which Is Inherently Religious

There is one final way to interpret Justice Stevens’ bold statement that the Missouri statute in *Webster* violates the Establishment Clause and that this conclusion “rests on the fact that the preamble [is] an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths,” and that it “serves no identifiable secular interest.”²⁵⁹ Under this reading the preamble to the Missouri statute is “religious” and “serves no identifiable secular purpose” because even if the Missouri legislators enacted the statute without intending to give juridical expression to an article of faith, they did so anyway—inevitably and unavoidably—because the proposition that “life begins at conception” is *inherently* religious.

Unlike the first reading suggested above,²⁶⁰ under this interpretation Justice Stevens does not mistake a conclusion for an argument. If this was Justice Stevens’ intended meaning, then he is not guilty of a logical error.

254. *County of Allegheny*, 492 U.S. at 594.

255. *McGowan*, 366 U.S. at 442.

256. *Webster*, 492 U.S. at 566 (1989) (Stevens, J., concurring in part and dissenting in part).

257. *Id.* at 572.

258. *Id.* at 566.

259. *Id.* at 566-67 (internal citations omitted).

260. *See supra* Part II.B.3.a.i and Part II.B.a.ii.

This is a coherent claim, but it is *only* a claim. It is not an argument, and Stevens gives almost no sense of an obligation to offer an argument in support of what he holds to be true.²⁶¹ He does not suggest how courts might distinguish between those propositions that are *inherently* religious from those that are only *occasionally* or *circumstantially* religious within a given social and historical context. Doing so would require not merely an argument but an elaborate theory exploring the epistemological foundation of belief in general and distinguishing “secular” beliefs from “religious” beliefs.²⁶² Given Justice Stevens’ method of finding religious purpose through naked assertion, such a theory is well beyond not only the bounds of Stevens’ *Webster* opinion but all of his religion clause opinions.

4. *Delayed Animation, St. Thomas Aquinas and Justice Stevens’ Embarrassing Analogy*

The remainder of the Justice Stevens’ opinion in *Webster* is replete with references to the “theological position” endorsed by the Missouri statute, the “theological tenet” embodied in it, a “theological answer to the question of when life begins,” and the “theological ‘finding’ of the Missouri legislature.”²⁶³ But these are only bald assertions. The fact that Justice Stevens adamantly refuses to consider any possible secular purpose that the statutory preamble might serve—such as the desire to educate the public as to the reasons behind the legislation, reasons grounded in the scientific conclusion that the unborn are human beings, members of the species *homo sapiens*, beings that share the same intrinsic nature as any adult human—does not mean that such a purpose is wholly absent. Instead, it only demonstrates the ease with which Stevens employs insular pronouncements in place of genuine argument.

Stevens does present a tortured, sad, and embarrassing passage in which he sets forth the views of St. Thomas Aquinas on abortion and then draws an analogy between these views and the Missouri statute at issue in the case. Justice Stevens correctly explains that Aquinas subscribed to a theory of “delayed animation” according to which it was thought that the embryo was not infused with a soul until 40 days following conception for males, and 80 days for females. He also notes that these views were once widely held in the Christian West. Stevens then opines:

261. Cf. Ely, *supra* note 92 at 947 (asserting that *Roe* is not bad constitutional law “because it is not constitutional law and gives almost no sense of an obligation to try to be”).

262. In their respective books Peter Wenz and Ronald Dworkin set forth arguments that purport to identify propositions that are unavoidably religious and so are not a proper subject for legal regulation. See WENZ, *supra* note 33; DWORKIN, *supra* note 33. The argument that each offers is deeply flawed, but, unlike Justice Stevens, Wenz and Dworkin at least recognize the need to make an argument.

263. *Id.* at 568, 570, and 572.

If the views of St. Thomas were held as widely today as they were in the Middle Ages, and if a state legislature were to enact a statute prefaced with a “finding” that female life begins 80 days after conception and male life begins 40 days after conception, I have no doubt that this Court would promptly conclude that such an endorsement of a particular religious tenet is violative of the Establishment Clause.²⁶⁴

This passage is telling in a number of respects. First, as is true of Justice Stevens’ *Webster* opinion elsewhere, Stevens makes no attempt to show that the substance of the views expressed—40 day animation for males, 80 day animation for females—are religious. These claims are certainly outlandish in light of modern embryology, but that does not mean that they are religious, only that they are wrong. Instead, Stevens assumes their religious character, presumably because these views were once “widely accepted by leaders of the Roman Catholic Church for many years.”²⁶⁵ He assumes that this historic connection will do the work of proving that the substance of the view embodied in law is “religious.” He also assumes that the religious identity of the author cited as the source of this view—St. Thomas Aquinas, a saint of the Catholic Church, a Dominican friar and theologian—will ensure that people will infer that the view itself is religious. What Justice Stevens fails to mention—an omission that can only be regarded as egregious—is that the supposedly “religious” indeed, *Christian* theory of “delayed animation” attributed to St. Thomas Aquinas and all of late medieval Christendom was not of Christian origin. Instead, Aquinas acquired these views from Aristotle,²⁶⁶ a pagan Greek philosopher who died three centuries before Christ was born.²⁶⁷

Stevens is playing on the eagerness—and one might even say the latent prejudice—of readers to confound the message with the messenger—to assume that a Catholic (even a Catholic from the 13th century) speaking on a controversial issue is attempting to introduce Catholic doctrine into what

264. *Id.* at 568.

265. *Id.* at 567.

266. JOHN CONNERY, S.J., ABORTION: THE DEVELOPMENT OF THE ROMAN CATHOLIC PERSPECTIVE 17-18 (1977) (citing Aristotle, *On the History of Animals*, bk. 7, 3); John Haldane & Patrick Lee, *Aquinas on Human Ensoulment, Abortion and the Value of Life*, 78 *PHILOSOPHY* 255-278, n. 18 (2003), available at http://www2.franciscan.edu/plee/aquinas_on_human_ensoulment.htm#_edn18.

267. To his credit, Justice Blackmun makes note of this fact in his original opinion in *Roe*. See *Roe*, 410 U.S. at 160 (referring to the “Aristotelian theory of ‘mediate animation’ that ‘held sway throughout the Middle Ages and the Renaissance in Europe [and] continued to be official Roman Catholic dogma until the 19th century’”).

should be a conversation of shared public reasons. This, it should be candidly noted, is a form of *ad hominem* attack.

Finally, it is worth noting that under the terms of his own hypothetical Justice Stevens' conclusion is far from certain. Recall that the premise with which he began was to suppose that the views of St. Thomas Aquinas "were held as widely today as they were in the Middle Ages."²⁶⁸ If we are to accept this as the vantage point from which to view the claims about delayed animation of the embryo, then Justice Stevens is surely wrong to suggest that the Court "would promptly conclude" that a law incorporating this view was "an endorsement of a particular religious tenet" because such a Court would likely not perceive such a view as *religious* at all. The members of a court living in such a context would no more see such a view as "religious" than we today see the big-bang theory or the theory of evolution as "religious." It would not be seen as distinctly theological or as an expression of faith, but as an accepted part of the sum total of scientific knowledge and a familiar feature of the larger cultural landscape in which they dwelt.

C. Justice Stevens' Opinion in Planned Parenthood of Southeastern Pennsylvania v. Casey

In 1992, nineteen years after the Court's momentous decision in *Roe v. Wade*, the Court confronted a direct challenge to the constitutional right to abortion created in that case. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a 5-4 majority voted to reaffirm and retain what it described as *Roe*'s "essential holding."²⁶⁹ For the majority this meant "a recognition of the right of the woman to choose to have an abortion before viability," as well as recognition of the state's ability to "restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health."²⁷⁰

Justice Stevens sided with the majority in *Casey* in upholding "the central holding of *Roe v. Wade*" on the basis of *stare decisis*. For Stevens "[t]he social costs of overruling *Roe* at this late date would be enormous."²⁷¹ He also sided with the majority for its "reaffirmation of *Roe*'s explanation of *why* the State's obligation to protect the life or health of the mother must take precedence over any duty to the unborn," namely, that the fetus is not a "person" within the meaning of the Fourteenth Amendment.²⁷² A

268. *Webster*, 492 U.S. at 568 (Stevens, J., concurring in part and dissenting in part).

269. *Casey*, 505 U.S. at 846.

270. *Id.* at 846.

271. *Id.* at 912.

272. *Id.* at 912-913.

“developing organism that is not yet a ‘person’” cannot, he said, “have what is sometimes described as a ‘right to life.’”²⁷³

On several key points, however, Justice Stevens parted company with the Joint Opinion authored by Justices O’Connor, Kennedy and Souter that announced the judgment of the court and around which a shifting majority coalesced. Justice Stevens rejected the view taken in the Joint Opinion that the trimester framework should be abandoned, and that the Court should adopt an “undue burden” standard for assessing abortion regulations throughout pregnancy.²⁷⁴ Explaining this disagreement required, he said, a careful articulation of “the nature of the interests at stake.”²⁷⁵ It was in this context that Stevens returned to the theme of religion and the regulation of abortion. Here he did not add anything to substantiate his prior assertions in *Thornburgh* and *Webster* that the interest in protecting the life of the unborn was “religious” and thus prohibited under the First Amendment. He did, however, clarify his understanding of what he believed those interests to be.

Citing his opinions in *Thornburgh* and *Webster*, Justice Stevens said that “in order to be legitimate, the State’s interest must be secular; consistent with the First Amendment the State may not promote a theological or sectarian interest.”²⁷⁶ This largely uncontroversial²⁷⁷ point of law is not, of course, what makes his *Thornburgh* and *Webster* opinions so deserving of criticism. Rather, it is Stevens’ assumption that he has actually shown that the state’s interest in protecting unborn human life is “religious”

273. *Id.* at 91.

274. *See Casey*, 505 U.S. at 869-879.

275. *Id.* at 914 (Stevens, J., concurring in part and dissenting in part).

276. *Id.*

277. I qualify this statement because of the breadth of Stevens’ claim that “the State may not promote a theological or sectarian interest.” Under its *Lemon* test, the Supreme Court looks to see that the “principal or primary effect” of a law or other state action “neither advances nor inhibits religion.” *Lemon*, 403 U.S. at 612-613. Because religion is a deeply embedded aspect of American society, it is often the case that laws that are entirely secular in origin have the effect of advancing religion. The Supreme Court is in fact deeply divided over the question of when and under what circumstances such a law constitutes an “establishment of religion” in violation of the First Amendment. *Compare Estate of Thorton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (striking down a statute that allowed an employee to not work on his or her religious Sabbath as “ha[ving] a primary effect that impermissibly advances a particular religious practice”) with *Corporation of Presiding Bishop*, 483 U.S. at 336 (upholding Section 702 of the Civil Rights Act of 1964 that exempts religious organizations from the statutory prohibition against discrimination in employment on the basis of religion even though it has the effect of helping religious organizations advance their purposes). Laws that advance religion in an incidental fashion, or that more substantially advance religion but do so indirectly may be permitted. *See Widmar v. Vincent*, 454 U.S. 263, 273 (1981) (holding that university could not deny religious student group use of school facilities available to other groups explaining that “a religious organization’s enjoyment of merely ‘incidental’ benefits does not violate the prohibition against ‘primary advancement’ of religion”); *Zelman v. Harris*, 536 U.S. 639, 649 (2002) (upholding school voucher program that allowed parents to send their children to private and religiously affiliated schools because the “government aid reaches religious schools only as a result of the genuine and independent choices of private individuals”).

when in fact he has done no such thing. He has merely asserted that this is the case—a flaw that Stevens’ opinion in *Casey* does nothing to correct.

For Justice Stevens the state’s interest in “protecting potential life” is “not grounded in the Constitution” because the unborn child is not a “person.”²⁷⁸ Instead, Justice Stevens says that the state has “an indirect interest supported by both humanitarian and pragmatic concerns.”²⁷⁹ Stevens does not define what he means by “humanitarian” or “pragmatic” but he does give two examples. First, he says that “[m]any of our citizens” are offended at the “disrespect for potential human life”²⁸⁰ that they perceive in the practice of abortion, and the state “has a legitimate interest in minimizing such offense.”²⁸¹ Second, the state also has a pragmatic interest “in expanding the population, believing society would benefit from the services of additional productive citizens.”²⁸²

It is clear from these two examples that, for Justice Stevens, the unborn have no intrinsic value. They are relevant only insofar as their demise or continued existence has some effect on others. Because they are not “persons,” their value is only instrumental.

Of course, even if the unborn are not “persons” this does not entirely resolve the matter of what constitutes legitimate state interests. As one early critic of the *Roe* decision put it “[d]ogs are not ‘persons in the whole sense’ nor have they constitutional rights, but that does not mean the state cannot prohibit killing them: It does not even mean the state cannot prohibit killing them in the exercise of the First Amendment right of political protest.”²⁸³ Justice Stevens might describe this concern for the well-being

278. *Casey*, 505 U.S. at 914.

279. *Id.*

280. Justice Stevens proves himself incapable of describing what these citizens actually find offensive in the act of abortion—not “disrespect for potential human life” but the actual loss of human life—the deliberate killing of a real (albeit developing) human being. He could acknowledge this point of view even as he expresses his personal disagreement with it. Instead, reality must be seen through Justice Stevens’ chosen lens even as he purports to describe how others see the world. Sadly, he is not alone in this regard. Justice Stephen Breyer has proven himself similarly incapable of describing what opponents of abortion actually believe. In *Stenberg v. Carhart*, he said that “[m]illions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child.” *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000). On the contrary, pro-lifers do not believe that abortion is merely *akin* to causing the death of an innocent child, but that it *is* the deliberate and intentional killing of an innocent child.

281. *Casey*, 505 U.S. at 915.

282. *Id.* Justice Stevens here adds a footnote in which he attempts to clarify the point he is trying to make. He says that “[t]he state interest in protecting potential life may be compared with the state interest in protecting those who seek to immigrate to this country.” *Id.* n. 3.

283. Ely, *supra* note 92 at 926. Building on this analogy, Ely concludes that the conclusion “[t]hat the life plans of the mother must, not simply may, prevail over the state’s desire to protect the fetus simply does not follow from the judgment that the fetus is not a person.” *Id.* Professor Tribe thinks that there is an “obvious difference” in that the expression of protest Ely hypothesizes “need not entail killing anything” whereas “a woman’s fundamental liberty of reproductive autonomy and bodily integrity necessarily collides with fetal survival prior to viability.” TRIBE, *supra* note 22 at 927 n. 47. The

of canines as “humanitarian”—an attempt to minimize causing offense to others. Of course, Justice Stevens does not explain what he means by “humanitarian” any more than he explains what makes anti-abortion legislation “religious.” This lack of rigor—really a lack of judicial accountability—could, with little effort, be turned against its author. If Stevens’ opinion were read with the same suspicion with which he views laws that restrict abortion, then the laws he would defend as being supported by “humanitarian” concerns could be dismissed as covert attempts to import religious sentiments into law. From this perspective, the rhetorical veneer of “humanitarian” concerns should not distract courts from seeing the underlying substance of religious dogma and “the absence of any secular purpose.”²⁸⁴

To label a law “religious” and then dismiss it out-of-hand is what passes for argument in Stevens’ opinions in *Thornburgh*, *Webster* and *Casey*. Such a “method of reasoning” is not only superficial and lacking in rigor, it is anti-intellectual, playing as it does off the latent prejudices and fears of some citizens. As such, it is unworthy of law.

III. CONCLUSION

The point of this essay has not been to demonstrate that the right to abortion, as set forth by the Court in *Roe* and revised in *Casey*, has no plausible basis in the Constitution. Nor has the point been to show that powerful arguments cannot be made on behalf of such a right, or that any arguments made in favor of such a right are doomed to failure. Instead, the aim of this essay has been far more modest, namely, to show the vacuous nature of Justice John Paul Stevens’ claim that laws seeking to afford some protection to the human child developing *in utero* are religious and so invariably violate the Establishment Clause of the First Amendment. I have focused on Justice Stevens’ opinions in *Thornburgh*, *Webster* and *Casey* in part because they are the most prominent expression of this point-of-view. Furthermore, the argumentative strategy that Stevens employs is exemplary of the approach taken by others who seek to advance the same perspective.

While the point of the foregoing essay has not been to address the larger question of abortion as a constitutional right, it has been to show that the

difference is not so obvious, however, if one understands the political protestor whom Ely imagines as one who insists on killing dogs in order to make his point in the same way that one understands the pornographer who insists that he needs to show the graphic images he employs in order to communicate the message he wishes to convey—no substitute will do. From this perspective the collision between the expression (i.e. killing dogs) and the legal prohibition of that expression (i.e. a law that protects the life of dogs *qua* non-persons) is just as unavoidable as the conflict between the pregnant woman and the fetus.

284. *Webster*, 492 U.S. at 566 (1989) (Stevens, J., concurring in part and dissenting in part).

perspective offered by Justice Stevens in *Thornburgh*, *Webster*, and *Casey* is intellectually vacuous. In truth, Stevens does not set forth any *argument*, only a *claim* founded on and sustained by nothing more than mere assertion. He makes no effort to explain what the quality of being “religious” is and thus what makes a proposition “religious” and so impermissible as a basis for law.²⁸⁵ Nor does he counter the argument that this purportedly religious proposition is supported by a secular rationale. He simply declares the impossibility of any identifiable secular rationale and so feels at liberty to ignore what the proponents of the challenged legislation proffer. More than this, neither Justice Stevens, nor anyone else making the claim, responds to the argument that to the extent that a law is “religious” because it places great value on the entity developing in the womb, in the same manner a law (including a judicial decision) that places little or no value on the entity developing in the womb is equally “religious.” If the former amounts to an “establishment of religion” the latter does as well.

The point of the argumentative strategy used by Stevens in his opinions is to foreclose substantive debate on the issue—to win an argument without ever really having one. As legal historian Joseph Dellapenna has observed

[a] major ploy in the ongoing abortion controversy has been for supporters of abortion rights to smear opponents as acting out of religious bigotry. The more the supporters of abortion rights make the tag stick in the public mind, the more they cut off the public’s careful consideration of the arguments against abortion rights.²⁸⁶

285. As noted above, the vast majority of writers who have sought to portray the pro-life position as inherently religious and thus illegitimate as a basis for law have ignored these questions. They have, like Justice Stevens, merely asserted the truth of what is their burden to show. Some few writers have acknowledged the need for genuine argument—for a deeper examination of the issues and establishment of the premises upon which their conclusion rests. See, e.g., WENZ, *supra* note 33; DWORKIN, *supra* note 33. A careful critique of these works exceeds the scope of this essay. While neither Dworkin nor Wenz succeeds in showing the religious and thus illicit basis of the pro-life argument (indeed each must be counted as a spectacular failure in this regard) they should be credited with at least seeing the need for further argument.

286. DELLAPENNA, *supra* note 44 at 791. Ramesh Ponnuru nicely summarizes the situation this way:

Let us imagine a pro-lifer who says that abortion should be illegal because it kills human beings. His pro-choice friend responds that this sort of theological talk is inadmissible in a democracy because it violates the rules of open debate. We can see that this pro-choicer has misrepresented his friend’s views and shut down the discussion – all in the name of reasoned argument. Yet that conversation happens all the time in our politics, and somehow we don’t see it.

RAMESH PONNURU, *THE PARTY OF DEATH: THE DEMOCRATS, THE MEDIA, THE COURTS, AND THE DISREGARD FOR HUMAN LIFE* 103 (2006).

Of course, one would hope for more than a “tag” fastened with the adhesive of accusation from a member of the nation’s highest court. One would hope for a rigorous argument, free from the tackiness of soft-pedaled religious prejudice. For anyone who respects the rule of law, that much should be “obvious.”²⁸⁷

287. See *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring); *Webster*, 492 U.S. at 569 (Stevens, J., concurring in part, dissenting in part).