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PLEDGING TO GOD WHILE GETTING A PUBLIC EDUCATION: WHY A WALL OF SEPARATION DIVIDES CEREMONIAL CELEBRATION FROM RELIGIOUS INDOCTRINATION: ELK GROVE UNIFIED SCHOOL DISTRICT V. NEWDOW AND THE RIGHT OF PARENTAL PRIVACY

ROD DIXON†

INTRODUCTION

Whether a reference to the word God in a religious text is distinguishable from a child's utterance of the word God has become a central concern in the current public discourse about the relationship between religion and government.

It is axiomatic that the requirement that government remain "neutral" in matters of religion does not foreclose the government from ever taking religion into account; stated plainly, neutrality towards religion need not mean not any religious thing.1 Yet

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† See, e.g., Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338–39 (1987) (defining the Court's neutrality concept); see also Sherbert v. Verner, 374 U.S. 398, 422–23 (1963). The doctrine of neutrality has come under attack by scholars who view the First Amendment's proscription against a government-established religion as a sense of attachment—among some of the founding fathers—towards religion that is greater than what neutrality actually captures. Even the Supreme Court occasionally has embraced, as acceptable, a doctrinal replacement for neutrality towards religion with equality among religions. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 714 (1984). This latter refinement might stand the Court's neutrality doctrine on its head by moving away from limiting the state's embracement of any religious thing to requiring the state's engagement of any religious thing. This approach risks mixing equality with liberty notwithstanding that equality and liberty are not the same and, indeed, are
these principles betray the hurdles that the government must surmount when questions of liberty, freedom, and religion traverse the public square and enter the courtroom.

This Article proceeds in two parts. Part I draws upon the Supreme Court's leading cases, advancing an evolving doctrine that has been used to interpret the Establishment Clause as it applies to public school issues. In light of the leading cases, Part I asserts that judicial doctrines regarding the Establishment Clause provide increasingly implausible results in resolving conflicts between the promotion of free expression (particularly free religious expression) among individuals and the imposition of constraints against state interference with free expression when conflicts arise in the public school context and touch upon religious exercise. Part I concludes by proposing that a way out of the Court's current affinity for unworkable doctrines is for the Court to provide due regard for the integration of similar constitutional interests—the right of parental privacy, the right of free expression, and the protections of the Establishment Clause—when addressing disputes involving public schools and the *kulturkampf* of religious exercise. Resolving disputes in light of relevant multi-constitutional interests implants the root for more satisfactorily safeguarding the liberty interests of parents and children when conflicts grow out of activities involving public education.

What follows in Part II is a pursuit of the argument regarding the integration of constitutional interests. Part II develops the argument that questions of liberty, freedom, and religion should not be resolved by resort to the Establishment Clause in isolation. Instead, it is argued, that these disputes should be resolved in light of the full scope of the liberty interest at stake. Taking this argument a step further, it is argued that occasionally antithetical. See John Lukacs, *When Democracy Goes Wrong*, HARPER'S MAG., Apr. 2005, at 13, 15.

2 *See* U.S. CONST. amend. I (stating that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).

2 *See*, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (“[The Court's] Establishment Clause jurisprudence is in hopeless disarray . . . .”).

4 Public education is emphasized because constitutional interests most often arise in response to state action. Even so, similar interests may abound in contexts of private school education due to state or federal statutory rights, or an evolving sense that the distinctions between public and private in some contexts are illusory.
the Court should acknowledge that a parent or child might rely upon courts to integrate constitutional interests under the First Amendment when disputes involve schools and religion. This should follow from the Court's long-standing recognition that our form of limited government provides the sharpest bulwark of safeguards for parents from state intrusions into the family unit when state actions, which implicate religion, offend personal parental decisions concerning the educational welfare of children.\(^5\)

To say that the right of privacy is an increasingly important American value is to state what is apparent in the twenty-first century. Yet, occasionally, courts seem to echo a different view—a view that seems sundered from context. To avoid such lapses in public school contexts, the application of basic principles focused on identifying our societal value for important human interests—often branded as "privacy" interests—must receive the Court's respectful attention when public schoolhouse disputes come before it.\(^6\) Toward that end, it is urged that courts must view the right of privacy as a fundamental liberty interest reflected through First Amendment liberties.

Conceptualizing privacy anchored in constitutional liberty\(^7\) serves to protect privacy interests when they matter most\(^8\)

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\(^5\) See infra notes 197–211. Quite another question is raised when school activities involve students, acting independent of school officials, exercising their right of religious freedom. While it is clear that students cannot be discriminated against solely due to their religious viewpoint, how best to protect student-initiated freedom of association involves careful balancing of competing interests from a range of choices that are outside the scope of this Article. Even so, it is doubtful that purely associational activities of students should come within the range of activities constituting state indoctrination of children in religion or state sponsorship of religious activities.

\(^6\) See Richard Elliot Feldman, Who Wrote the Bible 58–60 (1987). Although there were no public schools in the United States in 1776, the early history of the nation's public schools discloses that American educators assumed that morality could be derived only from religion, which was understood to be Christianity, more particularly Protestant Christianity. Id. Not until the nineteenth century did Protestants—ostensibly forced by Catholics—consider whether their assumption that public school students could be inculcated with moral teachings from only one (religious) source was correct. Id. at 62–64, 81.

\(^7\) At bottom, questions of liberty ask whether the right of the majority to give effect to their opinions by enactment of law or through the power of the state may permissibly burden the constitutional interests of the individual.

\(^8\) What is more, because law may influence market behavior, reestablishing the vitality of the constitutional right of privacy as a liberty interest would have the
and sheds focused light upon the path toward abandoning impertinent and indistinctly drawn traditional conceptions of privacy, including those that fail to reinforce privacy interests as appropriately framed by the interests and values at stake.

I. ESTABLISHMENT CLAUSE IN PUBLIC SCHOOL

Newdow v. Elk Grove Unified School District provides a particularly appropriate backdrop for launching a reassessment of the fundamental interests of children and parents that the state must respect to ensure that no aspect of compulsory public education is transformed into religious indoctrination. To date, the Supreme Court’s doctrines determining at which point a citizen’s rights of freedom and liberty are infringed by the state when its actions implicate religion have been infused with imprecision and controversy.

likely effect of encouraging private sector entities to begin adopting privacy policies as a genuine core business value.

9 542 U.S. 1 (2004) (acting on cert granted in Elk Grove Unified Sch. Dist. v. Newdow, 540 U.S. 945 (2003)), rev’g Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003). The Supreme Court in Newdow reversed the Ninth Circuit’s opinion in Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2003) [hereinafter Newdow II]. The U.S. Supreme Court reversed and remanded the Ninth Circuit’s opinion in Newdow. In Newdow II, the Ninth Circuit is expected to, in addition to potentially reaching the merits, review whether the reversal dislodges both the precedential and instructive force of the prior opinion.


11 See supra note 4 and accompanying text. The Supreme Court has acknowledged the freedom and liberty interests that anchor each fundamental right protected by the Federal Constitution, including those regarding religion.

12 See infra notes 13-17 and accompanying text. The term “controversy” is an acknowledged understatement. As the words of one commentator well acknowledged,

[o]f all the issues the ACLU takes on—reproductive rights, discrimination, jail and prison conditions, abuse of kids in the public schools, police brutality, to name a few—by far the most volatile issue is that of school prayer. Aside from our efforts to abolish the death penalty, it is the only issue that elicits death threats.

Lee v. Weisman, 505 U.S. 577, 607 n.10 (1992) (Blackmun, J., concurring) (quoting Parish, Graduation Prayer Violates the Bill of Rights, 4 UTAH BAR J. 19 (June/July 1991)). Indeed, the issue in Newdow is so controversial that Supreme Court Associate Justice Antonin Scalia chose to recuse himself from hearing the case. Caprice L. Roberts, The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort, 57 RUTGERS L. REV. 107, 123-24 (2004). Justice Scalia, who often votes in support of government displays of religious phrases or symbols, did not take part in the Court’s decision to hear Newdow. Newdow asked Scalia to recuse himself. Suggestion for Recusal of Justice Scalia at 1, Elk Grove
The Court's review in *Newdow* was expected to squarely address whether a citizen's rights of freedom and liberty are infringed by the state when its actions implicate religion.\(^\text{13}\) *Newdow*\(^\text{14}\) was to consider the question in the context of the First Amendment's Establishment Clause.\(^\text{15}\) Instead, the Court issued

Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2003) (No. 02-1624). Apparently, Scalia's public comments about the lower court's ruling in *Newdow* were viewed as criticism of the appellate court ruling. See *id*. Newdow called the Court's attention to remarks made by Scalia during a speech at a "Religious Freedom Day" observance sponsored by the Knights of Columbus, a Roman Catholic men's service organization. See *id.* at 7. During the speech, Scalia observed that his view of the Establishment Clause included the view that the government was permitted to make "nondenominational acknowledgements of God" and that doing so merely reflects "the true tradition of religious freedom in America—a tradition of neutrality among religious faiths." See Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries That Defined America*, 197 (2006).

Of course, in this context, liberty may mean different things. For example, the First Amendment encompasses two distinct guarantees—that the government shall "foreclose not only laws 'respecting an establishment of religion' but also those 'prohibiting the free exercise thereof'"—both with the common purpose of securing religious liberty. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring); Everson v. Bd. of Educ., 330 U.S. 1, 40 (1947) (Rutledge, J., dissenting) ("'Establishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom.").

Though for some, a reference to God in a pledge merely connotes a non-religious message, for others, no doubt, like with prayer, a pledge to God, regardless of context, denotes a sincere, deeply held religious belief in the communicative content. In this Article, the analysis does not embrace this broader debate. Instead, the concern here is with pledging by children in a public school context. The Pledge as we know it today: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4 (2006).

The Religion Clauses apply to the states by incorporation into the Fourteenth Amendment. See *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940). Judicial rulings involving the Establishment Clause have held that the Clause, at least, means that [n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. *Everson*, 330 U.S. at 15–16.
an opinion leaving the central issues in Newdow unresolved. The issues in Newdow provided a particularly appropriate context for a thorough reassessment of the fundamental interests of children and parents that the state must respect to ensure that compulsory public education is never transformed into religious indoctrination. An early stage of this reassessment is undertaken by examining the following illustrative cases.

A. Cases


Michael Newdow, a California father professionally trained as a doctor and a lawyer, wanted the words “under God” removed from the Pledge of Allegiance. Newdow argued that his daughter, who attended the second grade at a public school near Sacramento, California, had to listen to the teacher-led Pledge and that it constituted a daily religious indoctrination. The California law required the Pledge to be recited once, each day at public elementary schools. The words “under God” were added to the Pledge as part of a 1954 law adopted by Congress in an apparent effort to distinguish America’s religious values and heritage from those of communism. In reciting the Pledge,
students pledge allegiance to the American flag and "‘to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.’”

Michael Newdow sued to challenge the public school policy as it applied to his nine-year-old daughter. Newdow argued that the policy violated the Establishment Clause of the First Amendment, and the Ninth Circuit, by a two-to-one vote, agreed.

Newdow asserted that the public school policy infringed on his right to expose his daughter to his religious views. He argued that the public school policy requiring teachers to lead students in reciting the Pledge of Allegiance violated the First Amendment bar against public school endorsement of religion. A decision on the merits of the dispute by the Supreme Court was arrested due to a challenge to Michael Newdow’s ability to legally file suit.

In this regard, and as a general matter, a party seeking relief from a federal court must establish, as a condition precedent to a review of the merits, that the litigant has the right to request that the court decide the merits of the dispute.

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23 Newdow represented himself in the Supreme Court. See Newdow 542 U.S. at 2.

24 Newdow II, 292 F.3d at 612.

25 Subsequently, Newdow filed another suit challenging the Pledge, and, on September 14, 2005, a federal district court ruled in his favor, finding that the recitation of the Pledge of Allegiance in public schools is unconstitutional. Newdow v. Cong. of U.S., 383 F. Supp. 2d 1229, 1242 (E.D. Cal. 2005). In a press release dated September 14, 2005, the U.S. Department of Justice indicated that the federal government would likely appeal the court’s ruling. Noting that “official acknowledgments of our Nation’s religious heritage, foundation, and character are constitutional,” the press release then advised that the federal government would “continue vigorously to defend the ability of American schoolchildren to pledge allegiance to the flag.” See Press Release, Statement of Attorney General Alberto R. Gonzales on the Pledge of Allegiance Case (Sept. 14, 2005), available at http://www.usdoj.gov/opa/pr/2005/September/05_ag_479.htm. Newdow also has contested references to God made in formal congressional proceedings, and an increasing number of activists are asserting various political and legal challenges to the reference to God in the Pledge.

Michael Newdow, as the party bringing the legal challenge to the state's actions, had to establish that he could file suit to challenge the school district's policy.\textsuperscript{27} In other words, Newdow had to establish standing.

In August 2002, Newdow's spouse, the child's mother, filed a motion for leave to intervene or dismiss the complaint following the Court of Appeals' initial decision. At that time, the child's custody was governed by a February 6, 2002, order of the California Superior Court. That order provided that Newdow's spouse had sole legal custody of her daughter.\textsuperscript{28} The order required that the two parents consult with one another on substantial decisions relating to the child's psychological and educational needs but authorized only the mother to exercise legal control if the parents could not reach mutual agreement.\textsuperscript{29}

The U.S. Supreme Court noted that California's Domestic Relations Law provided the pertinent legal rule defining parental status.\textsuperscript{30} As such, the Court viewed it as imprudent for federal courts to entertain a claim by a plaintiff whose standing to sue is ostensibly restricted by state law.\textsuperscript{31} The Court noted that it had often imposed limits on the exercise of federal jurisdiction, particularly in the context of domestic relations, by recognizing a

\textsuperscript{28} Newdow v. U.S. Cong., 313 F.3d 500, 502 (9th Cir. 2002).
\textsuperscript{29} Id.
\textsuperscript{30} Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2003). Similarly, federal constitutional law has long considered the parental right of privacy an individual right, despite the reference to a parental unit. As the Court emphasized in \textit{Eisenstadt v. Baird}, for example, the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. \textit{Eisenstadt v. Baird}, 405 U.S. 438, 453 (1965). Although the \textit{Eisenstadt} Court had made this point in upholding the right of single persons to use contraceptives, the Supreme Court subsequently quoted the same passage to emphasize that a married woman was free to assert her own privacy interests in abortion against the independent and conflicting procreative interests of her husband. \textit{See} Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 896 (1992); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 70 & n.11 (1976).
\textsuperscript{31} Newdow, 542 U.S. at 17.
prudential standing limitation on a potential litigant's ability to raise another person's legal rights.\textsuperscript{32}

Chief Justice Rehnquist concurred with the majority's judgment but dissented—joined by Justices O'Connor and Thomas—with the majority's holding on standing.\textsuperscript{33} Notably, Rehnquist delved into the merits of Newdow's claim—notwithstanding the standing issue—and concluded that the requirement that schools begin the day with the Pledge of Allegiance did not violate the Establishment Clause because of the voluntary nature of the policy.\textsuperscript{34}

For Rehnquist, recitation of the Pledge of Allegiance in public school was akin to any public observance wherein a "patriotic invocation[] of God" occurred.\textsuperscript{35} Although Rehnquist conceded that a part of the Pledge of Allegiance is a conspicuous assertion of religious expression, this provided no constitutional concern because the phrase "under God" was demonstrative of the attitude among the nation's leaders to publicly acknowledge the generalized role of religion in the nation's history.\textsuperscript{36} Rehnquist did not identify the precise contours of the role of religion in the United States' history, nor did he address the robust debate among the founding fathers about the admixture of state and religion.\textsuperscript{37}

Rehnquist's position seems to rest largely on his view that recitation of the Pledge is a patriotic exercise designed to foster national unity and pride in the nation by requiring participants of the recitation to promise fidelity to our flag and our nation, not to any particular god.\textsuperscript{38} Rehnquist's analysis, however, says very little about the voluntary nature of the recitation of the Pledge in a public school classroom.

Moreover, Rehnquist's dissent stands a fundamental right on its head when he urges that the Court not "extend constitutional

\textsuperscript{32} See id. at 12–13; see also Warth v Seldin, 422 U.S. 490, 499 (1975) (finding that the standing doctrine embraces the general prohibition on a litigant raising another person's legal rights).

\textsuperscript{33} See Newdow, 542 U.S. at 18 (Rehnquist, J., concurring).

\textsuperscript{34} See id. at 18, 30–31.

\textsuperscript{35} Id. at 26.

\textsuperscript{36} See id. at 30.

\textsuperscript{37} See, e.g., Everson v. Bd. of Educ., 330 U.S. 1, 8–16 (1947) (describing the history behind the Establishment Clause and its meaning).

\textsuperscript{38} See Newdow, 542 U.S. at 31; see also Texas v. Johnson, 491 U.S. 397, 405 (1989) ("The very purpose of a national flag is to serve as a symbol of our country . . . .").
prohibitions beyond their previously recognized limit [when doing so] may restrict democratic choices made by public bodies" in cases respecting fundamental rights. One could hardly imagine the Court supporting this type of doctrinal flip-flop in First Amendment cases because the Court has rarely been halting in expanding the scope of the Freedom of Expression Clause to reach novel circumstances, despite democratic choices made and expressed in legislative enactments. This is for good reason, as developed more fully in Part II.

Taking a different path, Justice O'Connor, in her concurrence, recognized that the Court’s evolving approach under the Establishment Clause was dangerously headed toward “adopting a subjective approach [that] would reduce the [Establishment Clause’s constitutional] test to an absurdity.” To thwart this trend, O'Connor argued that the Court's doctrinal approach to the Establishment Clause must be infused with a sensible awareness of “the dizzying religious heterogeneity of our Nation.” For O'Connor, “some references to religion in public life and government are the inevitable consequence” of the nation’s history and traditions, but consonant with that is the fundamental principle that there are “no de minimis violations of

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39 Newdow, 542 U.S. at 32. Although the Supreme Court has never defined precisely what a fundamental right is, the Court often includes as fundamental the individual rights set forth in the Bill of Rights and, occasionally, those rights generally denominated as natural rights. See, e.g., Washington v. Glucksberg, 521 U.S. 702, 756–57 (1997) (Souter, J., concurring) (noting the “constitutional practice in recognizing unenumerated, substantive limits on governmental action”); Lochner v. New York, 198 U.S. 45, 53–54 (1905) (holding that the right of contract is protected under the “liberty” aspect of the Fourteenth Amendment). What is more, when the government is alleged to have infringed or burdened a fundamental right, strict scrutiny of the government’s conduct usually follows. See Pickering v. Bd. of Educ., 391 U.S. 563, 573–74 (1968). But see Michael C. Dorf, Incidental Burdens on Fundamental Rights, 109 HARV. L. REV. 1175, 1199 (1996) (noting that strict scrutiny is not always applied to violations of fundamental rights).

40 See, e.g., Watchtower Bible & Tract Soc'y v. Stratton, 536 U.S. 150, 165–66 (2002) (holding that the First Amendment prohibited a town from requiring door-to-door advocates to register with the mayor even though the registration was issued automatically); Johnson, 491 U.S. at 415–16 (holding that the First Amendment prohibited the government from criminalizing flag burning when the statute was aimed at expressive conduct).

41 Newdow, 542 U.S. at 35 (O'Connor, J., concurring).

42 Id. at 34–35.

43 Id. at 35 (2004); see also id. at 35–36 (“It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths.”).
the Constitution—no constitutional harms so slight that the courts are obliged to ignore them.”

According to O'Connor, the recitation of the Pledge in public school cannot be cabined off as presumptively permissible regardless of whether “a reasonable observer, fully cognizant of the history, ubiquity, and context of the practice in question” would conclude that the state's conduct constituted “an instance of worship.”

Applying this test in *Newdow*, O'Connor concluded that she knew of neither a “religion that incorporates the Pledge into its canon, nor one that would count the Pledge as a meaningful expression of religious faith.” As such, O'Connor concluded, a reasonable person standard would lead to the conclusion that the phrase is merely descriptive or “purports only to identify the United States as a Nation subject to divine authority,” which should not “be seen as a serious invocation of God or as an expression of individual submission to divine authority.”

This conclusion, however, runs counter to O'Connor's acknowledgement that there are no *de minimis* violations of the Constitution and no constitutional harms so slight that the Court should ignore them. Like Rehnquist, O'Connor's approach is not grounded in the vicissitudes of the public school classroom. That school children are required to pledge allegiance to a nation purporting to be subject to divine authority remains unaddressed by O'Connor's analysis.

Of the dissenters, only Justice Thomas observed that the definition of “coercion” was the critical issue in the Court's jurisprudence on the Establishment Clause in public school cases. Thomas noted that the Court's current jurisprudence “would require [the Court] to strike down the Pledge policy, which, in most respects, poses more serious difficulties than the prayer at issue in *Lee v. Weisman*.” In Thomas' view, *Newdow* was also more troublesome than the other dissenters had

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44 Id. at 36-37.
45 Id. at 40.
46 Id.
47 Id.
48 The Court already has determined that schools may permit students who object on religious grounds to abstain from the recitation of the Pledge of Allegiance. See id. at 30 (Rehnquist, J., concurring) (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
49 Id. at 45, 49 (Thomas, J., concurring).
50 Id. at 46.
acknowledged because in *Newdow* the students are “actually compelled (that is, by law, and not merely ‘in a fair and real sense,’) to attend school,” and unwilling children are actually forced into “pledging their allegiance.”\(^{51}\)

For Thomas, as a matter of precedent and consistent with the rule of stare decisis, the Pledge policy is unconstitutional.\(^{52}\) Although Thomas concluded that *Newdow* would prevail on the merits, he did not agree that he should prevail.\(^{53}\) Instead, Thomas preferred to overrule *Lee v. Weisman*\(^{54}\) on grounds that the holding in that case depended on a notion of “coercion” that had “no basis in law or reason,” and that the “kind of coercion implicated by the Religion Clauses” is that which is accomplished “by force of law and threat of penalty.”\(^{55}\) Moreover, for Thomas, “the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right.”\(^{56}\)

Justice Thomas may have the better view. First, Thomas instructs that legal coercion of pledging to “God” in a public school setting is inconsistent with faithful adherence to First Amendment doctrine.\(^{57}\) Second, Thomas calls attention to the serious debate regarding whether the Bill of Rights ought to apply to the states in their entirety. In that regard, Thomas would reexamine the incorporation doctrine and hold that the Establishment Clause bars the federal government’s actions, but imposes no bar to state endorsement of religion.\(^{58}\) Thomas’ legal philosophy on the Bill of Rights may warrant no traction in the Court’s more pragmatic attempts to remain faithful to prevailing precedent, but he seems to frame the Establishment Clause issue in the proper context of public schools, which Rehnquist and O’Connor failed to do. Thomas’ fidelity to precedent results in an analysis that appears helpful to Newdow’s claim but, ultimately, is not. Justice Thomas indicates that his goal is to alter the Court’s Establishment Clause doctrine in a manner that would

\(^{51}\) *Id.* at 47 (citation omitted).

\(^{52}\) *Id.* at 49.

\(^{53}\) *See id.*


\(^{55}\) *Newdow*, 542 U.S. at 49 (Thomas, J., concurring) (emphasis omitted) (internal quotation marks omitted).

\(^{56}\) *Id.* at 50 (emphasis omitted).

\(^{57}\) *See id.* at 46–47.

\(^{58}\) *See id.* at 50.
significantly weaken the Clause's limit on government power to mix state action with religious exercise. 59

As developed more fully below, the issue in Newdow is better framed as raising the liberty interests of child and parents. 60 In framing the matter as a liberty interest, the Court may draw upon the Constitution's first principles 61 regarding free speech, religious expression, and the protection of parental privacy. 62

As the dissents in Newdow acknowledge, the Court's First Amendment jurisprudence draws a fuzzy distinction between what constitutes an endorsement of religion and what is an accommodation of the free expression of religion. Although some expressions serve to solemnize a public occasion with a reference to "God," deeming some of these expressions constitutional and others unconstitutional shifts the Establishment Clause doctrine from its focus on the critical question of what constitutes an endorsement of religion to a largely out-of-focus objective concerning the accommodation of degrees of religiosity. To frame a sharp focus on the kind of coercion implicated by the Establishment Clause, the Court must shrug off urges to substitute illuminating clearness of logic and rationality with the darkness of convention and the dogmatic confidence of conviction.

Similarly, some commentators argue that those who urge that government-sponsored reverence of anything associated with religion runs afoul of the First Amendment have reduced the Establishment Clause to banality. An acknowledgement of

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59 See id. at 51.
60 See, e.g., Lee, 505 U.S. 577, 594–96 (1992) (recognizing that the relevant community under the Establishment Clause in the context of public school education would be parents, rather than children, since parents are likely to choose whether their children will participate in ceremonial exercises targeted toward school children).
61 In 1965, the Supreme Court held in Griswold v. Connecticut, that there was a clearly established right of privacy protected by the Federal Constitution. 381 U.S. 479, 484–86 (1965). The Court held that a Connecticut contraceptive statute was unconstitutional as applied to a married couple. Id. at 485–86.
62 As discussed more fully below, the modern conception of privacy is anchored in our understanding of liberty, not that liberty always is what the Court is signifying in its jurisprudence on privacy. See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 334 (2004) (urging that the Court, led by Justice Kennedy, is reshaping privacy as the right identified by earlier courts of substantive due process or liberty). Though the Court may be switching gears by replacing privacy with liberty without explicit acknowledgement, doing so does not diminish the right's vitality or inappropriately realign its doctrinal substance.
“God” by the state, it is said, is permissible because an acknowledgement of the existence of “God” has no more significance to religion than an acknowledgement of a belief in the “Force” by a Jedi Knight of Star Wars. Of course, a religion (and only religion) may rest upon the belief of a divinity. Likewise, the argument or proposition “that America is a nation under God” logically must include acceptance of the existence of “God” and a belief in “God.” In this regard, no matter how de minimis one might dare to quantify, as Justice Thomas urged, the Pledge, on its face, constitutes a religious expression.

The recitation of the Pledge of Allegiance also constitutes a matter of concern apart from its explicit religious expression. The Pledge, when recited by schoolchildren, is beyond “ceremonial celebration” or educational recitation because students must utter the words “under God” in unison in the same manner that an adult recites a solemn oath. In other words, the recitation of the Pledge of Allegiance is a speech act. The act of pledging requires affirming alliance to the nation as well as expressing by affirmation a belief that there is a god above the nation. As such, a pledge is a performative vow or oath that the speaker is presently offering. Of course, as evident in the case

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65 Neither premise can be viewed fairly as neutral since many religions consider an affirmance of “God’s” existence as a pillar of religious doctrine.
66 See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 48 (2004) (Thomas, J., concurring). To the extent that there are genuinely non-theistic religions, a reference to only theistic religions in the pledge still presents obvious neutrality problems under the Establishment Clause.
67 Indeed, for adults, oaths and pledges were highly contentious matters during the colonial era, not solely for those who refused to swear, but also for those who identified oaths as inconsistent with notions of freedom of conscience. See Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1409, 1475 (1990).
68 Interestingly enough, although actions may speak louder than words, not so when the words constitute actions themselves. Generally, we have learned from the contributions in the fields of linguistics and grammar that “speech act” describes a performative utterance or illocutionary act that may be performed by the explicit act of speaking (for example: praying, promising, pledging, vowing). See JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 64–65 (1969). Hence, a child’s words become his actions while reciting the Pledge.
that follows, if a state action has a predominantly secular purpose, a court may conclude that the state action does not unduly burden parental rights to control a child's religious upbringing.

Although a reasonable argument may be made that the phrase "under God" in the Pledge sums up the attitude of a majority in the nation to invoke "God" in public observances and that the recitation of the Pledge of Allegiance is a patriotic exercise, not a religious one, the history of the nation renders it indisputable that invoking "God" in the nation's public observances constitutes a reference not just to a god, but to the Judeo-Christian "God." Even so, as a normative matter, it is unclear what is meant by the phrase "under God." Except in the most figurative of uses, such as in a literary or, perhaps, fictionalized account, this phrase is meaningless without reference to a specific text belonging to a particular religion, sect, or set of identifiable religious views. Indeed, the assumption that the expression "under God" is not an expression of a particular religious viewpoint illustrates how some widely held religious traditions exclude religious traditions that are nontheistic.

the silence would communicate graphically that the existence of a higher power over the state is a possibility, even though the state cannot make declarations about it).

70 In Newdow, Justice O'Connor agreed with Chief Justice Rehnquist's appeal to the nation's traditions but concluded that the phrase "under God" in the Pledge constitutes nothing more than an instance of "ceremonial deism," which, in O'Connor's view, contains no reference to any particular religion. See Newdow, 542 U.S. at 37 (O'Connor, J., concurring). Of course, this perspective itself is illustrative of the pernicious effect of too closely tying a religious view with the power of the state. Justice O'Connor appears unable or unwilling to acknowledge not only that a reference to "God" certainly excludes religious perspectives that do not include a singular god or a god at all, but that it says nothing about the nation's traditions, which clearly anchor references to "God" in seventeenth and eighteenth century state enactments in a Judeo-Christian god. In contrast, Buddhists, for example, seem to agree that Buddha's awakening or enlightenment did not involve an encounter with "God," a god, or even the receipt of truths from a deity. See DONALD S. LOPEZ, JR., THE STORY OF BUDDHISM: A CONCISE GUIDE TO ITS HISTORY AND TEACHINGS 37-42 (2001). Indeed, Buddhist doctrine emphasizes the importance of nontheism in Buddha's enlightenment. Hence, Buddhists are taught to view the world simply, directly, and with the perception achieved in insight meditation. See MICHAEL CARRITHERS, THE BUDDHA 72 (1983).

71 A working definition of "God," for monotheistic religions, such as Christianity, Judaism, and Islam, might include "the Being perfect in power, wisdom, and goodness who is worshipped as creator and ruler of the universe," but this definition neither fully conveys the meaning of "under God," nor clarifies what it means to convey such a meaning in an act of pledging. MERRIAM-WEBSTER, INC., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 500 (10th ed. 1997).
What matters for purposes of the Establishment Clause in the context of public school education is that the school's activities provide no real danger that the school or that the state endorses religion or any particular religious doctrine. To avoid violating the Establishment Clause, the Government must not treat people differently based on the god or gods they worship or do not worship.

In the context of Newdow, the ceremonial quality of reciting a pledge heightens the close association of rituals with religious observance—an association that is likely to be enhanced in the minds of most youths. Students are susceptible to pressure in the classroom, particularly given their possible reliance on teachers as role models.

In the case that follows, the Court took a different path from the dissenters in Newdow and presented the Establishment Clause issue in the context of state action requiring that schools begin each day with readings from the Bible. Viewing the basic question in light of the history of the First Amendment, the Court concluded that the First Amendment, while protecting all religions, prefers none and disparages none. Notably, the Court recognized that the fundamental concept of liberty is a guarantee that the First Amendment embodies.


In School District of Abington Township v. Schempp, the Court agreed to decide whether the Pennsylvania law and Abington's policy, requiring public school students to participate in classroom religious exercises, violated the religious freedom of

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72 See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 842–43 (1995) (“It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups.”).

73 Newdow's complaint assumed that the Pledge's reference to "God" was a reference to monotheism, which could offend those who did not believe in the existence of "God" or of merely one god. See Newdow v. Cong. of the U.S., 383 F. Supp. 2d 1229, 1236 (E.D. Cal. 2005).


75 See Sch. Dist. v. Schempp, 374 U.S. 203, 214–15 (1963). The Free Exercise Clause secures religious liberty in the individual by prohibiting any invasions thereof by civil authority. See U.S. CONST. amend. I. In other words, the free exercise of religion is violated where the government's coercive effect operates against an individual in the practice of his or her religion.

76 Schempp, 374 U.S. at 215–16.
pledging to god

parents and students as protected by the First and Fourteenth Amendments. The Court concluded that the public school district violated both the Free Exercise Clause and the Establishment Clause because the readings and recitations were essentially religious ceremonies and were intended by the state to be so—that is, the ceremonies did not serve a predominant secular purpose.

According to the Schempp Court, the First Amendment's purpose is not merely to strike at an official establishment of a religious sect or creed, as had prevailed in England, but to bestir Americans, if necessary, by uprooting public spheres of religious activity entangled with state authority. Notwithstanding that Schempp's jurisprudence is now long established in First Amendment doctrine, the Court has recently conspicuously begun to question the logic and efficacy of Schempp.

Schempp reinforced that the government must maintain neutrality to ensure "the right of every person to freely choose his own [religious] course...free of any compulsion from the state." The Court asserted that if the purpose and the primary effect of an enactment is the "advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the [Establishment Clause]."

According to the Court, there must be a "secular legislative purpose...[and a] primary effect...that neither advances nor inhibits religion." Applying Establishment Clause principles to the facts in Schempp, the Court found that the required reading of Bible verses and recitation of the Lord's Prayer by the students, in unison, at the opening of the school day violated the Establishment Clause. Although the neutrality test supported by Schempp—that there must be a secular legislative purpose

77 Id. (quoting Cantwell v. Conn., 310 U.S. 296, 303 (1940)).
78 Id. at 222–24.
80 Schempp, 374 U.S. at 222.
81 Id.
82 Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)). Lemon sets out a three-prong test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...finally, the statute must not foster 'an excessive government entanglement with religion.'" Id. at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
83 Schempp, 374 U.S. at 223.
and a primary effect that neither advances nor inhibits religion—appears suitable to public school issues like those raised in Newsdow, it focuses analysis on motives or intent of government with little balancing between government and parental interests. In the case that follows, the Court extended the neutrality principle—requiring evenhanded treatment of all who believe, doubt, or disbelieve—to assessing state actions in a public school ceremonial context for indications of coercion.\textsuperscript{84}

3. \textit{Lee v. Weisman}

In \textit{Lee v. Weisman}, principals of public middle schools and high schools in Providence, Rhode Island permitted members of the clergy to give invocations and benedictions at their schools’ graduation ceremonies.\textsuperscript{85} A middle school principal invited a rabbi to offer prayers at the graduation ceremony for Deborah Weisman’s class and gave the Rabbi a pamphlet containing guidelines for the composition of public prayers at civic ceremonies.\textsuperscript{86} Weisman’s father sought a restraining order to prohibit school officials from including the prayers in the ceremony.\textsuperscript{87} Deborah and her family attended the ceremony, and the prayers were recited. Subsequently, Weisman sought a permanent injunction barring Lee and other petitioners—various Providence public school officials—“from inviting clergy to deliver invocations and benedictions at future graduations.”\textsuperscript{88} The Court determined that the Establishment Clause forbids the offer of prayers\textsuperscript{89} as part of an official public school graduation ceremony because the government may not coerce anyone to support or

\textsuperscript{84} Cf. Marsh v. Chambers, 463 U.S. 783, 791–92 (1983) (permitting the government, in some instances, to refer to or commemorate religion in public life). In \textit{Marsh}, the Court upheld Nebraska’s two-hundred-year-old practice of opening its state legislative sessions with a prayer offered by a chaplain. \textit{Id.} at 792–93. The Court, however, also has acknowledged that “one of the greatest dangers to the freedom of the individual to worship in his own way [lies] in the Government’s placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services.” Engel v. Vitale, 370 U.S. 421, 429 (1962).


\textsuperscript{86} \textit{Id.} at 581.

\textsuperscript{87} \textit{Id.} at 584.

\textsuperscript{88} \textit{Id.}

participate in religion, its exercise, or otherwise act in a way that establishes a state religion or religious faith. The Court recognized that a ceremonial celebration, in the hands of government, might end in a policy to indoctrinate and coerce. Prayer exercises in elementary and secondary schools, for example, carry a particular risk of indirect coercion. Consequently, the Court reasoned, the school district’s supervision and control of a high school graduation ceremony places public and peer pressure on attending students. The Court forbade the state from placing a student in the dilemma of participating or protesting a ceremonial celebration from which he or she dissented. In the Court’s view—as Justice Thomas noted in Newdow—the embarrassment and intrusion of the religious exercise cannot be refuted by arguing that the state action is of a de minimis character; praying to God, like pledging on behalf or affirming God’s existence, is not a minimal state action in the context of public school.

90 Lee, 505 U.S. at 587. It might be said that the Supreme Court has used at least three plausibly distinguishable tests to analyze alleged violations of the Establishment Clause in the realm of public education: the so-called “Lemon test” set forth in Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971), the “endorsement test,” adopted by the Court in County of Allegheny v. ACLU, 492 U.S. 573, 592–94 (1989), and the “coercion test” extended in Lee, 505 U.S. at 621. More directly, Justice O’Connor has noted that the Establishment Clause “cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches.” Bd. of Educ. v. Grumet, 512 U.S. 687, 720 (1994) (O’Connor, J., concurring). Justice Scalia’s dissent in Lee criticizes the majority’s coercion test as boundless and inconsistent with precedent. Lee, 505 U.S. at 631–32 (Scalia, J., dissenting). In fact, as Justice Scalia notes, the majority is less than clear about the contours of coercion. Id. at 640. Missing from the Court’s analysis is a clear indication of the types of coercion, if any, which would be within the bounds of the Establishment Clause.


92 This seems supported by the Court’s further instruction in Santa Fe, where the Court upheld a facial challenge to a school district’s policy of permitting, but not requiring, prayer initiated and led by a student at high school football games. Santa Fe Ind. Sch. Dist., 530 U.S. at 301. The Court further held that the “mere passage by the District of a policy that has the purpose and perception of government establishment of religion” violated the Establishment Clause. Id. at 314. In referring to the purported Establishment Clause endorsement test, the Court explained that it could not “turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.” Id. at 315. In the Court’s view, “an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive [the state conduct] as a state endorsement of prayer in public schools.” Id. at 308 (citation omitted).
In this respect, the Court rejected the option provided by the school district of not attending the ceremony. The option did not excuse any inducement or coercion in the ceremony itself. It was apparent to the Court that high school graduation is one of life's most significant occasions, and therefore, cannot compare with an activity among adults "where adults are free to enter and leave with little comment and for any number of reasons."93 Thus, a student is not genuinely free to decide not to attend commencement exercises in any real sense of the term voluntary.

The Weisman Court recognized that an act may have differing meanings for those who observe the act and that the state's meaning or interpretation is not dispositive of the Establishment Clause analysis because what is for many a spiritual act may be for others either devoid of spirituality or an entirely religious conformance compelled by the state.94 As Justice Thomas urged in Newdow, fidelity to the coercive effects test should result in Newdow prevailing in his challenge of the school district exercise.95 But the coercive effects test can twist and turn conceptions of coercion in opposing directions, highlighting the frailty of the test. To give genuine effect to the interests underlying the Establishment Clause in the public school context, courts must be cognizant of how those interests reinforce the values at stake for parents and children when the litigant seeks to limit the overreach of government's religious exercise in public school. In doing so, courts carefully ensure the vitality of

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93 Lee, 505 U.S. at 597.
94 The clearest command of the Establishment Clause is that the government cannot force us to proclaim our allegiance to any creed, whether it is religious or anti-religious. See W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). As Justice Thomas suggested, Barnette's protection would be illusory if dissenting students sitting in respectful silence could be mistaken for assent to or participation in a state-sponsored religious expression, rather than acknowledge that this would be coerced participation. Elk Grove Unified Sch. Dist. v. Newdow 542 U.S. 1, 47 (2004) (Thomas, J., concurring in the judgment). The coercion results in unwilling students actually pledging their allegiance and affirmation that God exists. Whether or not we classify affirming the existence of God as an acknowledgement of the nation's tradition or a formal ceremonial religious exercise, the state-sponsored expression presents a conspicuous constitutional problem of religious indoctrination. Although an affirmation of God's existence may not rise to the level of a prayer, if religious expressions may be sensibly distinguished in such a manner, the Court already has held that the government cannot require a person to "declare his belief in God." Torcaso v. Watkins, 367 U.S. 488, 489 (1961); see also Employment Div. v. Smith, 494 U.S. 872, 877 (1990).
95 Newdow, 542 U.S. at 47.
American democracy by steadfastly scrutinizing, when appropriate, the results of majoritarian rule; this role of the courts includes staying the hand of government when that hand reaches inside the religious affairs of parents and children who attend public school.

Taken together, these cases are illustrative of the prevailing Establishment Clause jurisprudence used by courts to determine whether state action is enshrouded in coercive religious ceremony having no secular purpose. These cases show that the Court’s Establishment Clause jurisprudence does not result in predictable results regarding whether the Constitution forbids a particular religious activity in public school. In failing to yield predictable results, the Court’s jurisprudence is not best serving the rights of parents to shape the religious education of their children. A better way to assess the legitimacy of religious exercise in public school arises from framing the constitutional question with reference to the preferences of a parent or parents. Doing so invokes more than a singular constitutional doctrine. The Establishment Clause and the right of parental privacy are in play in this analysis. That is, in the public school context, Establishment Clause violations must be assessed against both the strength of the parental right of privacy at stake and the coercive tendency of student participation in a school-sponsored religious exercise. In this light, even school-sponsored religious exercises having arguably nominal coercive impact upon students will not pass constitutional scrutiny where a widely acknowledged parental right of privacy is at stake; the stronger the parental right of privacy, the less tolerant the court must be in its assessment of the degree of coercion permitted in the school-sponsored religious exercise.

B. Fundamental Rights

Fundamental rights might be viewed as a bulwark against the majoritarian tyranny of some by those empowered in a democracy with the rule of the majority. State action that significantly impinges upon parental privacy ought to predictably require the state to prove that its interference with religious freedom is narrowly tailored to achieve a compelling state interest. The Constitution’s Religion Clauses and the fundamental right of privacy reinforce the long-standing American values that majority political power should not
trammel the fundamental rights of those in the minority. While the political preferences of the majority often prevail, the Court's jurisprudence should guard against the notion that the will of the majority—simply because of majority power—always balances favorably against those fundamental rights urged by individuals who express a minority religious viewpoint. In this respect, the protection of fundamental rights expands beyond the political preferences of the majority; indeed, it might be said that, at bottom, what is fundamental about fundamental rights is that such rights reach beyond the interests of the majority to protect those interests that may be opposed to the majority.

It is frequently the case that those who seek judicial protection of fundamental rights express interests of those who are disempowered. But for the moral principles protecting fundamental rights, slavery might never have ended, and civil rights might never have been enacted. The Court's jurisprudence emanating from the Constitution's Religious Freedom Clauses—protections of religious freedom and against state-sponsored religious establishment—reinforce the American value that religious beliefs are personal and private choices in the most fundamental sense. Although the distinction between religious acknowledgement and religious indoctrination is often unclear, courts oblige their duty to provide genuine judicial protections pursuant to the Religious Freedom Clauses by ensuring that an individual's religious belief is not threatened by state sanction merely because of majoritarian support of contrary views.

There is no doubt that the First Amendment in its broadest and most comprehensive scope protects the freedom of belief. Hence, no law banning specified ontological viewpoints could be deemed permissible under the First Amendment. Similarly, state mandates that have essentially the same effect as sanctioning one system of religious belief while pushing-out or shedding bad light upon a minority religious belief should never be deemed permissible under our Federal Constitution. Still, a

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96 Even in the sphere of commercial interests, the Constitution has protected fundamental rights against the “sudden and strong passions” of majority rule. See ROSEN, supra note 12, at 56–57 (noting the Supreme Court's decision in Fletcher v. Peck, 10 U.S. 82 (1810), which upheld the fundamental right of contract against majoritarian tyranny).

97 Because democracy is more than formalized populism, majority rule is tempered by the protection of the rights of those in the non-majority. See Lukacs, supra note 1, at 3.
court may be reluctant to stay the hand of legislative or executive power that is exercised under the imprimatur of the will of the majority. This is especially so when the people’s will is denoted by the most obvious form of legitimacy in a democracy: success in the political process. Consequently, Part II assesses the moral justification for the legal enforcement of majoritarian political power in the context of asserting a right or interest that may countermand majority will.

II. THE INTEGRATION OF CONSTITUTIONAL PRINCIPLES

A. Liberty and the Legal Enforcement of Majoritarian Morality

The Court has never accepted the notion that the will of the majority must always balance favorably against those rights urged by individuals whose religious viewpoints depart from the majority. The historical fact that most Americans self-identify as Christian, or, at least, hold a religious view, should not, itself, undermine judicial protection of fundamental rights. Indeed, the nation’s experience with the rule of law and with extending legal protections for women, disabled individuals, and African-Americans illustrate that moral principles protecting non-majority interests imbue American democracy.

In this regard, the protection of fundamental rights expands beyond the political preferences of the majority; fundamental rights protect the interests of those who are disempowered.

98 H.L.A. HART, LAW, LIBERTY, AND MORALITY 1 (1963) (noting that it is a basic historical fact that the development of law is influenced by morals).

99 Because in purely political terms, majoritarian rule is not necessarily coterminous with numerical majority, courts often become the focus of individuals seeking protection of individual rights after political power has been exercised in legislative and or executive fora.


101 Although one could cite the Court’s decision in Plessy v. Ferguson as evidence that judicial tyranny could undermine fundamental rights as effectively as legislative or executive majoritarian tyranny, state and federal judicial fora are generally viewed as important to the rule of law for which the fundamental rights of the weak, disadvantaged, or unpopular may receive legal redress against the excesses of popular democratic will. 163 U.S. 537 (1896) overruled by Brown v. Bd. of Educ., 347 U.S. 483 (1954); see, e.g., ROSEN, supra note 12, at 77–80. Hence, that
Moreover, the parental interests that may limit the state’s actions become particularly weighty when the target of litigation is directed toward the potential influence of the state upon the innocent minds of children. Despite this, the Court’s jurisprudence occasionally is rebuked as a thinly disguised hostility toward religion. In Santa Fe Independent School District v. Doe,\textsuperscript{102} for example, the dissent argued that the prevailing jurisprudence ostensibly bristles with hostility toward religious expression in public life.\textsuperscript{103} The majority held that a school policy permitting student-led and student-initiated prayer at football games violates the Establishment Clause.\textsuperscript{104} The Court concluded that the football game prayers were not properly characterized as private, but instead constituted public speech authorized by a government policy and taking place on government property at government-sponsored, school-related events.\textsuperscript{105} The school’s policy involved both perceived and actual government endorsement of the delivery of prayer at important school events.\textsuperscript{106}

Those who disagree with the Court’s conclusion in Santa Fe occasionally argue that the case represents the Court’s erroneous approaches to the Establishment Clause when a moral matter undergirds the government’s action; the opposition, however, is expressed in largely polemical terms. Indeed, whether morality\textsuperscript{107} does or should influence the content of legal rules is one of the more significant debates in jurisprudence.\textsuperscript{108} In

\textsuperscript{102} 530 U.S. 290 (2000).
\textsuperscript{103} Id. at 318.
\textsuperscript{104} Id. at 301.
\textsuperscript{105} Id. at 302–03.
\textsuperscript{106} Id. at 305.
\textsuperscript{107} For some, by morality it is not meant that there are some a priori principles that are true and axiomatic that do not require any human choices or that these principles have value because they are “right” or “moral,” and all we need do is find them. In this context, morality is not self-evident; it is agreed to. In this sense, whatever has value in our world now does not have value in itself, according to its nature—nature is always valueless, but has been given value. Values come into existence because of human choice. See, e.g., HART, supra note 98 (noting that the development of law is influenced by morals).
\textsuperscript{108} Moral principles that underlie constitutional doctrine might be defined in terms of the values held by some portion of individuals in a society. More to the point, moral principles prevalent in a society generate obligations that individuals should obey whether or not they are aware of the prevalent moral concepts or objective principles and whether or not sanctions will follow from violating those
reconciling majoritarianism and individual rights protected by judicial review, courts rely upon first principles, or objective principles that transcend majoritarian belief. These principles exist whether or not they are endorsed by any individual or group of individuals in "the fabric of the universe."\(^{109}\)

In rejecting the argument that morality alone is an insufficient basis for enforcement of law, the Supreme Court, in Bowers v. Hardwick,\(^{110}\) held that laws are "constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."\(^{111}\) In Lawrence v. Texas,\(^{112}\) however, the Court answered the Bowers Court by noting, "that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice..."\(^{113}\) In other words, Lawrence rejected morality as a singularly constitutionally sound basis for law. During oral argument in Lawrence, Justice Scalia made it clear that in his view, morality, without more, can justify legislation.\(^{114}\) Clearly, for some, the wisdom of religious tradition may serve as a valid basis for legislating.\(^{115}\) Even if religious

\(^{109}\) See RONALD DWORCKIN, LAW'S EMPIRE 267 (1986). Scholars who seem to express skepticism regarding objective principles may find little solace for their skepticism in the work reported by physicists and other scholars who have disclosed compelling theories derived from the laws of physics concerning universals existing in the fabric of the universe. These scholars contend that their work illuminates, though not yet fully explains, principles upon which aspects of the ultimate questions of physics and metaphysics depend for answers, including questions such as "why we are here." See BRIAN GREENE, THE ELEGANT UNIVERSE: SUPERSTRINGS, HIDDEN DIMENSIONS, AND THE QUEST FOR THE ULTIMATE THEORY 386-87 (2003).


\(^{111}\) Id. at 196.

\(^{112}\) 539 U.S. 558 (2003).

\(^{113}\) Id. at 577.

\(^{114}\) Id. at 589–90 (Scalia, J., dissenting). Yet, as explained more fully below, one conspicuous difficulty with this view is its conceptual repugnance, namely, the argument equates lack of religiosity with immorality.

\(^{115}\) In contradistinction to this view, some secularists argue that religion should not be taken into account in the political sphere at all. FELDMAN, supra note 6 at 113, 129, 148. For example, for Feldman, the secularist movement "failed"—notwithstanding that courts occasionally engage in a serious effort to resuscitate the Establishment Clause's proscription that government must have a secular, rather than religious, purpose—in conveying a message that would otherwise express endorsement or disapproval of religion. See id.
tradition should play a role in resolving debates concerning
government policy, the question remains—how so? Because all
religious traditions are not the same, to whose religious tradition
would we appeal?

The ongoing debate over Roe v. Wade or, more recently, Lawrence, and their constitutional vitality, also engulfs religious expressions disguised as legal arguments. Although it would be false to declare that majoritarian support for legal codes is never—or is only rarely—influenced by views on morality, it would be similarly misleading to ignore that what are asserted to be objective principles reflected in law instead serve as democratically determined majoritarian religious expressions enacted in law.

Even if the assertion is correct that a widely held view of morality is merely reflected in law, the question remains—why should that sentiment be granted constitutional significance? A law based upon a popular moral principle may nonetheless be condemned as irrational if it operates in a manner contrary to another equally compelling moral principle.

Indeed majoritarian democracy is often confused with the appealing belief that a democracy is governed by widely shared values. This may be so, but American democracy also reflects the importance of the rule of law, which allows a heterogeneous society with various competing conceptions of good to remain viable. In this respect, it may be that adherence to the rule of law may well be indispensable for purposes of achieving political cohesion with a minimum of oppression. Today, it is

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117 The very notion of an ordered liberty seems infused with a moral criticism of law regulating morality; namely, that the legal enforcement of morality is not always morally correct. See HART, supra note 98, at 17–20. Similarly, in American democracy, any legal test protecting a fundamental right must have some heft to shoulder the fundamental interests through the mountain of attempts by the state to regulate. Notably, in Bowers v. Hardwick, the Court failed to examine whether the legal enforcement of majoritarian morality was legitimate, but in Lawrence v. Texas, the Court, using a rational basis test with heft, considered and rejected the argument that the State of Texas had a rational basis for its law implementing the majority’s belief that same-sex sodomy should be punishable by law. In so doing, the Court, at least implicitly, accepted the notion that the legal coercion of majoritarian morality was not morally justified.
118 Since the rights of individuals are protected in our constitutional democracy, even “when popular morality is supported by an ‘overwhelming majority,’” no one should conclude that “loyalty to democratic principles requires him to admit that its
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incontrovertible, for example, that American-styled democracy embraces a relationship between the rule of law and the right to individual liberty and choice—participation, accountability, and representation—in political decision-making.\(^{119}\) In America, rather than simply promoting naked populism, numerical majorities yield to the rule of law when popular vote or majoritarian political power otherwise would trammel individual liberty. Though not without exception, courts must follow the rule of law by protecting constitutional liberties, even when doing so might frustrate majoritarian political power.\(^{120}\) Indeed, it is fundamental to American-styled democracy that majority rule occasionally must yield to anti-majoritarian constitutional constraints to resolve the disparate demands arising from the clashing of private interests when the legitimacy of fundamental liberties is at stake.\(^{121}\)

An interesting recent commentary on whether non-majority interests should yield to majoritarian religious views or practices is particularly worthy of note. Noah Feldman argues that despite the “traditional manifestations of public symbolic” majoritarian religious expression to “marginalize . . . minorities like Jews and Catholics,” it “matters more that” these traditions have primarily protected “religious liberty without sacrificing the aspiration of living together as a single nation.”\(^{122}\) In this regard,

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\(^{120}\) See, e.g., Everson v. Bd. of Educ., 330 U.S. 1, 511–12 (1947) (holding that the state cannot finance parochial schools). More recent decisions, however, have upheld certain indirect or incidental state aid to parochial schools. See, e.g., Agostini v. Felton, 521 U.S. 203, 234–35 (1997) (public school teachers may impart remedial education to disadvantaged parochial school students).

\(^{121}\) An example is aptly expressed: “[T]he democracy of legislative and executive politics is overstated. The point does not require much development: the ways in which representative democracy in practice diverges from the ideal are well-known. The result then is an imperfectly anti-democratic judicial process and an imperfectly democratic political process.” LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 309 (3d ed., Foundation Press 2000) (citation omitted).

\(^{122}\) FELDMAN, supra note 6, at 248–249. Feldman argues that the Church-state problem should be resolved by allowing “public religion where it is inclusive, not exclusive, and to allow religious displays and prayers so long as they accommodate and honor religious diversity.” As such, Feldman concludes, “[n]o one should ever be coerced into religious exercise, but so long as no one’s rights are violated, it makes no sense to ban public religion on the theory that someone might be offended or feel
the separation between Church and state evokes a principled separation between government and organized religion, while preserving public symbolic manifestations of faith.123

Since many Americans shape their political views by religious values, it is argued, the Constitution's Establishment Clause does not push religious expression into an entirely private matter.124 Adapting this view would seem to reject Newdow's claim and allow the state to force students to participate in majoritarian "symbolic" public religious practices regardless of the age of the student. To some extent, Noah Feldman's view echoes a similar view by others who argue that there are "so many different religious denominations in the United States that no one group would ever be able to impose its will over the others."125 This view seems to be a degree optimistic and runs contrary to the thrust of American history, which is replete with attempts—some successful, some not—to imbue public life with all manner of religious practice by those exercising majority political power.126

excluded." Id. at 15-16. As a conceptual matter, Feldman's goal seems laudable; yet, it is not clear how his accommodation may be achieved—certainly not any more so than the Church-state problem currently imposes. Feldman's proposal accommodates the sense of exclusion that evangelicals necessarily experience under secularism, but this accommodation is remarkably one-sided; it ignores those who are not "religious" or who are aggressively secular. In addition, Feldman's accommodation of "inclusive" religious expression seems to lack accommodation of those who disagree with the symbols themselves or who disagree with the view that public expression of religious symbols in a given circumstance actually honors religious diversity. Id.

123 See Marci A. Hamilton, God vs. The Gavel: Religion and the Rule of Law, 5 (2005) (Hamilton argues that because some religious conduct deserves freedom and some requires limitation, "the right balance is achieved by subjecting entities to the rule of law—unless they can prove that exempting them will cause no harm to others").

124 During the time of the Constitution's framing, the framers likely adopted moral principles that grew out of Protestant Christianity. Feldman, supra note 6, at 51.

125 Id. at 19.

126 Notwithstanding that Christianity has its divergent doctrinal and ecclesiastical strains, the United States is often referred to as a "Christian nation." And, undoubtedly, in the United States, in drawing a comparison with Christianity, the nation's religious diversity arises from numerically minority religions. Even so, the world's major religions are well represented in America. Buddhism, for example, "established 600 B.C., long before the Christian era," ranks fourth in number of adherents in the United States and among the world's religions. See Cruz v. Beto, 405 U.S. 319, 322 (1972); World Almanac 681–82 (2009); The Faces of Buddhism in America (Charles S. Prebish & Kenneth Kenichi Tanaka eds., 1998).
Moreover, it is unclear which analytical tool is available to separate symbolic religious expression in the public realm from institutional religious expression. Indeed, a regime safeguarding symbolic religious expression would seem to promote powerful majoritarian messages in public life that merely reengages the debate between separation of Church and state without resolving it.

Feldman's proposal seems to fail primarily because of an internal inconsistency and a reliance on an improbable assumption. The improbable assumption is that guarding society against religious oppression by the state is sufficient to ensure genuine religious diversity. The Founding Fathers knew better: "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part." In other words, diversity in symbolic religious expression may guard against legislative abuses of religious freedom, but the pernicious harm springing from the majoritarian tyranny over the symbols of religious expression in public life is not slightly or temporarily ameliorated unless the state ensures that the rights of religious minorities are secure from the pernicious impact of religious exclusion.

For commentators who enter the Church-state debate by adhering to the argument that majoritarian religious expression does not harm minority religious views as long as those in the majority hold for themselves what they impose on others, this principle seems difficult to meet and conceals an important aspect of American democracy—namely, that democracy is not mere majority rule with the inevitable consequence that political minorities are coerced and compelled to obey laws imposed against their will. Instead, American democracy requires

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127 Feldman, supra note 6. With regard to the internal logic of Feldman's proposal, his principle of accommodation—to accommodate the interests of those whose political views are shaped by religious belief—runs counter to his accepted principle that no one should be coerced into religious exercise.


129 There is nothing unique to the notion that majoritarian tyranny naturally crowds out other voices. John Stuart Mill, On Liberty 80-81 (Currin V. Shields ed., Prentice-Hall 1956) (1859). For Mill, majoritarian tyranny could express its might through race, religion, or class.

130 The nation's history with minority religious conflicts, such as nineteenth century government support of Catholic schools and the regulation of Mormon
implementation of the general will through the efforts of the entire citizenry, while acknowledging that fundamental rights protect the development of the individual from the tyranny of mass opinion. Indeed, the very structure of American democracy—through its separation of powers and republicanism—aims to safeguard against the “common impulse of passion” instigated and unleashed by “unjust majorities.”

B. The Integration of Constitutional Interests

Like the Free Exercise Clause, the right of parental privacy bolsters the weight of the parent’s interest by injecting a precisely framed interest for the matter at issue; notably, children and parents are free from state intrusions or sanction for expressing (or withholding expression of) their beliefs. Religious freedom and parental privacy reflect two important constitutional values, often tightly interwoven, that reinforce prime goals of fundamental rights to protect the development of the individual from the tyranny of mass opinion or the pernicious social ostracism that results from unchecked majoritarian democracy. Indeed, unchecked majoritarian democracy ultimately squelches individuality, independence, and free will, all of which sustain the benefits that flow from the freedom to be individual—not in the sense where individualism runs in contrast to societal goals, but rather as society’s real counterpart.

polygamy practice exemplify the difficulty of drawing principled distinctions between majority rules and non-establishment of religion. FELDMAN, supra note 6, at 108-109 (arguing that the “historical power of nonsectarian conformity backed by state coercion could hardly be more apparent” than it was in transforming the religious views of Mormons from polygamy to strong adherents of the definition of marriage as constituting only one man and one woman).

See The Federalist Papers xxv-xxvi (Clinton Rossiter ed., Signet Classic 2003) (noting by way of introduction that the Federalists argued that separation of powers and representative democracy serve the function of providing a degree of protection against the tyrannical passionate excesses of numeric democratic power).

Some scholars and commentators find it compelling to urge that the Establishment Clause does not purport to protect individual rights in contrast with the First Amendment’s Free Exercise Clause, which does. Yet distinguishing the Establishment Clause from the Free Exercise Clause by classification of what is or is not a protection of an individual right has no ultimate relevance on what government actions are restricted by either clause. Both clauses restrict government power regardless of how a court may classify the clause, and what is at issue is whether the clause reaches the government action targeted by the plaintiff. In this regard, either clause could limit the government’s action in a particular case.
C. Manifestations of American Tradition

When courts begin urging an Establishment Clause doctrine with a sense that the God penetrating the doctrine is a particular God with a particular target of reference, the doctrine stresses a point that seems at war with itself.\textsuperscript{133} Even so, it is historically accurate to say that explicit American ceremonial government-sponsored references to God were once supportable as references to a Protestant god.\textsuperscript{134} For those who worshiped other gods, no god, or even the same god differently, God had no constitutional context or target reference.\textsuperscript{135}

Yet, a zealous historicity to an interpretation of the Establishment Clause obscures the unremarkable fact that the meaning of religion as well as religious doctrine changes in tandem with, and in response to, the changes in the culture of both those who worship religion and those who are persecuted by religion.\textsuperscript{136} The fact that the Establishment Clause erects an impasse blocking the righteous zeal of those who would embed a compulsion in religion in the structure of government informs the

\textit{Id.} That the influence of Locke's political works on the Founding Fathers is so widely well documented, it bares simple observation.

\textit{But see} Jill Lepore, \textit{Prior Convictions: Did the Founders Want Us To Be Faithful to Their Faith?}, NEW YORKER, April 14, 2008, at 71, 73 (arguing that some scholars make the claim that except for cherry-picking the statements of some of the Founding Fathers, there is little support for the notion that the United States was founded as a Christian nation; Benjamin Franklin, George Washington, John Adams, Thomas Jefferson, and James Madison were not Christians or believers in the divinity of Christ).

\textit{See}, e.g., County of Allegheny v. ACLU, 492 U.S. 573, 673 (1989) (Kennedy, J., concurring in part and dissenting in part) (“[I]t borders on sophistry to suggest that the ‘reasonable’ atheist would not feel less than a ‘full membe[r] of the political community’ every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.” (internal quotation marks omitted)).

This is so notwithstanding the debate on how to interpret the Constitution. \textit{See} HAMILTON, supra note 123, at 111 (“[T]he early public schools started with indoctrination in a Protestant perspective.”). Far from tradition, the early practice of American public schools seems illustrative of the controversy and fight for political power over nascent public education systems.
careful manner in which Courts must reject unreflective approbation for linking national identity with religion.\textsuperscript{137}

Those who recoil from a Christian-centric view of the Establishment Clause argue instead for an interpretation that focuses upon the establishment of religion (or a religion). Having no particular targeted religion in mind, however, provides no guidance in the ways religious people view religion and, hence, offers a rather effete guidepost.

For instance, in his dissent in \textit{Lawrence}, Justice Scalia would cabin off state laws against same-sex sodomy as sustainable under rational basis review.\textsuperscript{138} For Scalia, the law is often derivative of notions of morality. Implicitly, Scalia’s argument does not turn on the interpretation of constitutional text, history, or structure; instead, his focus is upon a doctrine of morality and its role in either shaping law or being shaped by law.\textsuperscript{139} Without saying so explicitly in \textit{Lawrence}, Scalia switches from a concern as to what the Constitution means to conceptual arguments framing what concerns the Justice as a matter of Christian morality. This conceptual switching is apparent in cases in which the reasoning of the Court’s majority raises concerns of Christian morality. This conceptual switching is apparent in cases in which the reasoning of the Court’s majority raises concerns of Christian morality.\textsuperscript{140} In such cases, the Court’s holding obfuscates the principle for which it stands; ironically, the Court’s opinions rest on a consideration of the intersection between a supernatural entity and moral judgment in law. Given that the task of the Court in such cases is to ensure that the state not weigh in favor of those whose belief in a particular supernatural entity results in the legal enforcement of ethical imperatives of the given supernatural being, the Court’s doctrinal foundation for conceptual switching from what the

\textsuperscript{137} The American “tradition” is filled with all sorts of paradoxes; during the framing of the Constitution, church attendance was low, most Americans were Protestant, Thomas Jefferson rejected the idea of a “personal God,” and Thanksgiving was both supported and opposed because it was viewed as a state-sponsored religious exercise. See, \textit{FELDMAN, supra note 6, at 51–53.}

\textsuperscript{138} \textit{See Lawrence v. Texas, 539 U. S. 558, 599 (2003) (Scalia, J., dissenting).}

\textsuperscript{139} In this case, morality may be confused with taboo. Inducing an individual to abstain from a behavior because of an attached conventional value is often the province of taboo, not morality. \textit{See HART, supra note 98, at 57.}

\textsuperscript{140} \textit{See, e.g., Wallace v. Jaffree, 472 U.S. 38, 100–03 (1985) (Rehnquist, J., dissenting).}
Constitution means to what it means to apply the Constitution to Christian morality is hopelessly frustrating.\(^\text{141}\)

This is not to say that the application of Christian morality to constitutional interpretation is always a cover for Christian liturgy—or even conservative ideology. The Court’s faithful approach to interpreting the Constitution by resort to the original meaning of the text in such cases is not worthy of doubt. Often, however, rather than assess the controversy before it by acknowledging the nation’s religious heritage, the Court invokes the doctrinal underpinnings of a specific religious heritage.\(^\text{142}\)

Even if the appeal of connecting religious morality with law springs from a conviction that the “history of man is inseparable from the history of religion,”\(^\text{143}\) this is not to say that First Amendment jurisprudence should abandon the long-standing principle that the Establishment Clause “rest[s] on the belief that a union of government and religion tends to destroy government and to degrade religion.”\(^\text{144}\) Nor is the connection between religious morality and law sustained by applying originalism to constitutional decision-making.\(^\text{145}\)

To the extent that the Court might be viewed as faithfully endorsing an original meaning doctrinal position of Constitutional interpretation, the Court has not yet addressed why an originalist analysis, anchored in past meanings, does not, itself, ill-serve the purported agenda of originalists—keeping courts from legislating private preferences through

\(^{141}\) Indeed, the application of a Judeo-Christian-centric view to the Constitution’s Establishment Clause ultimately begs the question of what a separation of Church from state may mean since religion is not in any sense separate from state in the traditional doctrine of Judaism or Christianity. See, e.g., RICHARD ELLIOT FRIEDMAN, WHO WROTE THE BIBLE 46 (1987) (noting that early Judaism was so connected to the affairs of the state that the harbinger of Judaism was ostensibly a transnational religion).

\(^{142}\) For example, Justice Scalia, the Court’s most consistent adherent of constitutional interpretation through the lens of originalism, is viewed as guided, in part, by his “traditional Catholic education.” ROSEN, supra note 12, at 190.

\(^{143}\) Engel v. Vitale, 370 U.S. 421, 434 (1962). In Zorach v. Clauson, 343 U.S. 306 (1952) the Court specifically recognized that “[w]e are a religious people whose institutions presuppose a Supreme Being.” Id. at 313.

\(^{144}\) Engel, 370 U.S. at 431. Similarly, Thomas Jefferson argued that the Constitution’s First Amendment banned any state action that in any way interfered with or engaged in religious practice or exercise. See FELDMAN, supra note 6, at 53.

\(^{145}\) At bottom, theories of constitutional interpretation or construction raise two concerns; namely, whether we are “debating the meaning of the text, or how this meaning should be put into effect[]” BARNETT, supra note 62, at 357.
Constitutional adjudication. This is not to say that judicial deference to democratic outcomes never should guide constitutional interpretation; rather, the questions are whether originalism, ultimately, is successful in achieving its purpose and whether the Constitution is well supported by judicial decision-making constrained by an interpretive philosophy that anchors the meaning of the Constitution to bygone textual meanings. Notwithstanding the assumptions made by

146 There is considerable scholarship challenging the argument that a preferred method of interpreting the Constitution is by resort to determining the original intent of the Founding Fathers. Many adherents have abandoned this version of "originalism." In its place, originalism is framed as a method of interpreting the Constitution by excavating the text's original meaning. See Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 854 (1989); see also Randy E. Barnett, Was the Right To Keep and Bear Arms Conditioned on Service in an Organized Militia?, 83 TEx. L. REV. 237, 240 (2004) (book review) (“Those originalists who favor original intent want to fill the gaps in the original public meaning and cabin the discretion of those engaged in construction of abstract provisions by appealing to the specific intentions of those who either wrote or ratified them.”). Although the move from original intent to original meaning avoids some of the obvious frailties generally associated with matters of intent, it is difficult to view original meaning as a vastly improved theory of constitutional interpretation. Indeed, original meaning may be derivative of original intent, rather than favorably distinct from it. The move by originalists from original intent to original textual meaning is an illusory move because originalism, in either form, cannot escape the basic assumption that textual meaning is intimately tied to a process whereby expressions, words, and phrases are understood as references delivered by drafters or speakers for a particular purpose. Like original intent, original meaning is anchored to context. Whether clues as to the answers of textual meaning spring from assumptions about the intentions of the drafters of a text or from the context of the text, disputes over meaning may require those searching for meaning to go beyond the text in as many cases as any interpretative theory would; hence, reducing the clumsy view that originalism as a method provides a greater restraint on judges who might otherwise more systematically go beyond text (for example, appeal to moral principles, democratic values, precedent, or the Constitution's structure) to divine the Constitution's meaning.

147 See, e.g., BARNETT, supra note 62, at 96. Barnett prefers a version of originalism—identified as original public meaning—that ostensibly has two steps of analysis: (1) discerning the original public meaning of the text of the Constitution by examination of linguistic usage; and (2) with the results of the first step in hand, an application of the meaning to the facts of the case. Once the “original public meaning of the text” is interpreted, the interpretation “must be applied to the facts of particular cases”; in Barnett's originalism, the act of applying interpreted meaning to cases “is better described as constitutional construction, rather than as interpretation of text.” Barnett, supra note 146, at 240. Because original public meaning anchors constitutional interpretation to the Constitution's text, as an interpretative method, it may be superior to original intent, which allows the search for constitutional meaning to go far beyond the Constitution's text. In this respect, originalism, as an interpretative method, binds courts in some objective way in the search for meaning or when discerning what the law is; but, step two of Barnett's
originalists, it may well be perverse to expect the inevitably innovatory relations of human affairs to be hamstrung by a rigid and unflinching constitutional law.\(^\text{148}\) Indeed, originalist analysis linked to historical meanings may just as likely lead to so-called activist judicial decision-making as is true of other theories of constitutional interpretation.\(^\text{149}\) As the vicissitudes of legal opinions among originalists demonstrate, history is no objective

originalism seems to remove the objective shackles imposed by step one by permitting courts to engage in what may be a highly arbitrary construct in actual practice. Constitutional construction takes the interpreter outside the text of the Constitution. In this manner, interpretative construction seems no less open-ended than viewing the Constitution as a living document for which the Court may breathe new meaning into it at its discretion. Indeed, the need to "construct" the Constitution's meaning rather than, or in addition to, interpreting it, is likely to be a common phenomenon under Barnett's originalism. Notably, constitutional interpretation largely rests on disputes over how to apply what we say the Constitution means to facts never imagined by "the People" or those who wrote and ratified the Constitution's text. Hence, whether the First Amendment, for example, protects the right to download digital bits significantly will depend on a court's application of step two of Barnett's version of originalism. Step one will not offer much to the analysis. Moreover, it is not at all incontrovertible that a text as abstract as the United States Constitution will rarely have a singular original meaning. Indeed, the very instance of litigation over a phrase or word in the Constitution is likely to demonstrate the flawed presupposition in the method of original public meaning; the method seems to confuse the role of the court in deciding what the law is, with the court's method of deciding what the law is. That a court, when appropriate, will determine what the Constitution means (that is, the court will pick a meaning when meaning is in dispute), does not denote, ipso facto, that a court has established the "singular" public meaning of the text. A textual interpretation that hinges on a linguistic assessment of textual usage does not necessarily embrace the conclusion that the text has a singular original meaning, no matter how emphatically the court expresses its conclusion. Abstract language is inherently vague, imbued with multiple meanings and various shades of meaning. Still, original public meaning has a great deal of appeal as an interpretative method that, when used cautiously and faithfully, may yield textually consistent meaning that changes only by following a formal method of amendment.

\(^\text{148}\) Of course, originalists often persist that originalism reminds courts that they have no authority to inject the judiciary into every matter of human activity and, as such, originalism acts as a beacon of democracy by staying the hands of otherwise activist judges who are unaccountable and anti-democratic. But, it is far from clear whether originalism is as principled as its adherents assert. Some critics of originalism urge that originalism is in drag: a set of hard-core political attitudes and traditions, self-styled and dressed up as a legal theory of constitutional interpretation. Compare Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("[T]he Equal Protection Clause... requires the democratic majority to accept for themselves and their loved ones what they impose on you and me."), with Romer v. Evans, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting) (noting that the Equal Protection Clause does not prohibit a democratic majority from singling out gays for disfavored treatment).

\(^\text{149}\) All heuristic tools of textual analysis are interpretive.
limitation on the judicial discretion of courts. In addition, original meaning proponents have not provided persuasive arguments for why limits on government power to intrude upon fundamental rights must weaken in the arms of history and tradition. And, for originalists, the arms of history and tradition are strong indeed, squeezing broad limits on judicial discretion to stay the hand of congressional intrusion upon the body of fundamental rights.

In cases where majoritarian support for legal codes is influenced by views on morality (or, more likely, constituting religious expression), originalists have consented to locating the right of privacy as “penumbral to the specific guarantees in the Bill of Rights.” They urge, however, that privacy is not a fundamental right. Instead, originalists view privacy as an interest that can be invaded by the state if the state has a legitimate interest and a rational reason for the invasion. Of course, as a fundamental interest, privacy would be ostensibly nugatory under originalism because it follows a fortiori that, given the nation’s tradition of permitting states to regulate majoritarian views of morality (and, more obliquely, popular religious views), such laws, when challenged by a minority viewpoint, will be deemed legitimate and pass rational basis scrutiny.

Interestingly, Justice Scalia has explicitly recognized this conundrum for originalists in contexts where originalists hold less affinity for state invasions of privacy. In Lawrence, Scalia urged that the right of privacy found no support “deeply rooted in this Nation’s history and tradition,” or that the right of privacy can be legitimately restricted based on our “longstanding history

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150 See Lepore, supra note 134, at 73. Originalism sends us to the Founding Fathers after the Constitution’s text proves too vague to inform, but with regard to the Constitution’s Religion Clauses, it may be “impossible to discover precisely what the Founders believed about God, Jesus, sin, the Bible, churches, and Hell. They changed their minds and gave different accounts to different people.” Id.

151 Indeed, one view of originalism is that it may be used to cut short the reach of history and tradition when such is incompatible with the views of those carrying out the will of the present-day majority. See ROSEN, supra note 12, at 192–93 (“Scalia defended his judicial philosophy of [originalism] . . . as a way of ensuring that democratic majorities can enact their will into law.”); see also Lepore, supra note 134, at 74 (urging that an interpretative theory of the Constitution that begins and ends with the Founding Fathers may suffer from compressing eighteenth-century American life into the views of a handful of men).

of laws" influenced by majoritarian views regulating consensual sexual conduct in the home. But in *Kyllo v. United States,* he urged that privacy expectations are longstanding and deeply rooted when an individual is in his home. Though the right of privacy asserted in *Kyllo* emanated from the Fourth Amendment rather than a "right penumbral . . . in the Bill of Rights," Scalia offered that, in this context, the right of privacy had "roots deep in the common law." Speaking for the Court, Scalia explained that the right of privacy protects the home and any information found in the home; in his words, "[i]n the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." In this regard, what was at issue in *Kyllo* was not whether a fundamental right of privacy existed to protect those in the home—it did, and the Court said so. At issue was whether the government actually had invaded the home.

Notably, Justice Scalia was concerned with the constitutional traditions of protecting privacy in *Kyllo,* despite the fact that no stretch of the original meaning of any of the words of the Fourth Amendment to legitimately reach a search or seizure conducted from a helicopter or a thermal imaging device. It is quite astonishing to find an originalist in *Kyllo,* urging that the Court must "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." Indeed, Scalia found the modern technology

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153 *Id.* at 596–97 (Scalia, J., dissenting).
154 533 U.S. 27 (2001). In *Kyllo,* the Court held that the use of a thermal imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a "search" within the meaning of the Fourth Amendment. *Id.* at 28.
155 *Id.* In this regard, the *Kyllo* Court determined that thermal image monitoring of the home to detect invisible thermal radiation as it passes through the walls of a house, strips us of our most basic boundary of personal privacy by electronically gathering invisible information coming from the interior of the home. The state violates the right of privacy in substantially the same way as occurred through the use of electronic monitoring in *United States v. Karo,* 468 U.S. 705, 715-716 (1984), and in *Katz v. United States,* 389 U.S. 347, 353 (1967) superseded by statute, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, as recognized in *United States v. Koyomejian,* 946 F.2d 1450, 1455 (9th Cir. 1991).
156 *Lawrence,* 539 U.S. at 595.
157 *Kyllo,* 533 U.S. at 28.
158 *Id.* at 37.
159 *Id.* at 28.
particularly invasive of interests known to be important in 1791, noting that despite the dissent’s view to the contrary, a “thermal imager reveals the relative heat of various rooms in the home,” and, as such, the heat constitutes the type of information desired to be protected from unwarranted access by the government by those who voted to adopt the Fourth Amendment in 1791.

Of course, Scalia could not have meant what he was saying. Instead Scalia was acknowledging—what might be difficult for an originalist—that our fundamental rights would exist only frozen in time, with no relevance in modern life, if the scope of fundamental rights could be assessed only by what was known two-hundred years ago. What is more telling is that an originalist could make the concession—albeit obliquely—in *Kyllo*, but not in *Lawrence*.

D. Concealment, Solitude, and Non-Public Zones

Conceptually, privacy is confined in two important respects. First, the scope of privacy is restricted to protections for control (or the degree of control) over the disclosure of information that would provide intimate access to self. Secondly, the scope is restricted to protections against the unwanted disclosure of information that would result in an invasion of subjectively protected space, including both physical matters and those conceptual matters that draw meaning from authentic communion. The former protects our value for self-determination, while the latter protects our value for real and perceived zones of intimacy. Taken together, these interests reinforce values of independence and free will that form the

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160 Even for the originalist, the “Constitution sometimes governs through open-ended standards rather than tightly written rules.” John O. McGinnis, Bookshelf: A Justice is Weighed in the Balance, WALL ST. J., Jan. 31, 2006, at D8. This is so, because “determining the substantial needs of government can be quite a subjective exercise.” Id.

161 In *Lawrence v. Texas*, police officers in Houston, Texas, responded to a private report of a weapons disturbance in a private residence. They entered the residence owned by John Geddes Lawrence. On entering, they did not see any weapons. But they did see Lawrence engaging in a sexual act with Tyron Garner. Lawrence and Garner were arrested, held in custody, and convicted of the crime of “deviate sexual intercourse, namely anal sex, with a member of the same sex (man).” 539 U.S. at 562–63 (internal quotation marks omitted).

162 As developed more fully below, the unifying construct advanced here centers on conceiving of the right of privacy as protecting primarily liberty-based interests. See infra text accompanying notes 164–79.
essence of our conception of privacy.\textsuperscript{163} Private issues not coming within this framework probably identify values other than those traditionally conceived of as supporting a right of privacy.

Secrecy is an illusory counterpart of privacy. Both secrecy and privacy are regarded as matters involving concealment, solitude, and non-public zones of disclosure. Yet, conceptually, privacy neither requires concealment nor encompasses that which is not shared with others. American privacy, in its broadest sense, expresses a societal view that individuals should be protected against unauthorized interference by government, media, and others with respect to certain matters hinging on independence and free will.

The relationship between individual liberty and government control is, at least, conspicuously informative of the nature of free will and individual independence.\textsuperscript{164} The yoke of public opinion throughout American history—whether empowered by private individuals acting through collective conformity or the power of the state—has demonstrated that there is social value in restraining social convention from oppressing individual development.\textsuperscript{165} Ironic perhaps, but the evidence of oppressive social convention is replete throughout the historical records of American public education. Consequently, privacy interests are paramount in public school education where the power and influence of the state upon children is considerable, and, once absorbed, the impact of the state’s influence is not easy to dislodge.\textsuperscript{166}

\textsuperscript{163} Defining “free will” is a sufficiently ambitious undertaking. John Stuart Mill’s view of “human liberty” captures the essential qualities. Free will comprises the (1) inward domain of the liberty of human thought and feeling and the outward domain of expression, (2) the liberty to pursue life to suit one’s own character, and (3) the liberty of the individual to form collectives. \textsuperscript{MILL, supra} note 129, at 16. Perhaps a simpler way to refer to free will is to view a will that is free as one that is willing and able to make morally responsible decisions, notwithstanding that the will may be influenced by external agents such as culture, language, or persuasion. \textsuperscript{See, e.g., Luke Pollard & Rebecca Massey-Chase, An Argument About Free Will: Dialogue About Freedom and Determinism, PHIL. NOW, Mar./Apr. 2008, at 28, 29.}

\textsuperscript{164} See \textsuperscript{MILL, supra} note 129 (Mill’s classic statement on individual liberty urges for restrictions against both government control and social conventions that limit the individual from developing in his or her own way).

\textsuperscript{165} Public opinion can express a powerfully restraining influence against individual development by accusing the individual of either doing “what nobody does” or of not doing “what everybody does.” \textsuperscript{Id.} at 83.

E. Protection of Free Will

Notwithstanding American tradition, a clearly expressed conception of liberty within the explicit text of the Federal Constitution is challenging to denominate. The challenge, however, does not serve as a basis to negate the conception of privacy as an interest supporting free will.¹⁶⁷ There is no doubt, for example, that the right of privacy is largely grounded in a long-standing acknowledgement that privacy is conceptually an essential coordinate branch of autonomy and liberty. This right calls forth legal interests that protect the individual from oppression and harmful unauthorized disclosures of matters or facts that are valued because of their interconnection between an individual and his subjective self.¹⁶⁸ Fundamentally, privacy supports the interests protecting control over the development of one's mental and moral nature, unconstrained from the yoke of public opinion. This includes those interests privileged by imposing restraints against the state’s intrusion into individual liberty, except for those matters where the collective authority of society and/or the state are necessary to protect society.¹⁶⁹

¹⁶⁷ Without more, "personal autonomy" and control over "self-disclosure" are no longer assumed valid interests by a growing number of skeptical commentators. Although it is difficult to conceptualize personal autonomy as anything but a moral good, some commentators have noted that autonomy stems from power relations and is too dependent on the exaltation of the individual over the social order or collective. Yet, it cannot be denied that the exercise of personal autonomy is a feature of American life as it is in any progressive society. Personal autonomy allows one to identify and exercise individual choice. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 89 (1980) (citing HANNAH ARENDT, ON REVOLUTION 147 (1963)).

¹⁶⁸ Of course, freedom of expression and the right of privacy may clash as competing constitutional interests as well. See, e.g., Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829, 833 (8th Cir. 1976) (holding that consumer credit reports merit relaxed First Amendment protection because they constitute commercial speech); Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 29-30 (5th Cir. 1973) (noting that private subscription credit report "coincides with the doctrine of commercial speech" mainly because it "was distributed . . . for commercial purposes and clearly without regard to social concerns or grievances"); Grove v. Dun & Bradstreet, Inc., 438 F.2d 433, 438 (3d Cir. 1970) (holding that credit reports are not entitled to the extended constitutional protections under the First Amendment’s freedom of expression).

¹⁶⁹ As Mill informs, though, the struggle between liberty and the state often has been the most conspicuous struggle when issues involve liberty. The struggle
As noted above, laden within the value of protecting privacy are interests in protecting the individual from unwarranted intrusions into private spheres of his life and existence, whether within or outside the home. Because privacy does not equate with solitude, it is difficult to gauge the degree of public or open coverage that may accommodate an activity. Certainly, private and public modes follow interdependent and co-evolutionary paths in any valid conception of privacy. Marriage, for example, has both public and private modes, neither of which eliminates the fact that married couples enjoy privacy protections despite the open nature of a legally sanctioned marriage. Indeed, what places marriage within the womb of protection of the right of privacy is not a legal fiction concerning the secret nature of marriage—for marriage is rarely viewed as an object of secrecy or solitude. Instead, marriage falls fittingly within the scope of privacy because civil marriages are deeply personal, intimate relationships within which the participants often freely disclose aspects of self that remain outside the eyes of the viewing public, despite the recognition that marriages constitute relationships that are important to society as well as individuals. "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." The civil aspect of marriage in American

between the cultivation of the individual and the tyranny of public opinion is a similarly "highly dangerous" threat to liberty. MILL, supra note 129, at 1–2. For Mill, there is a zone of human dignity and a vector of private belief with which the state has no legitimate interest traversing. See DAVID COHEN, LAW, SEXUALITY, AND SOCIETY: THE ENFORCEMENT OF MORALS IN CLASSICAL ATHENS 2–3 (1991).

At least, what is meant by reference to the “right to marry” has been accepted to be a fundamental right that is protected against unwarranted state interference. See Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("[T]he right to marry is of fundamental importance for all individuals."); Loving v. Virginia, 388 U.S. 1, 12 (1967) (stating that freedom to marry is "one of the vital personal rights essential to the orderly pursuit of happiness by free men" under the Due Process Clause of the Fourteenth Amendment); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (finding that marriage is one of the "basic civil rights of man"); see also Turner v. Safley, 482 U.S. 78, 95–96 (1987) (holding that a prisoner’s right to marry is constitutionally protected).

See Zablocki, 434 U.S. at 384.

It may be an accident of American history that the private aspect of marriage did not engulf the practice sufficiently to render it a basic liberty of contract or a “simple act of consent.” Feldman, supra note 6, at 103 (noting that if the Puritans had their way, legal theories supporting the regulation of marriage in the United States, at least, would have less to do with rank religiosity disguised as tradition).

culture may also reinforce a fundamental value that the decision whether and to whom to marry is among life's meaningful acts of self-definition with which the government is forbidden to interfere with by erecting barriers of invidious discrimination.\textsuperscript{174}

As noted earlier, privacy, like liberty, presumes a freedom of will that includes freedom of thought, belief, expression, and certain intimate conduct.\textsuperscript{175} It is in this regard that privacy erects a barrier setting limits of society over the individual.\textsuperscript{176} The Supreme Court has identified at least two significant formulations supporting this conception of privacy interests: the Fourth Amendment protection against unreasonable search and seizure and the Fourteenth Amendment protection against unwarranted intrusions upon liberty.\textsuperscript{177} As recently as \textit{Lawrence}, the Supreme Court reasserted that an important constitutional protection of privacy emanates from the exercise of liberty as understood under the Court's reading of the Due Process Clause of the Fourteenth Amendment to the Constitution.\textsuperscript{178}

\begin{footnotesize}
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\item But see ROSEN, supra note 12, at 130 (noting the apparent skepticism that should accompany the notion that \textit{Griswold} is properly viewed as a "paean to the sanctity of marriage").
\item Of course, some theorists doubt the moral good of personal autonomy or private life. \textit{See}, e.g., Robin L. West, \textit{Constitutional Skepticism}, 72 B.U. L. REV. 765, 774 (1992) (noting that personal autonomy may serve the ends of private hierarchies of power); \textit{cf.} Richard A. Posner, \textit{The Moral Minority}, N.Y. TIMES, Dec. 19, 1999, § 7, at 14 (reviewing GERTRUDE HIMMELFARB, \textit{ONE NATION, TWO CULTURES} (2001)) ("Unless we want to go the way of Iran, we shall not be able to return to the era of premarital chastity, low divorce, stay-at-home moms, pornography-free media and the closeting of homosexuals and adulterers.").
\item Privacy should be an ends in itself. Often, however, the conception of privacy is either confused with closely resembling interests or is inappropriately defined by its relationship to other interests and meanings. For example, interests in solitude, secrecy, and individuality are confusingly balanced against openness, public exposure, and societal values instead of conceiving of privacy on its own regard.
\item See Planned Parenthood of Se. Pa. \textit{v.} Casey, 505 U.S. 833, 847-48 (1992) (stating that "there is a realm of personal liberty which the government may not enter"); Katz \textit{v.} United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (arguing that the Fourth Amendment is violated when an expectation of privacy is invaded and it is one that society is willing to recognize as reasonable).
\item Lawrence \textit{v.} Texas, 539 U.S. 558, 562-63 (2003) (stating that there are spheres in our existence where the state should not be present). Going a step further, Randy Barnett has urged that the Supreme Court currently appears to be on a course of entirely redefining the right of privacy as a right of liberty. See Randy E. Barnett, \textit{Justice Kennedy's Libertarian Revolution: Lawrence v. Texas}, 2002-2003 CATO SUP. CT. REV. 21, 21. Barnett notes that if the theory of "privacy" set forth in \textit{Lawrence} is taken seriously by the Court in future cases, it may represent "nothing short of a constitutional revolution." \textit{Id}. Pushing the point further, Barnett notes
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F. Protection of Individual Independence

In addition to the constitutional conceptions sustaining the protection of privacy, the common law has found privacy interests rooted in first principles concerning the value of human dignity and the desire for control of self-disclosure. Sensationalist journalism, fed by our implacable appetite for rumors, gossip, and scandal, has yielded a robust common law privacy jurisprudence. This common law represents the idea that knowledge of others inevitably leads to knowledge of self. Moreover, the common law recognizes, that this knowledge of self becomes the object of personal regard and non-disclosure. In other words, unwanted gossip is often the target of contemporary protections of common law privacy.

Few, if any, would deny that upon meeting a stranger, the acknowledgement by the stranger, “I have heard so much about you,” beckons a response as to what had been heard. This natural sentiment seems to follow from the contradiction

that in Lawrence, Justice Kennedy puts “rhetorical distance” between the right of privacy protected in Griswold and the liberty right protected by Lawrence. Id. at 34. He supports this conclusion by noting that Justice Kennedy only once used the words “right of privacy” (apart from quotations from the grant of certiorari from a previous case discussing Griswold) in his majority opinion, but in contrast, Justice Kennedy used the word “liberty” “at least twenty-five times.” See id. Certainly, that the Lawrence court describes petitioners’ conduct as “an exercise of their liberty,” suggests that in some liberty cases, the Court may urge that the government must justify its statutory restriction, rather than requiring the citizen to establish that the liberty being exercised is somehow “fundamental.” Lawrence, 539 U.S. at 564; see also Michael H. v. Gerald D., 491 U.S. 110, 122 (1989). In this manner, once an action is deemed to be a proper exercise of liberty (as opposed to license), the burden shifts to the government. This is significant, in part, in Barnett’s view, because “[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.” See Barnett, supra, at 33. Barnett’s analysis seems fair, if not completely persuasive. Even those who maintain a degree of intellectual unease with Justice Kennedy’s newly established connection between privacy and liberty in Lawrence, may find comfort knowing that Griswold’s emanations, penumbras, and zones of privacy are philosophically connected to a liberty-centered view of the Constitution; a view that sees natural law as persuasive as enumerated rights as a basis for constitutional adjudication. See, e.g., Rosen, supra note 12, at 131 (echoing the sentiment that there are roots of natural law Lochnerism in Griswold). At any rate, the argument urged is that the Court is reestablishing a broken connection between privacy and liberty, rather than attempting a wholesale invention.


180 Id.
between our appetite for information about others and our desire to control disclosures of self.

Privacy performs both an individual function as well as a social function: free society is enhanced through the personal development of its individual members whose personal growth is fostered through the freedom of self-evaluation that blossoms under the protections of control of self-disclosure. Hence, privacy promotes the "vital diversity of speech and behavior" essential to a healthy democracy. To be sure, the protection of privacy encompasses two interests. It grants individual autonomy over disclosure of self and mitigates the harmful effects caused by unauthorized surveillance. Consequently, the protection against disclosure by others is laden with similar values—albeit differing legal interests—supporting the protection against state invasions of privacy.

Too often, it seems courts proceed in analyzing privacy questions as if the pivotal issue before them requires a consideration of when the law should prohibit the disclosure of a person's private information by a government or private actor. This question begs for a certain class of answers that frequently disfavor imposing limits upon disclosure. Samuel Warren and Louis Brandeis argued that the pertinent question for privacy is whether the "sacred precincts of private and domestic life" ought to be sealed from unauthorized invasion. For Warren


182 See Calder v. Bull, 3 U.S. 386, 388 (1798) (recognizing that an act of the legislature contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority merely because the majority has spoken).


184 See William L. Prosser, Privacy, 48 CAL. L. REV. 383, 383 (1960) (noting that Warren and Brandeis' law review article is one of the most influential legal periodicals in American law).

185 See Warren & Brandeis, supra note 179, at 195. Apparently, what became a seminal law review piece on the normative impulse for judicial enforcement of common law privacy interests was co-authored when Samuel Warren was affronted by a story published about his family's private life by an obsessive and ruthless
and Brandeis, privacy was protectible to keep the boundaries "of propriety and of decency" from being exceeded.\textsuperscript{186} It is a priori that the protection against disclosure, not the promotion of disclosure, is the aim of privacy.\textsuperscript{187}

In simple formulation, Warren and Brandeis conceived of privacy as a protection arising from a liberty interest that safeguards an individual's inviolate personality. For Warren and Brandeis, privacy is rooted in the protection of an individual's thoughts, emotions, and sensations expressed in writing or in conduct.\textsuperscript{188} As such, privacy denotes a right protecting expression that, once disclosed, necessarily creates an injury to the honor and dignity of the individual. In other words, the facts relating to one's private life that one has seen fit to keep private should not be disclosed without an individual's authorization.

Notwithstanding that there are common roots in the principles underlying the right of privacy, courts have not shown serious inclination to systematically assess the law for privacy.\textsuperscript{189} In fact, courts have a tendency to express confusion or doubt about the basis for the law of privacy rather than harmonize or make sense of the case law.\textsuperscript{190} Courts rarely conceive of privacy as a unifying principle because of doubts about the normative appropriateness of doing so.\textsuperscript{191} Indeed, it is true enough that a court is likely to fail in its attempt to derive a core value for privacy by searching positive law. For some time now, the protection of the right of privacy has been accomplished through

\textsuperscript{186} See Warren & Brandeis, supra note 179, at 196; see also RESTATEMENT (SECOND) OF TORTS § 652D (1977).

\textsuperscript{187} There are important interests supported by deterring clandestine invasions of privacy and preventing the involuntary broadcast of private communications. Warren and Brandeis recognized that "[t]he intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual." Warren & Brandeis, supra note 179, at 196.

\textsuperscript{188} See id. at 195.

\textsuperscript{189} To be sure, there is no such thing as a systematic conception of "privacy law." The doctrinal basis to the law of privacy springs from amorphous roots that, thus far, have been unyielding to simple analysis.

\textsuperscript{190} See Jeff Kosseff, Note, The Elusive Value: Protecting Privacy During Class Action Discovery, 97 GEO. L.J. 289, 313 (2008).

a patchwork of laws and regulation. This depth and breadth of privacy law exceeds the practical necessity of providing a court seeking to resolve the matter before it with guidance on a conceptual account of privacy.

Particularly with regard to federal constitutional questions, distinctions among differing protections of privacy are sometimes bolstered by reference to cases that conflate into one matter what are actually two distinct issues. Those cases confuse whether privacy should be protected in a given circumstance with whether it has already been protected as such. Often, when courts are addressing the latter matter, privacy is relegated to an issue about the meaning of privacy and its use in a specific context. But when, more appropriately, the former is addressed, a court will examine what is being protected and why.

Though courts often have not treated the matter as such, the question, what should be protected by privacy, is analytically distinct from whether privacy has protected a given area or subject matter. The latter question, dealing primarily with precedent and tradition, is likely to result in conclusory answers aimed at rejecting the arguments favoring privacy—especially when a court poses an answer to the latter question as if it were directly addressing the former question.

Under the rubric of the right of privacy, the Court, for example, has discretely acknowledged a right to abortion, contraception, marriage, and rearing of children. This grocery

192 Kosseff, supra note 190.
193 See id.
194 Of course, this type of confusion is reminiscent of the courts' confusion over the meaning of liberty as a right of substantive due process, notwithstanding that the concept of liberty is fundamental to American notions of freedom, individuality, and the democratic process.
195 Too often, courts follow an analysis that ultimately requires the court to resuscitate a weakened conception of privacy after the court has nearly killed it through prior analysis.
196 Traditions are important, but only a rare tradition should override the fundamentally American tradition that past practices—merely because they are past practices—shall not become excuses to isolate or devalue groups who cannot exercise majoritarian political power. History and tradition must be given sufficiently broad girth to allow a court's reach to grasp protected interests that once were viewed as unprotected without turning the court's grasp into limitless judicial discretion or unbounded judicial fiat.
A list approach to privacy has the effect of reducing and diffusing the rhetorical force of the right to a highly discretionary interest of individuals or a weak impediment to countervailing interests of government, which courts across the country too often uphold or reject at will.

Answers to the questions what is it that individuals find worthy of protecting in the sphere of privacy—however we agree to define the concept—and how best can policymakers give that desire sufficiently clear articulation to allow courts to vindicate privacy interests when appropriate, are worth pursuit because we should be concerned about the appropriate answer to the question: What is privacy to the people it protects?

Themes that are invoked repeatedly throughout constitutional, statutory, and common law approaches to the protection of privacy include: (1) the right to be let alone—Samuel Warren and Louis Brandeis' famous formulation for the right to privacy; (2) limited access to the self—the ability to shield oneself from unwanted access by others; (3) secrecy—the concealment of certain matters from others; (4) control over personal information—the ability to exercise control over information about oneself; (5) personhood—the protection of one's personality, individuality, and dignity; and (6) intimacy—control over, or limited access to, one's intimate relationships or aspects of life. Generally, the essential elements overlapping the areas of common law privacy involve the offensive nature of the intrusion or disclosure, whether there is a legitimate reason for the disclosure, and whether the information is of a private nature.

(recognizing a woman's right to have an abortion before fetal viability without undue interference from the state); Carey v. Population Servs. Int'l, 431 U.S. 678, 689–90 (1977) (recognizing a right to sell or distribute contraceptives); Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 498–99 (1977) (recognizing a right of extended family members to live together); Roe v. Wade, 410 U.S. 113, 154 (1973); Eisenstadt v. Baird, 405 U.S. 438, 447–49 (1972) (recognizing a right of individuals, regardless of marital status, to use contraception); Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing a right to marry); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (recognizing a right of married couples to use contraception); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (recognizing a right to avoid sterilization on the ground that "[m]arriage and procreation are fundamental to the very existence and survival of the race").

188 See generally Warren & Brandeis, supra note 179.
199 See generally id.; see also RESTATEMENT (SECOND) OF TORTS § 652D (1977).
More generally, there are three dimensions of privacy: (1) a physical aspect capable of invasion of space or self, (2) an informational aspect capable of invasion through unauthorized disclosure, and (3) a decisional aspect capable of invasion by force of authority, technological fiat, or formal and informal power. Each dimension of privacy represents an instance where control over disclosure of self is the interest that privacy protects. But, unlike informational aspects of privacy, the protection of space and self from physical invasion and the protection of individual decision making from forms of authoritative restriction evoke the desire to protect disclosures of self as much as expressing the desire to protect the self against unauthorized invasion or exposure of thoughts, sensations, emotions, or identifying portraiture (for example, the dignity of choosing to raise a child as a Muslim rather than a Christian). Ostensibly, these interests concern how we relate to each other in a society that respects individual liberty and free expression through communication in the public sphere.

Privacy is a liberty interest. Like liberty, privacy presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. When assessing the liberty interest at stake when an individual's privacy might be threatened by state conduct, it is important to frame the

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200 See Cohen, supra note 181, at 1377.

201 Informational privacy is "an individual's claim to control the terms under which personal information—information identifiable to the individual—is acquired, disclosed, and used." Jerry Kang, Information Privacy in Cyberspace Transactions, 50 STAN. L. REV. 1193, 1205 (1998) (quoting INFORMATION INFRASTRUCTURE TASK FORCE, PRIVACY AND THE NATIONAL INFORMATION INFRASTRUCTURE: PRINCIPLES FOR PROVIDING AND USING PERSONAL INFORMATION (1995)).


203 To be sure, freedom of expression is, itself, a liberty-sustaining value. Difficult questions, however, arise when not speaking or not being spoken to is also liberty enhancing by being both a right of expression and a right of privacy. See, e.g., David G. Post, Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace, 1996 U. CHI. LEGAL F. 139, 147–48; Lee Tien, Who's Afraid of Anonymous Speech? McIntyre and the Internet, 75 OR. L. REV. 117, 120 (1996).

204 The concept of liberty embodied in Fourteenth Amendment embraces liberties guaranteed by the First Amendment, such as those relating to religion. See, e.g., Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 n.3 (1973); Cantwell v Connecticut, 310 U.S. 296, 303 (1940).
question at issue in a manner that is not tautological and that does not, ipso facto, undercut the scope of the interest.\textsuperscript{205}

Consistent with the Court's narrowcasting of privacy rights, the Court has denominated certain important interests as protecting \textit{parental privacy}; the first cases recognizing the constitutional right of family privacy involved state intrusions upon families. The Supreme Court laid the framework for the constitutional right of parental privacy in \textit{Meyer v. Nebraska}\textsuperscript{206} and \textit{Pierce v. Society of Sisters}\textsuperscript{207} in the early 1920s. These cases established that parents had the right to make decisions concerning the educational welfare of their children.\textsuperscript{208} As a result, parents, ostensibly, were afforded a privacy right of protection from state intrusion into the family unit.\textsuperscript{209} The Court moved closer to granting an express right of privacy in \textit{Prince v.}

\textsuperscript{205} In drawing the scope of the liberty interest at stake, courts must be mindful of the potential far-reaching consequences upon private human conduct if the state could invade the dignity of free persons without boundaries or limitations upon government access to our private lives. The application of fundamental rights ostensibly imposes a basic limitation circumscribing the scope of government power: the majority may act through the power of the legislature, but may not compel an individual to forfeit a fundamental right unless the government's interest is sufficiently substantial to overcome the individual right.

\textsuperscript{206} 262 U.S. 390 (1923).

\textsuperscript{207} 268 U.S. 510 (1925). Despite the fact that the framework of constitutional privacy was laid down during the early twentieth century, it has continued to successfully weather highly destructive storms. See, for example, Bowers v. Hardwick, 478 U.S. 186, 191–95 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003), where the Court found that no fundamental right was implicated although the challenged state action—laws prohibiting homosexual conduct as sodomy—threatened to deprive the individual of a means of intimate sexual expression. Likewise, in \textit{Michael H. v. Gerald D.}, 491 U.S. 110, 121, 127 (1989), the Court found that no fundamental right existed, although the stakes of the governmental action included the extinguishment of a biological father's established relationship with his daughter and his complete exclusion from her life.

\textsuperscript{208} But cf. Barbara Bennett Woodhouse, "Who Owns the Child?": \textit{Meyer and Pierce and the Child as Property}, 33 WM. & MARY L. REV. 995, 997 (1992) (arguing that \textit{Meyer} and \textit{Pierce} "were animated ... by ... a conservative attachment to the patriarchal family, to a class-stratified society, and to a parent's private property rights in his children and their labor").

\textsuperscript{209} The Court has determined that the state has an interest in the family because it is the basic unit of socialization and education. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 399 (1978) (Powell, J., concurring) ("The State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people.").
Massachusetts by holding that the family unit, in the confines of the home, cannot be subject to state intrusion.

Defining parental privacy has proven to be no easy task for courts. Similar to the right of privacy in different contexts, assurance of the right within the family unit depends on the limit of the state's legitimate interest in regulating matters that would otherwise run afoul of parental privacy. This has been difficult to determine partly because the federal constitutional right of privacy is often analyzed under the jurisprudence of the Fourth Amendment regardless of whether, under the particular circumstances, this jurisprudence is well-suited to encompass issues arising from parental decisions concerning the educational welfare of their children. But regardless of these jurisprudential shortcomings and qualifications, a distinctive principle of the Fourth Amendment is its embodiment of a more outright balancing approach to privacy protection. Although the Court has obscured this balancing occasionally by adopting rules demarcating certain police practices as per se unreasonable, the core of the Fourth Amendment is neither a warrant nor probable cause, but rather, is reasonableness.

In Wisconsin v. Yoder, the Court allowed Amish parents to exclude children from compulsory schooling, recognizing parents'
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free expression rights. The decision is considered both landmark and controversial due to its recognition and definition of parental rights under the Free Exercise Clause and its bold invalidation of an apparently neutral and generally applicable law. The Court defined parents’ rights to free exercise of religion as inclusive of the parental privacy right to establish a home and raise children under the control and direction of parents and their beliefs.

Yoder is the first case where the Court, ostensibly, found parental privacy coextensive with the right to religious expression. In explaining why strict scrutiny applied to the Wisconsin law, the Court expressly referred to the law’s burden on the claimants’ Free Exercise rights. Moreover, the Court pointed out that the result would be otherwise if the parents were motivated by “secular considerations” in objecting to sending their children to school, thus, implying that the law’s interference with autonomy in the parents’ child-rearing decisions alone would not have been enough to trigger strict scrutiny.

Similarly, Pierce stands for the general liberty-based proposition that children may not be forced to attend public schools. There, two operators of private schools, the Society of the Sisters of the Holy Names of Jesus and Mary and the Hill Military Academy, sought and secured injunctions against Oregon’s enforcement of a state law requiring public school

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216 Id. at 234.
217 See id. at 232–34; see also HAMILTON, supra note 123, at 219–20 (arguing that Yoder should have been overruled, not precisely because of the right of parental privacy issue, but rather for the decision’s repudiation of the rule of law and its support of mandatory religious accommodation).

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. . . . [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them.

Cf. Warren & Brandeis, supra note 179, at 198 (footnote omitted). The common law recognized that one did not necessarily forfeit a privacy interest in matters made part of the public record, however, the privacy interest was diminished and another who obtained the facts from the public record might be privileged to publish it. See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 494–95 (1975) (“[T]he interests in privacy fade when the information involved already appears on the public record.”).

218 See Yoder, 406 U.S. at 219.
219 See id. at 215.
Ultimately, the Court struck down the state law, upholding the right of parents to send their children to private school throughout the adolescent years. The holding included the Court's determination that the Oregon law interfered with the right of parents and guardians to direct the upbringing of their children.

Not surprisingly, autonomy of choice is recognized in both religious expression and parental decision-making. This reinforces the liberty interest of parents in rearing their children, which is enhanced rather than diminished when religious freedom and parental privacy are treated as coordinate constitutional values.

Questions of liberty, freedom, and religion that traverse the classroom and enter the courtroom involve difficult cases that should not be resolved by resorting to the Establishment Clause in isolation. Instead, these cases must be resolved in light of the full scope of the liberty interest at stake, which includes the right of parental privacy. It should be axiomatic that parents may rely upon an independent, fundamental right of parental privacy to safeguard them from state actions implicating religion and the educational welfare of their children. Indeed, given the risks of majoritarian tyranny by a numerically dominant political majority, our understanding of a liberty-centered right of parental privacy should serve to illuminate the conflicting interests at issue in cases involving religious practices in public schools.

Courts must climb the appropriate legal pedestals with the goal of humanizing our legal system's scattered theories and appropriately maximizing parental interests where they matter most. The issue disputed in Newdow may take us far toward finding a way out of some of the conceptual approaches currently in use, yet largely failing to resolve conflicts arising from illicit state-sponsored religious practices in public school.

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221 See id. at 531-35.
222 See id. at 534-36.
223 See id.
III. Conclusion

An assessment of the liberty interest threatened by state conduct must be framed in a manner that is neither tautological nor outcome deterministic. In drawing the scope of the liberty interest at stake, courts must be mindful that the resolution of claims presenting liberty interests may involve far-reaching consequences upon private human conduct when the state is given authority to invade the dignity of free persons without unambiguous limitations upon government access to our private lives.

Assessing challenges to state actions implicating religion in public education by filtering the strength of the asserted interest of the parent or child through the lens of protections of parental privacy reinforces the constitutional injunction against the state's forcing any individual to profess a belief or disbelief in any religion—including a religious doctrine that receives majority support by the polity. When state actions implicating religion permissibly occur inside the public schoolhouse, the integration of parental privacy protections with the limits on state power imposed by the Establishment and Religious Freedom Clauses properly ensures that the government is required to successfully surmount the requisite constitutional hurdles by showing that the competing interests of children, parents, and the state can be carefully balanced in the state's favor.

That the freedom of religious expression and the right of privacy are interrelated in a manner that favors both is not a novel idea; many Americans have long understood religion to be a personal and private affair shielded from restriction and interference by the state. The laws of parental privacy and the anti-establishment of religion are fundamentally concerned with serious violations of certain forms of personhood and human dignity, namely those that threaten an individual's free will and independence. In the public school context, alleged Establishment Clause violations must be assessed against both the strength of the parental right of privacy at stake as well as the coercive tendency of student participation in a school-sponsored religious exercise. In this light, even school-sponsored religious exercises having arguably nominal coercive impact upon

students will not pass constitutional scrutiny where a widely-acknowledged parental right of privacy is at stake. The stronger the parental right of privacy, the less tolerant a court must be in its assessment of the degree of coercion permitted in the school-sponsored religious exercise. The Court should make it plain that a wall of separation divides ceremonial celebration from religious indoctrination, which means children cannot be coerced into pledging to God while getting a public education.