

ABSTRACT

Title of Dissertation: CULTURE WARRIORS GO TO COURT: THE SUPREME COURT AND THE BATTLE FOR THE “SOUL” OF AMERICA

Michael Odell Spivey, Doctor of Philosophy, 2015

Dissertation Directed by: Professor Wayne McIntosh
Department of Government and Politics

The notion of a “culture war” has become a fixture in the academic writing about current American politics, in the popular press and in the cultural zeitgeist. Theorists have suggested that there is a cultural fault line dividing cultural progressives and religious traditionalists. This fault line, it is argued, stems from a basic epistemological disagreement as to whether there is transcendent “truth.” According to James Davidson Hunter, these different worldviews lead to policy polarization and cultural warfare. Hunter goes on to suggest that courts (and especially the Supreme Court) are focal points for this conflict.

This work analyzes the nature and scope of battles over culture war issues in the United Supreme Court. It relies on a popular description of key culture war issues: God, guns and gays. The Supreme Court’s treatment of each of these issues is analyzed in turn. In addition, the Supreme Court’s abortion jurisprudence is also examined.

With respect to each issue, key Supreme Court cases are identified. The briefs filed by the parties are then summarized and coded, identifying key “modalities” of arguments and specific arguments themselves. All amicus briefs are similarly analyzed and coded. The key Supreme Court decisions are then analyzed in light of arguments raised by parties and amici.

Based upon this analysis, it appears that there is not one culture war but rather an interrelated set of cultural battles. Relatedly, there has been an evolution of cultural warfare over time. Some issues have become largely settled (at least within the Court's jurisprudence); others are on their way to being settled and still others present continuing opportunities for cultural clashes.

The work concludes by suggesting that the sexual revolution lies at the heart of cultural warfare. Moreover, cultural battles are over the "meaning" of America, that is, what social values will be protected under law.

CULTURE WARRIORS GO TO COURT:
THE SUPREME COURT AND THE BATTLE FOR THE “SOUL” OF AMERICA

by

Michael Odell Spivey

Dissertation submitted to the Faculty of the Graduate School of the
University of Maryland, College Park in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy
2015

Advisory Committee:

Professor Wayne McIntosh, Chair
Professor Karen Kaufmann
Professor Frances Lee
Professor Irwin Morris
Professor Susan Dwyer

©Copyright by
Michael Odell Spivey
2015

TABLE OF CONTENTS

List of Tables and Charts.....	iv
Chapter 1	1
War or Rumours of War?	3
The Supreme Court and Culture Warfare.....	7
Models of Judicial Behavior.....	10
Constitutional Interpretation and the Culture Wars.....	19
Dissensus or Cultural Warfare.....	23
Methodology.....	27
Chapter 2	40
A Brief History of the Court and Culture War Issues	40
How Important Are Culture War Issues in the Supreme Court.....	43
Does “Party” Matter in Court Decisions?	46
Amici, the Culture War and Conflict Extension	49
Do Amici Matter?.....	55
Methodology.....	58
Chapter 3: Guns.....	68
Gun Rights and the Culture War	69
<i>Heller</i> (and <i>McDonald</i>)	73
The Parties and their Arguments	75
Amici and Their Arguments.....	79
Amici and the Culture War.....	92
The Court, History and Ethos.....	96
Whither Hunter’s Culture War?	104
Chapter 4: Gay Rights	107
<i>Bowers v. Hardwick</i> : The Parties’ Briefs	111
Amici and Their Arguments.....	115
The Court’s Decision.....	121
<i>Bowers</i> Revisited: <i>Lawrence v. Texas</i>	123
The Parties and Their Arguments.....	125
Amici and Their Arguments	132
The Court’s Decision.....	144
<i>Lawrence</i> and the Culture War over Gay Rights.....	150
Chapter 5: The Battle Over Abortion	157
<i>Roe v. Wade</i> : The Parties’ Briefs.....	162
Amici and Their Arguments.....	172
A Clash of Moral Worldviews	176

<i>Roe v. Wade</i> : The Decision	184
Rethinking <i>Roe</i>	189
Overruling (?) <i>Roe</i> : <i>Planned Parenthood v. Casey</i>	198
The Parties Briefs	199
Amici Fight the Culture War	205
Overruling (?) <i>Roe</i> : The Court’s Decision	214
Abortion and the Culture Wars.....	220
Chapter 6: God: The Battle Over Religion in Public Life.....	225
Religious “Schisms” and the First Amendment	226
<i>Employment Division v. Smith</i> : Peyote and the Free Exercise of Religion	235
<i>Hobby Lobby</i> : A New Front in the Culture Wars.....	241
The Parties’ Arguments.....	245
Amici and Their Arguments.....	252
The Court’s Decision.....	268
The Shape of Cultural Battles to Come.....	274
Chapter 7: The Least Polarized Branch?.....	281
Is Cultural Warfare Increasing?	283
Cultural Fault Lines.....	287
The Quest for Constitutional Certainty	290
“Balancing” (Or Not Taking Sides in the Culture War)	293
A Sexual Revolution, Not a Culture War.....	298
Constitutional Stories	303
The Future of the Culture Wars.....	309
Appendix 1: Number of Briefs Filed in the 38 CQ Culture War Cases	311
Appendix 2: Organizations Filing Amicus Briefs in CQ Culture War Cases	312
Bibliography	327

LIST OF TABLES AND CHARTS

Chart 2.1: Organizations Filing Briefs Most Frequently (Main Author).....	52
Chart 2.2: Topic Briefs of Organizations Filing the Most Briefs (Main Author).....	53
Chart 2.3: Top Filing Organizations with Percentage of Rate on Prevailing Side	58
Table 3.1: <i>Heller</i> Petitioner Amici.....	81
Table 3.2: <i>Heller</i> Respondent Amici	82
Chart 3.1: <i>Heller</i> Respondent Modalities	83
Chart 3.2: <i>Heller</i> Petitioner Modalities.....	84
Chart 3.3: Petitioner Amici Arguments	88
Chart 3.4: Respondent Amici Arguments.....	89
Table 4.1: <i>Bowers</i> Petitioner Amici.....	116
Table 4.2: <i>Bowers</i> Respondent Amici	116
Chart 4.1: <i>Bowers</i> Petitioner Amici Modalities.....	120
Chart 4.2: <i>Bowers</i> Respondent Amici Modalities.....	120
Table 4.3: <i>Lawrence</i> Petitioner Amici	133
Table 4.4: <i>Lawrence</i> Respondent Amici.....	134
Table 4.5: Amici in both <i>Bowers</i> and <i>Lawrence</i>	135
Chart 4.3: <i>Lawrence</i> Petitioner Amici Modalities	139
Chart 4.4: <i>Lawrence</i> Respondent Amici Modalities.....	143
Table 5.1: CQ Abortion Cases	160
Table 5.2: <i>Roe</i> Appellant Amici	173
Table 5.3: <i>Roe</i> Appellee Amici.....	174
Chart 5.1: <i>Roe</i> Appellant Amici Modalities	175

Chart 5.2: <i>Roe</i> Appellee Amici Modalities.....	176
Chart 5.3: <i>Roe</i> Appellant Amici Arguments.....	177
Chart 5.4: <i>Roe</i> Appellee Amici Arguments	178
Chart 5.5: Planned Parenthood Petitioner Amici Modalities.....	207
Chart 5.6: Planned Parenthood Respondent Amici Modalities	209
Table 6.1: CQ Religion Cases.....	230
Table 6.2: <i>Hobby Lobby</i> Respondent Amici.....	254
Table 6.3: <i>Hobby Lobby</i> Petitioner Amici	255
Table 6.4: Organizations Filing Brief in <i>Hobby Lobby</i> and <i>Casey</i>	255
Chart 6.1: <i>Hobby Lobby</i> Respondent Amici Modalities.....	257
Chart 6.2: <i>Hobby Lobby</i> Petitioner Amici Modalities	258
Chart 7.1: Culture War Specialists.....	286

Chapter 1

In 1991, James Davison Hunter looked at the cultural zeitgeist and found a full scale “culture war” in America. According to Hunter, cultural warriors with sharply differentiated and clearly articulated moral visions were fighting for the very soul of the nation.¹ “[T]he contemporary culture war is ultimately a struggle over national identity—over the meaning of America.” (Hunter 1991, 50) While Hunter conceded that the “meaning” of America has always been contested, he claimed to find new and disturbing fault lines dividing Americans. In Hunter’s telling, the religiously orthodox—Christian fundamentalists, Orthodox Jews and conservative Catholics—joined forces to battle cultural progressives over not just policy issues such as abortion, school prayer, homosexuality or “the meaning of Columbus’ discovery of America” (Hunter 1991, 48), but over competing moral visions for what America should be. Differences in political and public policy positions “can be traced ultimately and finally to [differences in] the matter of moral authority.” (Hunter 1991, 42) The battle was and still is engaged between traditionalists who adhere to “an external, definable, and transcendent authority” and “modernists” who do not. “It is these differences in worldviews that lead to cultural and policy polarization, and ultimately, cultural warfare.” (Hunter 1991, 43)²

¹ To say that there is a culture war begs the question of what culture really is. Hunter does not fully explain what he means by culture. According to Jacoby (2014), the classic description of American culture is liberalism tempered by democracy. . . .” (Jacoby 2014, 1) Jacoby also cites definitions by Smith (1993), Almond and Verba (1963), Inglehart (1997) and Douglas and Wildavsky (1982). For my purposes, it is not necessary to define culture as a predicate to my analysis of cultural warfare at the Supreme Court decisions. Rather, I will simply focus on the issues identified by those that believe they are engaged in cultural warfare.

²Hetherington, *et al.* (2010) also argue that differences in worldview lead to cultural and political warfare and like Hunter, they suggest that the disagreements are not just about policy issues but also about “the correct way to lead a good life. . . .” (Hetherington 2010, 5) Unlike Hunter they do not believe that such differences are the result of different views regarding moral authority. Rather, differing “worldviews” derive from different cognitive styles and cognitive styles differ as a result of differing levels of what they refer to as the “authoritarian disposition.” For Hetherington, *et al.* “[A]merican politics are undergoing a *worldview evolution* in which politics is increasingly contested over issues for which preferences are structured by authoritarianism.” (Hetherington, *et al.* 2010, 13 (emphasis in original))

Hunter also argues that the rules of the culture war are set by the Supreme Court and that, in fact, the Court has become a key battleground for moral traditionalists and moral modernists. While this work will demonstrate that in the last fifty years, the Court has been a locus of continuing cultural conflict, it is my thesis that while culture warriors have gone to court, the battle is not a simply one between two camps with differing views of moral authority. Rather, the conflict is much more nuanced. It involves various types of culture warriors with different but often overlapping agendas. The war is led by a variety of cultural elites³ that differ in their views as to what constitutes a “good” or “just” society. They thus have significant differences on their preferred policy outcomes and they differ in their views as to the proper role of the Supreme Court in culture war debates.

But the culture war has also been democratized. As the next chapter will demonstrate, there has been a continuous rise in the number of groups fighting the culture wars at the Court. And in contrast to fifty years ago, briefs are no longer being filed by only large, national groups. Now, a multitude of homegrown groups also vie for the Court’s attention. If the culture war is being fought by elites, now it is being fought by a larger number of more diverse elites.

As we will see, there has also been conflict extension in the culture war. Originally, culture war battles focused on a handful of issues—religion in the public square and abortion being the original ones, joined later by homosexual rights and gun rights. But cultural warfare has also spread to other issues, not normally characterized as “cultural”—affirmative action, voting rights, campaign speech, government provision of health care, *etc.* In none of these cases,

³ “Elite” is a notoriously difficult term to define. In his 1957 book, *The Power Elite*, C. Wright Mills defined “elite” as: “those political, economic, and military circles, which as an intricate set of overlapping small but dominant groups share decisions having at least national consequences. Insofar as national events are decided, the power elite are those who decide them”. (Mills at 4-5.) The increasing complexity of society has brought the concept into some disrepute and it is certainly possible to argue that cultural battles are predominantly led by populists discontented with elites’ cultural views. I need not enter into a lengthy discussion of this issue. Suffice it to say that by any definition, Supreme Court justices and advocates that file briefs with the Court are elites.

do basic differences stem from differing moral worldviews, though it is true that those with opposing worldviews are likely to be on opposite sides of these issues. Rather, cultural battles and cultural warfare—at least as it is practiced before the Supreme Court, is more complex. Cultural battles result from differences in class, race, partisanship and ideology. But mostly, they derive from evolving heterogeneity in views among elites over the last fifty years.

War or Rumors of War?

Notwithstanding the intuitive appeal of the culture war model, it has been subjected to extensive and continued criticism. As Hunter has noted, “the criticism has been substantial and emphatic.” (Hunter and Wolfe 2006) Numerous critics have failed to find any evidence of increasing policy polarization. Dimaggio, Evans, and Bryson (1996) conclude that political attitudes were no more polarized in 1996 than they were in 1972 except with respect to abortion.⁴ Evangelical Christians, who are usually viewed as being in the vanguard of any culture war, are apparently no more conservative than they were in 1972 (Jelen 1997). Miller and Hoffman (1999) argue that there has not been a change in “actual attitudes” but only in “social categorization.” Similarly, some researchers find increasing policy differentiation and partisan polarization but not broad cultural polarization (Kaufmann *et al.* 2008). “[W]hile we are certainly *becoming* more polarized in a relative sense, it is less clear that we *are* polarized . . . American voters remain firmly grounded in the center of the policy spectrum . . .” (Kaufmann *et al.* 2008, 64-65).

⁴ Miller and Hoffman (1999) suggest that the paradox of increasing perceptions of cultural warfare and stability in individual attitudes can be resolved by looking at the increasing salience of many social and moral issues. They argue that historical events in the 1970s and 1980s led to both a redefinition of the terms liberal and conservative and increased differentiation of views of in-group members and out-group members.

Steven Brint concluded simply, “There is no culture war in America.” (Brint 1992, 438) Christian Smith and his colleagues (1996), Randall Balmer (1993), Jeremy Rabkin (1999), Wayne Baker (2005) and Thomson (2010) agree. In their short volume, Fiorina, *et al.*, call the culture war a “myth.” “The simple truth is that there is no culture war in the United States—no battle for the soul of America rages, at least none that most Americans are aware of.” (Fiorina 2005, 5) Americans are “closely divided” but not “deeply divided.” According to Fiorina, there are rumors of cultural warfare because “the political figures Americans evaluate are more polarized.” Thomson fails to even find elite polarization. Reviewing 436 articles in both conservative and liberal publications from 1980 – 2000, Thomson concludes that elite culture warriors of various stripes all subscribe to similar “enduring cultural ideals.” (Thomson, 217). Specifically, Thomson argues that cultural partisans: (1) respect religion but are uncertain about its role; (2) use moral frameworks but do not “moralize; (3) believe in individualism but not to excess; (4) respect pluralism within one culture; (5) are ambivalent towards elites; and (6) value moderation. (Thomson, 2) In short, culture war critics agree with Alan Wolfe that America is “One Nation, After All.” (1998)

But in a dialogue with culture war critics (Hunter and Wolfe 2006) Hunter argues that much of the criticism is misplaced. Critics are looking for cultural warfare in all the wrong places and thus, unsurprisingly conclude that there is no culture war.

Hunter suggests that he and his critics define “culture” differently and their different definitional starting points predictably ensure that they will talk past each other. The critics see culture as simply the sum of individual attitudes, beliefs and moral preferences. Such an approach conceives culture narrowly and reduces culture to nothing more than the quantifiable summation of individual views. Hunter rejects this reductionistic approach, pointing out that “all

of the empirical tests of the culture wars hypothesis—*all of them*—have been based exclusively upon individual-level data.” (Hunter and Wolfe 2006, 20) For Hunter, culture is more complex. It is rather a system (or systems) “of symbols and other cultural artifacts, institutions that produce and promulgate those symbols, discourses that articulate and legitimate particular interests, and competing fields where culture is contested.” (Hunter and Wolfe 2006, 20) In short, “none of the critics address the *culture* in culture wars.” (Hunter and Wolfe 2006, 21)

Hetherington, *et al.*, reinforce this point. Conceding Fiorina’s point that the policy differences between the average Republican and the average Democrat is simply “not that large” (Fiorina, 2005), Hetherington, *et al.*, like Hunter, suggest that cultural conflicts are “about core self-understandings of what it means to be a good person and to the basis of a good society.” (Hetherington, *et al.* 2010, 17)

Notwithstanding their theoretical and methodological differences, Hunter suggests that there is in fact broad agreement on a number of empirical questions. First, “virtually everyone agrees that somewhere between 10 and 15 percent of the population occupy . . . opposing moral and ideological universes” and that “one group operates from a biblical foundation that tends toward absolutism that reinforces traditional values, while the other tends toward moral improvisation and, in rare instances, relativism that predisposes its members to ambivalence toward traditional moral codes.” (Hunter and Wolfe 2006, 25) Further, Hunter readily concedes that cultural warfare is not “total war” enlisting broad swaths of citizens. Rather, it is an elite driven phenomenon, with small numbers of highly charged cultural warriors engaged in battle.

In short, while there are significant differences between Hunter and his critics—over the definition of culture, the nature and extent of the culture war and even whether there is a culture war—there is more agreement than first appears. Suggestions of broad cultural polarization

appear to have come mainly from the media which latched onto Hunter's culture war concept seduced by the narrative of conflict inherent in the concept. Hunter has been careful not to reduce cultural warfare to fighting over assorted social issues (Hunter 1991, 48) and he explicitly cautions against assuming significant issue polarization: "In truth, most Americans occupy a vast middle ground between the polarizing impulses of American culture." (Hunter 1991, 43) And Fiorina, while stressing the partisan nature of political polarization, at least implicitly concedes that some cultural warfare exists, though of a limited nature.⁵ Wolfe, in his response to Hunter, arguably concedes even more: "This does not mean that there is no such thing as a culture war; it simply means that the one being fought by partisans and ideologically inclined pundits does not extend very deep into American opinion." (Hunter and Wolfe 2006, 42). While Layman and Green see new political fault lines between the religion and the secular, they nonetheless reach a similar conclusion: "The culture wars are waged by limited religious troops on narrow policy fronts under special political leadership, and a broader culture conflagration is just a rumor." (2005, 61). (*But see* Abramowitz and Saunders, 2008: "[Culture War] divisions are not confined to a small minority of activists—they involve a large segment of the public . . .") and Jacoby, 2014: pronounced difference in value choices by the public "provides forceful empirical evidence for the existence of a culture war in American public opinion." Jacoby 2014, 1.)

Finally, Evans (1997) distinguishes between "strong" culture war theories and "weak" culture war theories. The strong culture war theory, i.e. Hunter's theory, argues that "conflicts over abortion, sexuality, and similar issues are caused by two polarized worldviews." (Evans 1997, 372). Evans argues that this fails to recognize the "social context" of moral values or

⁵ In his response to Hunter, Fiorina "suspects" that the culture war is now showing signs of exhaustion and that "the influence of elites is declining." (Hunter and Wolfe 2006, 86)

worldviews. “[S]ocial groups that cross-cut different worldview attitudes explain more of the variance in moral value attitudes than worldviews do. . . .” (Evans 1997, 396). Contrary to Hunter’s critics, worldviews are important and they lead to real policy differences, but they are not significant in the simplistic way that Hunter suggests. Worldviews and social groups matter.

Notwithstanding the academic disagreement over the nature and existence of a culture war, there is the *perception* that America has been in the midst of a culture war. (Miller and Hoffman, 1999). Perhaps war is not all that significant. Perhaps it is being fought by a limited number of troops and does not affect most “civilians.” Or maybe not. Maybe larger cultural-political differences are at work. But whatever the scope and size of the culture war, there is a public perception that such a war is being fought. It is being fought in state legislatures where abortion restrictions and gay rights are perennial issues. And—it is being fought in the courts, including (and perhaps especially) the Supreme Court.

The Supreme Court and Cultural Warfare

While the culture war is being fought on a number of battlefields, Hunter and even a critic like Wolfe suggests that the Supreme Court has become a singular forum for battles among culture warriors. Hunter points to the significance of the Supreme Court in noting that it is the Supreme Court that sets “the rules by which moral conflict [of the culture war] is to be resolved.” (Hunter 1991, 271) The Supreme Court is central in the culture war not just because it is often the final arbiter in disputes over religion, abortion, free speech and other culture war issues but because the Court defines the very rules by which the war is to be fought. Moreover, it is the Court that decrees not just “what the Constitution legally requires, but what it morally implies as well.” (Hunter 1991, 251)

While Hetherington, *et al.* focus less on the courts than Hunter—instead focusing on how differing worldviews have increasingly differentiated the political parties—they do suggest that “the string of liberal decisions handed down by the Warren Court in the 1950s and 1960s” became a catalyst for increasing cultural warfare.

For those like Fiorina who find little evidence of broad cultural conflict, the Supreme Court is all but absent in their analysis. There are only nine references to the Supreme Court in Fiorina’s book. Unlike Hunter, Fiorina does not consider the Court as a forum for political warfare nor does he suggest cultural polarization on the Court. This may be the product of the focus on partisan polarization and an assumption that the Court is not by its nature partisan.

Somewhat oddly, however, Hunter spends the bulk of his chapter on the Court dealing only with separation of church and state issues. There is no discussion whatsoever of the Court’s role in other high profile culture war issues such as abortion, gay rights, gun control and the death penalty. Rather, to Hunter, the culture war battle within the Court is over the role of religion in a modern, secular democracy. While Hunter never uses the term, he suggests that the Court is simply a “referee” in the battle between religious traditionalists and religious modernists to “reestablish an old or to formulate a new cultural hegemony.” (Hunter 1991, 271) Thus, it is a battle within the Court over the role of religion in society that in turn, shapes the contours of battles over culture war issues.

Wolfe, by comparison, suggests that the Supreme Court may have been the first beachhead in the culture war and that now, due to the rise of a conservative legal establishment, the Supreme Court retains primacy of place in culture war battles. Conservatives have long complained that liberals bypassed the democratic process and used the courts (and especially the Warren Supreme Court) to achieve cultural victories that they could not achieve through normal

democratic processes. Wolfe suggests that the real fighting began later: “Liberals, in fact, may have begun the culture war: their decision to prevent the appointment of Robert Bork to the Supreme Court was accompanied by heated rhetoric about Bork’s views that inflamed a desire for revenge on the part of [cultural conservatives].” While a review of Supreme Court culture war cases shows that the shooting started long before Judge Bork’s nomination, there is little doubt that the nomination battle escalated the stakes in the culture war and helped to bring the Supreme Court front and center in the debate.⁶

While both Hunter and Wolfe suggest that the Supreme Court is a locus in the culture war, they are less clear about the role that Supreme Court justices play in the battle? Are justices simply referees in the culture war, or do they play a more active role? While Hunter sees cultural warfare as stemming from differences in “the matter of moral authority,” nowhere does he suggest that Supreme Court justices themselves differ as to the source of moral authority. He does not suggest that there is a battle between moral traditionalists and moral modernists on the Court. It may be that all justices are in fact moral modernists—after all, every Supreme Court justice going back to at least the beginning of this analysis has been a graduate of an Ivy League law school, schools that are known as sources of moral traditionalism. On the other hand, as of recently, a majority of members of the Supreme Court are Catholic. Perhaps moral traditionalism lurks somewhere beneath their Ivy League credentials. It is also possible that Justices simply keep their modernist and traditionalist views hidden on the grounds that such views are irrelevant to judicial decision-making. Justice Roberts suggested as much in his confirmation hearings when he compared judges to referees, just calling “balls and strikes.”

⁶ It was all but certain that Judge Bork’s cultural views would provoke such a battle. His basic philosophy is summed up in the title of his best known work, *Slouching Towards Gomorrah: Modern Liberalism and American Decline*.

Notwithstanding the shift in metaphor, judges may simply see themselves as “referees” in the culture war. In any case, it is worth a brief detour to discuss what Justices do (or what they think they do) and what political scientists think they do.

Models of Judicial Behavior

A central preoccupation of political scientists studying judicial behavior is the question of how to understand judicial decision making. Three primary theoretical models have been used to explain judicial behavior: the legal model, the attitudinal model and the strategic model. (Some also include institutional explanations as a fourth model. *See* Kapiszewski 2011, 475). The models are not mutually exclusive but until recently, they have been viewed as competitive. For present purposes, each does have distinct implications for thinking about the Supreme Court and the culture war.

The oldest model is the legal model. In its naïve form, the legal model suggests there is something called “the law” that justices “find” rather than “make.” Justices may have their own policy preferences, but in deciding cases, they ignore these and base their decisions on “neutral principles.” (Wechsler 1959) In doing so, they are constrained by the Constitution’s words themselves, by the intent of the authors of those words and by precedent. Judges err when they fail to pay these appropriate heed and let their policy preferences affect their judicial judgments. In this sense, the legal model is both an empirical and a normative description of judicial decision-making. Though some political scientists believe that legal considerations inform Supreme Court decisions, virtually none subscribe to a mechanistic model of Supreme Court decision making. (*See. e.g.* Bailey and Malzman (2008, 381): “we find strong evidence that legal principles are influential.”)

At the other extreme, the attitudinal model argues that Supreme Court justices are simply political actors like other political actors. They seek to advance their own policy preferences. (Segal and Spaeth 1993) While justices may cloak their opinions in the language of precedent, neutral principles or original intent, analysis of their opinions give away the game. It is a justice's values and attitudes that are determinative of his or her decision in an individual case. (Rohde and Spaeth 1976; Segal and Spaeth 1993) Further, in its purest form, the attitudinal model suggests that justices are fundamentally unconstrained in seeking to enshrine their policy preferences in law. Precedent, for example, can be ignored or easily cherry-picked to support a justice's policy preference in an individual case. For hard-core attitudinalists, a single variable explains case level judicial decision-making. Justices are free to vote their sincere policy preferences and they do so.

In the strategic model, drawing from the rational choice paradigm, justices are sophisticated, rational actors seeking to advance their policy preferences but they do so within an institutional framework and the constraints that framework imposes. To give an obvious example, a Supreme Court justice cannot set his or her policy preferences into law without four other votes. Accordingly, a justice may need to alter or modify his or her policy preferences to obtain the requisite majority. "Justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, or the choices they expect others to make, and of the institutional context in which they act." (Epstein and Knight 1998, xiii)

In the 1990s, the attitudinal model came to dominate analysis of Supreme Court decision-making, only to be incorporated into a strategic-attitudinal approach in the last decade. (See Epstein and Knight, 2000). But both versions were not without their fierce critics. While there

are many critiques and the attitudinal model, one dominant theme is that it is too simple and does not comport with what judges think they do and say they do. While most authors concede that ideology or policy views affect a Justice's decision in a case (and some Justices have conceded as much), the attitudinal model seeks to explain judicial decision based upon one variable—a judge's policy preferences. Even in its revised form and with increased focus on strategic bargaining, the model sought to explain judicial decision making primarily based upon a social-psychological paradigm. Recent work rejects this view or at least, complicates this view.

Songer (2012), while conceding that policy views and ideology do affect justices' decision-making, nonetheless concludes that the attitudinal model is simply not accurate. It cannot explain the failure of courts to overturn precedents with which they attitudinally disagree. Analyzing 102 "liberal" precedents from the late Warren Court, Songer demonstrates that while the Court "moved decisively in a conservative direction" between 1968 and 2000, it failed to overrule a majority of the Warren Court precedents. (Songer 2012, 350) In fact, "there was an ideological majority on the Supreme Court in every term from 1972 to 2000 in favor of overturning every liberal precedent adopted by either a 5-4 vote or by a 6-3 vote on the late Warren Court." (2012, 352) And yet, only "five of the 120 precedents reviewed were overturned. (2012, 354) Songer concludes that "[t]he actual result provide virtually no support for the Attitudinal Model." (2012, 353)

Bartels (2011), while also recognizing ideological voting, argues that the attitudinal model fails to place Court voting in a case-level context. He notes that the attitudinal model "assumes that the impact of ideology on voting is constant across a wide range of situations." (2011, 164) To the contrary, he finds, "case-level stimuli activate preferences to varying degrees." (2011, 165) These case-level stimuli—"issue salience, issue attention, the authority

for the decision, intercourt conflict, the presence of a lower court dissent, and mandatory versus discretionary jurisdiction all significantly influence ideological voting.” (2011, 142)

Similarly, Pacelle *et al.* 2010 argue that multiple factors influence judicial decision-making. In essence, they argue that there is some truth in each of the models. Do justices seek to advance their policy preferences? Yes, sometimes, but justices are constrained in doing so. Do legal factors matter? Sometimes, but at times these are subordinate to policy preferences and sometimes not. Issue salience, that is, the importance of certain issues to justices as compared to other issues, also matters. “Issues that are more salient grab closer attention from the Court” and here “precedent and legal factors take a back seat.” (Pacelle 2010, 201) Pacelle, *et al.* suggests that civil rights issues are traditionally more salient than economic issues. (Pacelle 2010, 73) (See also Unah and Hancock (2006) “justices rely significantly more on ideological preferences when deciding high salience cases than low salience ones.”)

For Pacelle, *et al.*, public opinion also matters. Some justices have publicly and explicitly expressed concerns about maintaining the “credibility” of the Court. Stated differently, they have indicated that public opinion matters when deciding highly contentious and salient cases.⁷

In short, according to Pacelle, *et al.*:

[P]recedent, attitudes, issue evolution, the president and Congress all influence decision making, but they are conditional parts of the Court’s environment. Their relative impacts wax and wane over time and across multiple dimensions. (Pacelle 2010, 73)

⁷ A vast literature exists on the impact of public opinion on Supreme Court decision making and Supreme Court decisions on public opinion. *See e.g.*, Casillas, *et al.* (2010); Giles, *et al.* (2008); Epstein and Martin (2010); Friedman, (2009); Marshall, (2008); Baum and Nevins (2010); Greenhouse (2012). Since I subscribe to the view that the culture war as fought within the courts is a battle among elites, I am not focused on either the impact of public opinion on the Court or the impact of Court decisions on the public. I am interested in the signals that Supreme Court decisions send to elite culture warriors and battles between culture warriors at the Court.

Similarly, Kapiszewski (2011) develops the concept of “tactical balancing.” In her model, six considerations correspond “to a particular tactical approach to high court decision making.” (2011, 475) While her analysis focuses on decisions of the Brazilian Supreme Tribunal of Justice, her analysis is equally relevant to the U.S. Supreme Court. In her model, there is an attitudinal consideration—Justices’ ideology; an institutional consideration—Justices’ corporate or institutional interests; strategic considerations—public opinion, elected branch preferences and political or economic repercussions of the decision; and finally legal considerations—law, doctrine and precedent. Kapiszewski suggests that the predominance of one of these considerations leads to different “tactical approaches” to decision making. An ideologically driven opinion is “preference-driven” while an institutionally driven opinion is “self-protective.” Strategic decisions can be either support-building, deferential or pragmatic and a “legal” decision is principled (or at least can appear that way). In short, this “micro-foundational” approach can highlight “significant differences . . . in judicial rulings that look quite similar.” (2011, 480)

Baum and Devins (2010) also attempt to develop an integrated model. Like the legalists, they recognize that law matters and like the attitudinalists, they concede that policy matters but they conclude that Justices are not “single-minded maximizers of legal or policy preferences.” (2010, 1516) “Instead, Justices seek both to advance favored policies and to win approval from audiences they care about.” (2010, 1516) Rather than reacting to public opinion, Justices care about “elite opinion.” They do so out of the “human need for approval.” (2010, 1580) According to Baum and Devins, “Justices will not diverge sharply from policy positions they strongly favor [and] the departures they do make are more likely to reflect their personal reference groups than the popular will.”

Finally, Lax (2011) attempts both to place law and legal doctrine at the center of judicial decision making and place it in the context of case-specific facts. He suggests that “[a] new judicial politics of legal doctrine has the potential to resolve foundational dilemmas and reconcile long-standing and counterproductive scholarly divisions by bringing together legal concerns and political science priorities. (2011, 131). This approach utilizes a “case-space” model that takes into account judicial preferences and goals, collegial and hierarchical divisions of power and the specific facts of a case. Lax suggests that ideological differences between judges “will be expressed in terms of legal rules that partition fact-filled legal cases into different dispositions.” (2011, 152). In short, this approach seeks to “take law seriously.”

My goal here is not to resolve the long raging debate over the attitudinal or strategic-attitudinal models or develop (yet another) model of judicial decision making. Suffice it to say that there is much to commend the recent work cited above. Each seeks a nuanced understanding of what the Court does and each supports the idea that what a court says it is doing—the reasons it gives for its decisions—is as important (if not more important) than the actual disposition of a case. By implication, what legal advocates say also matters. Interest groups’ legal argumentation drives legal change. (Epstein and Kobylka, 1992) This notion that what legal advocates say matters and the reasons the Court gives for its decisions is the foundation of this project. While judicial scholars have focused primarily on process, my intent is to focus on legal product—Court decisions and the amicus briefs that influenced these.

My immediate goal in discussing theories of judicial decision-making is somewhat more modest—to tease out the implications of these theories in understanding the role (if any) of the Supreme Court in the culture wars.

First, it seems uncontroversial to say that Supreme Court Justices (and judges generally) do not consider themselves to be “naked political actors.” For example, neither Justice Stephen Breyer in his articulation of a “living Constitution” nor Justice Antonin Scalia in advocating a “dead” Constitution suggests that they are attempting to advance their political or policy views. And no justice has suggested that such action is or would be proper. The attitudinal model may or may not accurately describe what Justices do (justices may be attitudinally driven without recognizing it) but the model does ignore what justices say they do, failing to take seriously the reasons justices give for their decisions.

At the same time, no justice is a naïve legalist. Even the most ardent originalists recognize that interpretation of ambiguous constitutional provisions without clear “legal” answers is a part of their job descriptions. They differ in large part over how and when (and perhaps if) they are constrained in their interpretative enterprise. Does precedent matter most? How should “the intent of the Founders” affect judicial analysis (and if the Founder’s intent is relevant, how can judges even be sure of the Founder’s intent)? What is the relevance of the “original understanding” of those ratifying the Constitution? How are the goals of “life, liberty and pursuit of happiness” to inform Constitutional interpretation? And even more importantly, what is the role of the Court vis-à-vis the elected branches? When should the Court intervene to overturn democratically approved laws and when should it stand aside? In other words, when will it intervene to referee cultural battles, and when will it simply let the combatants “slug it out”?

Second, it also seems uncontroversial to assert that culture warriors see the Court, per Hunter, as a “field of conflict.” Culture warriors of all stripes continue to seek to influence the agenda of the Court. As discussed further in the next chapter, the number of briefs by “culture

warriors” has increased dramatically over the last 50 years. But how do culture warriors judge the Justices themselves?

One possible answer is that all culture warriors are attitudinalists. Both culture warriors on the right and the left rally their troops by asserting that the Supreme Court is one vote away from overturning *Roe v. Wade*. Furious nomination battles ensue. Both sides seek justices with policy preferences similar to their own that they can then confidently assume that their policy preference will be protected in law. Of course, if culture warriors are attitudinalists, then all the court briefs are just for show. None of the culture warriors actually expect the briefs to change the views of Court members.

Another possible answer is that at least some culture warriors are legalists (whether of the naïve or non-naïve variety). For these combatants, there is a “right” answer to Constitutional culture war questions and the Court must simply find these. In this view, the problem with the Court is that it has strayed from its institutional mandate and certain Justices have in fact simply sought to promote their own policy preferences. If the Court returns to a “strict” interpretation of the Constitution, then the Constitution will be restored to the position of “law” and not “policy.”

While there is variation among members of the warring cultural camps, culture warriors on the left tend to talk in the language of the attitudinalists and those on the right in the verbiage of the legalists. Those on the left see an assault by the right on the Court and the judicial nominating process. They assert that the current Court is the most ideological in history⁸ and

⁸ See Silver, Nate, “Supreme Court May Be Most Conservative in Modern History.” New York Times, FiveThirtyEight: Nate Silver’s Political Calculus, March 29, 2012 at http://fivethirtyeight.blogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-in-modern-history/?_r=0. Accessed 12/17/2014.

“One statistical method for analyzing the Supreme Court, in fact, already finds that the current court is the most conservative since at least the 1930s.”

that right-wing culture warriors, in seeking dependable and predictable conservative appointees to the Court, do not respect law or precedent.

In contrast, culture warriors on the right generally sound a clarion call for a return to “law.” They reject the notion that policy attitudes affect judicial decision-making. Rather, the Constitution itself provides correct answers to culture war legal questions. Justices need only correctly interpret it.

Finally, modernist culture warriors seem to appreciate the strategic role of Justices. For cultural warriors on the left, there is a recognition that the Court will not return to the days of the Warren Era—when the Court was more ready to find broad individual rights not explicitly stated in the Constitution, but they do understand that more champions of a living Constitution could minimize the “damage” that conservatives can do.

In his chapter on the Court, Hunter begins by saying that contenders in the culture war operate “by very different views of logic and moral judgment,” (Hunter 1991, 250) thus we should see very different kinds of arguments being made to the Court by cultural combatants. In later chapters, I will examine in detail the arguments made by combatants in culture war cases. Hunter does not suggest, however, that Justices differ in their own views of logic and moral judgment. His discussion of actual cases focuses on Justices’ differences in attitudes and policy preferences. It is hard to know what to make of this. Are Justices above the cultural fray? Do they behave by “different views of logic and moral judgment” or do they simply apply their own ideological views to culture war cases? Hunter does not offer a theory of judicial decision-making nor does he even discuss competing theories. (In his defense, he is not a scholar of the judicial process.) Hunter seems to adopt an attitudinalist approach to the Court, but Hunter’s theory does raise an interesting and unanswered question—if cultural warriors operate by

different views of logic and moral judgment, do their differing arguments affect the Court and are they taken up by different members of the Court?

Constitutional Interpretation and the Culture Wars

In the 1970s, conservative constitutional theorists led by Robert Bork (then a professor and yet to be a judge) and Raoul Berger sought to develop an interpretive theory to restrain what they saw as the unjustified activism of the Warren and Burger Courts. (Berman 2009, 9; Colby 2011, 716; Harrison 2003, 83-86) Not content to fight liberals in hand-to-hand combat over individual culture war issues, they wanted to develop an interpretive foundation that would support conservative views on a variety of culture war issues. In their view, the activist Warren and Burger Courts, in wading into a number of culture war battles, were no longer simply interpreting the Constitution. Rather, these Courts were injecting liberal “fundamental values” into the Constitution and thereby creating rights from thin air. But as Bork put it “there is no principled way to prefer any claimed human value to any other.” (Bork, 1971, 8) Stated differently, once the Court elected to decide cases based upon “fundamental values,” it had waded waist deep into the relativistic swamp.

Ironically, Bork, Berger and others choose not to counter this value relativism by establishing a values hierarchy. As Bork’s quote suggests, no such ranking is possible. Unlike Hunter’s cultural traditionalists, Bork, *et al.* appear to be firmly in the camp of the modernistic relativists. In short, conservative critics did not counter the judicial relativism they despised by grounding a critique on moral traditionalism (though Bork and others are moral traditionalists). Rather, they sought to develop a constitutional interpretive theory based upon an appeal to historical authority.

In the name of fidelity to the “true” meaning of the Constitution, the original “originalists” argued that constitutional interpretation must and had to be based upon and constrained by the original intent of the drafters of the Constitution. Originalism did not allow for “living” constitutionalism. The Court was not to interpret the Constitution based upon contemporary principles (on even on historical principles understood in light of contemporary circumstances). Rather, the proper task of the Court in interpreting the Constitution was to discern what the Constitution’s drafters understood the text to mean when they put pen to paper. More specifically, the Court was to “intent” of the Framers or relevant constitutional provisions. This “old originalism” as it came to be called, promised much—namely that there was an “objective, discoverable, [and] fixed constitutional meaning.” (Colby 2011, 717) But the attractiveness of Originalism was even greater. Originalism allowed hope for a truce in what only later came to be known as the culture war. If originalism could deliver on its promises, the Court could function as a neutral referee in the culture war.

Almost immediately, however, originalism was subject to withering criticism. The first and obvious complaint was that the “intent” of the Framers is simply not discoverable. Short of channeling James Madison (or perhaps resurrecting him), there was no way to know what he intended when he drafted many of the vague phrases of the Constitution.

Second, old Originalism assumed that there was a single, collective intent. But the Constitution was itself a product of negotiation and compromise and many of the vague phrases that conservatives were most eager to cabin may have been (and probably were) the product of different “intentions.” Different Framers had different understandings of key Constitutional phrases and these could not be reduced or aggregated to a single, collective intent. (Brest 1980, 209-222)

Finally, critics contended that the Framers did not intend for their intentions to be definitive when interpreting the Constitution. Rather, the Framers intended that future generations follow their own judgments in understanding and interpreting this Constitution. (Colby 2011, 720; Powell 1985, 885-888) In this view, the quest for original intent was not just misguided; it was harmful to the Framers' constitutional project.

Originalists quickly responded to these complaints and reframed originalism as a quest for the original public" meaning or understanding of constitutional provisions as opposed to the original intent of the Founders. In this formulation, the relevant interpretive question was how the public understood the Constitution at the time of ratification. Originalists now avoided the initial complaints against the old Originalism but invited new variations of the old complaints. Most significantly, the new originalism—like the old—was still focused on determining “the subjective beliefs of particular persons.” (Colby 2011, 723) In some ways, the new originalism posed even greater problems than the old. Under the new version of the theory, the Court must inquire into the subjective beliefs of an even larger number of people. It seemed that the promise of an “objective, discernible, and fixed meaning” of the Constitution was slipping away, replaced with an interpretative approach as subjective as the one it was meant to replace.

But originalists were not ready to give up their quest just yet and so Originalism evolved once more. Under the “new new” originalism, originalists sought to return to a theory based on objective inquiry. Rather, than attempt to discern the subjective mental states of either the Founders or the public at large, Originalism would look at what a “hypothetical, reasonable person” would have understood the words of the Constitution to mean. As Gary Lawson explained, the appropriate judicial inquiry is how the words of the Constitution “would have been understood by a hypothetical, objective, reasonably well informed reader of those words

and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted.” (2002, 327) (*See also* Perry 1993). In essence, originalism adopts the common law’s “reasonable man” test (given evolving standards of gender equality, the test is now usually referred to as the “reasonable person” test) and makes it the centerpiece of constitutional inquiry. But it is not at all clear that this inquiry is any less subjective than the search for original meanings or original understandings. The reasonable person is judicially created; there is no “reasonable person” standing by waiting to be interviewed by the Court.

“Originalism was born of a desire to constrain judges. Judicial constraint was its heart and soul—*its raison d’etre*.” (Colby 2011, 713.) This statement is true as far as it goes, but it does not go far enough. Originalism was born of a desire to overturn culture war precedents that conservatives found unpalatable and to ensure that there would be no further such decisions. If originalism had led to the same conclusions as those of the Warren and Berger Courts, conservatives would have been uninterested in Originalism. They were interested in Originalism because they believed that Originalism would lead to different results—no gay rights, no restrictions on religion in public life, no (less) restrictions on gun rights, no right to an abortion. The investment in Originalism was not an investment in a theory so much as it was an investment in obtaining particular judicial outcomes. As the analysis of decisions and briefs in culture war cases will demonstrate, investment in Originalism was instrumental. It was a powerful weapon deployed by forces on one side of the culture war.

Dissensus or Cultural Warfare?

While Supreme Court decisions on highly salient cultural issues have been eagerly watched, closely scrutinized, and regularly condemned by culture war combatants, it is not clear that culture warfare has broken out among the justices themselves, notwithstanding Justice Scalia's continued complaint that the Court has taken sides in the culture war. To be sure, the Court is closely divided in many culture war cases and many culture war case opinions evidence a combative contentiousness among the justices, but is this "cultural warfare" or just disagreement? And how do we tell the difference?

Political science literature dealing with the Supreme Court is largely silent on the issue of measuring consensus/dissensus on the Supreme Court. While numerous articles focus on the number and percentage of concurrent and dissenting opinions issued by the Court, they fail to put these into a larger theoretical framework that addresses the nature and meaning of conflict on the Court.⁹ Moreover, they simply assume that dissenting and concurring opinions represent "overt conflict" without explaining or examining the nature of the conflict. While it certainly seems reasonable and perhaps even obvious to conclude that a dissenting opinion represents a disagreement between the dissenter and the writer for the majority, the dissent in and of itself tells us little about the nature or intensity of the disagreement.

Caldeira and Zorn (1998), for example, state confidently at the outset that "overt conflict, as expressed in dissenting and concurring votes and opinions, has become the rule rather than the

⁹ In analyzing a state Supreme Court, Sheldon (1999) measures dissensus as the sum of dissenting and concurring opinions divided by total opinions. He finds that dissensus varies greatly over time but he fails to explain why this straightforward measure is an appropriate measure of dissensus. For example, he correctly points out that a concurring opinion disagrees with the majority in their analysis of the merits of a case but in including concurring opinions as a sign of dissensus, he minimizes the fact that the majority and concurring opinion agree on the appropriate outcome of the case. A concurring opinion thus by its nature reflects less disagreement with the majority than a dissenting opinion and the strength of disagreement among those concurring can probably only be gauged by review of the concurring opinion itself.

exception in the modern Supreme Court.” (Caldeira and Zorn 1998, 874) “Conflict exploded in the 1941 term and never returned to previous levels.” (Caldeira and Zorn 1998, 875) According to the traditional explanation, dissents and concurrences increased as a result of “the demise of consensual norms.” The authors then proceed to analyze these consensual norms and conclude consensual norms have restrained justices from engaging in overt conflict, have varied considerably under different chief justices and have been susceptible to “exogenous changes in the Court’s environment.” What the authors do not explain is what, if anything, a historical increase in dissents and concurrences tell us about “overt conflict” or even that an increase in dissents and concurrences necessarily reflects an increase in conflict (though they do recognize that “dissents and concurrences might be driven by different processes and concerns over and above consensus”). (1998, 875)¹⁰

Epstein, *et al.* (2001) track the percentage of Supreme Court cases with at least one dissenting opinion, finding a marked rise over time. Since they conclude that “a similar pattern emerges for votes,” they “use the terms ‘dissensus’ and ‘rise in dissent’” interchangeably. (Epstein, 362). To their credit, they do attempt to analyze the extent to which dissensus/consensus is revealed in public versus private deliberations. They review thirteen years of conference records, comparing these to published votes and find a significant discrepancy between how justices voted in private and the final votes recorded in cases. They conclude that the evidence is consistent with “the story that scholars have told about the existence of a consensual norm.” (Epstein, 376) While not central to their analysis, they have not explained why “rise in dissent” and dissensus” should be seen as interchangeable. They have not taken notice of concurring opinions and even though “a similar pattern” may exist for votes

¹⁰ Caldeira and Zorn track the number of cases with concurrences and dissents as opposed to votes.

and cases with at least one dissent, such measures are limited and do not tell the whole story regarding the nature of dissensus on the Supreme Court.

In fact, an analysis of dissents and concurrences by Wahlbeck, *et al.*, (1999) leads to doubts as to whether dissents or concurrences tell us anything at all about conflict on the Court. According to the authors, “separate opinions result from justices’ pursuit of their policy preferences within both strategic and institutional constraints.” (Wahlbeck 1999, 488) Thus, a dissenting opinion cannot be viewed as simply a reflection of a disagreement with the majority over a policy position. (Equally, the failure to author a concurring or dissenting opinion cannot and should not be interpreted as reflecting unanimity among members of the majority.) “[T]he costs and benefits of a choice [to write a concurring or dissenting opinion] reflect both . . . policy preferences and the implications of a particular course of action for securing their policy objectives and facilitating positive relationships with . . . colleagues.” (Wahlbeck 1999, 496.) Dissents and concurrences, for example, may reflect nothing more than a game of tit-for-tat among justices and may tell us little or nothing about policy conflict among and between justices.¹¹

Collins (2011) concludes that dissents simply represent “dissonance reduction mechanisms. Based upon an analysis of both dissenting and concurring opinions from 1946 to 2001, he argues that a dissent is simply an explanation of an “attitudinally” incongruent vote. It is an attempt to “avoid the aversive consequences of being viewed as an inconsistent decision

¹¹ Brace and Hall (1993) also cast doubt on the extent to which dissents reflect serious conflict among appellate judges. Their review of state supreme courts in six states concludes that dissents result from attitudinal disagreement, reactions to case facts and responses to contextual forces interacting with institutional rules and arrangements. Caldera and Zorn similarly pose a challenge to the use of dissenting opinions to measure court conflict. They conclude that patterns of concurring and dissenting opinions on the Court are “long-term, long-memory processes.” (Caldeira and Zorn 1998, 900) If this is true, it supports the view that concurring and dissenting opinions may not be an accurate measure of conflict on the Court. Rather, the level of conflict as reflected in separate opinions may be constrained (or not) depending upon the operative consensual norm.

maker.” (Collins, 2011, 362) The implication of the analysis is that in and of itself, a dissent says nothing about conflict on the Court.

More recently, theorists of judicial decision-making have attempted to measure ideological polarization on the Court. Segal and Cover (1989) developed estimates of judicial ideology based upon the public perceptions of a Justice at the time he or she was nominated. By contrast, Martin and Quinn (2002) estimate ideology by ranking Justices each year based upon their votes in specific cases. Alone these scores say little about conflict or consensus on the Court. Clark (2009) has attempted to use these score to estimate “judicial polarization.” He shows a “relatively unpolarized Court” during the Warren era with increasing polarization during Richard Nixon’s presidency, peaking in 1972, before *Roe v. Wade* and the onset of Hunter’s culture war. Polarization stayed high, however, during the 1980’s and declined in the early 1990’s. An important caveat in Clark’s work is that polarization does not equate with ideological “extremity.” As Clark notes:

A homogenous Court is not polarized, even though it may be ideologically extreme. However, a Court with a moderate center may be very polarized if it has ideological extreme and sizable wings, such as the Court of the mid-80s.

Clark’s work also puts dissents in a different light. Based upon his “initial empirical analysis” ideological divergence results in larger minorities (i.e. more close decisions) and more dissents. Accordingly, while a dissenting opinion may be an explanation of an “attitudinally incongruent vote,” it may be more than that. It may reflect polarization on the Court and it may reveal real policy and legal differences with the majority and if there is culture war conflict on the Court, it may give insights into the nature of this conflict.

Methodology

How does one determine if there is a culture war going on within the Court or “at” the Court? In this chapter on the Court, Hunter deals almost exclusively with religion cases. He states that “the definition of religion and the debate over church and state are the principal battlegrounds over which the procedural dimension of the culture war is fought.” (Hunter, 1991, 269) He goes on to explain the importance of this conflict: “what is ultimately at stake is the ability to define the rules by which moral conflict . . . is to be resolved. (1991, 271) It is not at all clear what Hunter means by the “procedural dimension.” Culture wars fighting over the appropriate constitutional borders of church and state hardly seem to be fighting about “procedure.” There are real substantive cultural issues at stake.

But in addition, as Hunter notes elsewhere, there are other issues that culture warriors fight about. Most prominent are those involving family, gender roles and sexuality and fights about these issues have come and are still coming to the Court. Thus it seems to include analysis of at least a subset of these issues—abortion and sexuality—in looking at the Court and the culture wars. Finally, I add one more issue to the list. The “traditional” shorthand for culture warfare had been “God, guns and gays.” and so I include guns in my list of culture war issues. While the Court has had few opportunities to comment on the Second Amendment, and arguably the issue of gun rights does not have the same salience as the other culture war issues, it seems appropriate given not only the historical inclusion of this issue in characterizations of the culture war but also the renewed vigor with which battles over gun control and gun rights are being fought in venues other than the courts.

If Hunter is correct, then simply tallying the number of culture war cases, the number of briefs filed and the level of consensus or dissensus among Court members will not accurately reveal the degree of culture war conflict. Nonetheless, such analysis is a good place to start.

Accordingly, in the next chapter, I begin with a descriptive analysis of the Court's "culture war" jurisprudence. Beginning in 1962 (the year in which *Engel v. Vitale* was decided), I have coded every Supreme Court case based upon whether the case involved a "culture war" issue. I have further coded each "culture war" case based upon subject matter-- religion, abortion, guns and homosexuality/gay rights. Then, I calculate, by year, culture war cases as a percentage of total caseload. This reveals the degree to which cultural war cases has ebbed and flowed over the last 50 years. I also calculate by year individual subject matter cases as a percent of all culture war cases to determine the degree of issue evolution during this period.

Second, I have recorded the votes in all cases and accordingly, I look at the degree to which disagreement over culture war issues compares to disagreement among the justices over other issues. To what degree are 5-4 decisions confined to culture war cases as opposed to all cases? This analysis will also be placed within an even broader context. How does disagreement among the justices compare to agreement? For example, a Court with a large number of 5-4 and 9-0 decisions could look the same as a Court with only 7-2 decisions. Accordingly, for culture war and non-culture war cases, I will compare the number of 5-4 decisions to the number of cases in which the Court was unanimous.

Finally, I will look at Supreme Court votes in light of the "party affiliation" of each justice. Obviously, Supreme Court justices are not overtly political; they do not self-identify as members of a political party. At the same time, however, each justice owes his or her appointment to a political party (i.e. the party of the President appointing the Justice). In

Hunter's view, cultural conflict exists between those with diametrically opposed "worldviews" and moreover, the political parties have largely segregated themselves according to these different worldviews. To what extent has this happened (or not happened) on the Supreme Court? Given the Religious Right's disappointment over recent Republican nominees and especially, the failure of the Court to overturn *Roe v. Wade*, it may be that there is less "sorting" among members of the Supreme Court than among and between the political parties.

While these measures will place the Court's culture war issues in context, it is unlikely that they will reveal much about the nature or depth of the culture war being fought at the Court. To understand cultural warfare and the Court, it is necessary to look at the Court's decisions themselves and the briefs filed by culture warriors in these cases. (I will ignore briefs filed by the parties and briefs by groups of a purely local nature.)

To make this task manageable, I have selected 38 salient culture war cases for review. These cases are taken from the annual Congressional Quarterly (CQ) list of significant cases.¹² (A list of these and the number of briefs filed in each case is included at Appendix 1). There has been some disagreement among judicial scholars as to the appropriate method for identifying salient or important cases. In the first instance, a case can be politically significant or legally significant or significant in both respects. Epstein and Segal (2000) recommend using the front page of the New York Times to determine the salience of Supreme Court cases. In contrast, Brenner and Arrington (2002) suggest that there are reasons for using the Congressional Quarterly list alone and situations in which the New York Times list should be used. Cook

¹² The thirty-eight cases are from the CQ list as of 2012. Two additional cases, both involving gay marriage—*United States v. Windsor* and *Hollingsworth v. Perry*—were decided by the Court the 2012-2013 term. In addition, in *Burwell v. Hobby Lobby*, decided during the 2013-2014 term, the Court dealt with the issue of religious freedom in the context of Obamacare's birth control mandate. This case will be discussed extensively in chapter 6. By any measure, all three are significant cases and almost certain to be included in a future CQ list.

(1992) operationalized significance by doing a factor analysis of Burger Court cases chosen as significant by 15 “authorities.” (Cook, 1992, 1129) While Cook concluded that this method allowed for a more nuanced estimation of the significance of a case, she nonetheless concluded that the annual list by Congressional Quarterly is “a reliable authority for research on contemporary decisions.” (Cook 1992, 1136).

In looking at culture war cases, a review of undergraduate case law books, the front page of the New York Times and the CQ list all yield similar results. Given this result and the nature of the analysis to be undertaken, the CQ list is appropriate and suitable. It has slightly more cases since it includes cases that are legally significant even if they were not perceived by the public as being politically significant. Since I am most interested in elite views of cases, it is preferable to be over-inclusive as opposed to under-inclusive.

In order to analyze the nature and the depth of the culture war, I have assembled all amicus case briefs filed in the 38 CQ culture war cases.¹³ I have excluded briefs from the parties themselves and in some cases, I have excluded briefs from local as opposed to state or national amici. There are a total of 721 culture warrior briefs filed in these cases. (A list of the number of amici briefs by cases is included at Appendix 1. A list of all culture warrior amici is included at Appendix 2. The number of amici exceeds the number of amici briefs since amici regularly join on a single brief.)

There has been some scholarly debate over the importance of amici briefs and by extension, the value of examining such briefs. Early critics found that “briefs amici are repetitious at best and emotional explosions at worst.” (Harper and Etherington 1953, 1172)

¹³ Kearney and Merrill (2000) correctly point out that the Supreme Court database assembled by Spaeth does not include information on the number of amici briefs filed. As they note, this is not surprising given that the database was developed by attitudinal scholars.

Early analysis of case outcomes by political scientists found no evidence that amici briefs substantially increased the success rates of supported litigants. (Songer and Sheehan 1992; Caldiera and Wright 1988) But more recent analysis calls these conclusions into question. Collins (2007) concludes that the Justices “can be influenced by persuasive argumentation presented to them by organized interests.” (Collins 2007, 65) An extensive analysis of 6000 cases by Kearney and Merrill found the impact of amici briefs to be much more case and circumstance specific. They concluded that briefs by the Solicitor General had a noticeable impact on case outcomes. Further, amici filers were more successful when supporting respondents than petitioners and certain institutional amici—the ACLU, the AFL-CIO and states, enjoyed higher success. Still others have pointed out that amici briefs help the justices anticipate the impact of their opinions and provide unique arguments not raised by the parties, even if these are less likely to be adopted by the Court. (Spriggs and Wahlbeck, 1997) Similarly, Flango, *et al.* point out that amici can develop arguments that parties cannot. (Flango, Bross and Corbally, 2006)

In short, there is a growing consensus that amici briefs matter. The attitudinal model discussed earlier implies that briefs—by the parties or amici—are irrelevant since justices decide cases based upon their own attitudes and are not swayed by arguments from the parties or amici. This appears to not be the case but even if it were, an analysis of amici briefs can still shed light on the nature and extent of the culture war at the Court.

There has been an explosion of amici briefs before the court and this is true in culture war cases as well. There has also been an increase in the number the culture war groups and especially in the number of conservative legal organizations. In the analysis that follows, I will examine the extent to which culture warriors fight issue-specific battles and to what extent do

culture warriors fight battles on numerous culture war fronts. More importantly, what arguments do culture warriors make? Is there the grand battle between cultural traditionalists and cultural relativists or are the arguments more policy specific? To answer this question and as discussed more fully in the next chapter, I have undertaken a content analysis of each brief filed in the 38 selected cases. I have identified “modalities” of argument: textual, historical, structural, doctrinal, prudential, ethical, and policy. I have further identified particularized arguments made by amici. The type of arguments advanced and the specific arguments made should shed light on the nature of the culture war being fought at the Court. Is there a battle for the “soul of America” or just a series of skirmishes over a variety of cultural hot button issues?

In subsequent chapters, I will tackle examine key decisions in each issue area—guns, gay rights, God and religion and abortion—and the briefs filed in each of the key cases. In Chapter 3, I will focus on gun control and gun rights cases. While of late this has become a very prominent policy issue, historically this has not been a major culture war issue before the Court. Over the last fifty years, only two cases involving gun control and gun rights have made it onto the Supreme Court docket—both within the last five years. Most state constitutions provide significant gun ownership rights and so, for the most part, a Second Amendment right to own a firearm has little more than symbolic significance. However, over the last twenty years there has been a coordinated effort—at times more coordinated than at others—among gun rights activists to establish the constitutional right of individuals to own firearms. They achieved this goal in *Heller v. District of Columbia*. In *McDonald v. City of Chicago*, the Supreme Court “incorporated” this right into the Fourteenth Amendment and thereby made it applicable to states. Both cases involve a long list of briefs by culture warrior groups.

Next I turn to constitutional issues related to homosexuality and gay rights. Two cases stand out: *Bowers v. Hardwick* (1986) and *Lawrence v. Texas* (2003). In these two cases, the Court reached diametrically opposed conclusions. In fact, *Lawrence v. Texas* directly overruled *Bowers v. Hardwick*, a surprising outcome to most given that less than twenty years separated the two cases. Two other cases also appear on the CQ list—*Boy Scouts v. Dale* (2000) and *Romer v. Evans* (1996). While not as well-known as the first two cases, they nonetheless received significant public attention. In the last term, two new cases joined the list—*United States v. Windsor* and *Hollingsworth v. Perry*. The former case struck down the federal Defense of Marriage Act (DOMA) and in essence, mandates federal recognition of gay marriages sanctioned by state law. The latter case denied standing to those seeking to uphold California’s Proposition 8. While *Hollingsworth* can be viewed as simply a technical “procedural” opinion, it effectively cleared the way for California’s sanction of gay marriage. Gay rights cases also appeared on the Court’s agenda before gun rights cases did, but gay rights cases are still relatively new, having moved onto the Court’s agenda only in the late 1980s. Like the gun rights cases, these cases also involve a long list of briefs by competing culture war groups.

In Chapter 5, I turn to an analysis of the Court’s abortion jurisprudence. While abortion is not formally part of the tripartite “cannon” of culture war issues, perhaps no issue defines the culture war in the same way that abortion does. Certainly, no issue has been as hotly contested in the Supreme Court over the last forty years. While *Roe v. Wade* (1973) is generally remembered as not being particularly contentious at the time it was decided (only 26 briefs were filed in the case), *Roe* came to define the culture war battles in the Supreme Court. Even though most of the *Roe* amicus briefs supported abortion rights, anti-abortion advocates were there and their arguments were later refined, and expanded and then repeated over the next forty years. In

Gonzalez v. Carhart (2007), 33 briefs were filed, only slightly more than the number filed in *Roe*, but the battle lines had hardened with an almost equal number of pro-life and pro-choice amici briefs being filed.

The depth of cultural antagonism over abortion is also revealed in the language of the Court's abortion opinions. The opinions in these cases are often strident, with justices personally attacking their fellow justices. The major cases here—*Roe v. Wade* (1973), *Webster v. Reproductive Health Services* (1989), *Planned Parenthood v. Casey* (1992) and *Gonzales v. Carhart* (2007)—will reveal that there is in fact a very real culture war and it is of the nature that Hunter described.

In the penultimate chapter, I will address issues of religion and the state. The battle over the role of religion in public life and its place in the public square has been increasingly enjoined over the last two decades. Perhaps no issue, including abortion, has the same symbolic significance as religion in public life. Hunter suggests that the religion cases are actually the most important cases for the reason that it is these cases that set the “rules of conflict” in the culture war. It is not exactly clear what Hunter means by this claim because the phrase “rules of conflict” is ambiguous at best. Perhaps he means that these cases set out the “boundaries” of conflict—where and when cultural warfare can be fought. At any rate, First Amendment religion cases have a symbolic resonance that is central in the culture wars.

More recently, however, religion and its role in a pluralistic society has taken on new meaning as moral traditionalists, armed with an act of Congress, have asserted their religious beliefs as a defense against an ever-growing secular state. Pursuant to provisions in the Affordable Care Act (ACA), also known as “Obamacare,” private corporations were required to provide a range of contraceptives to their employees. The owners of a closely held private

corporation, Hobby Lobby, asserted that the contraceptive mandate violated their rights under the First Amendment and the Congressional Act. The Court agreed that the mandate impermissibly impinged on religious belief. While it is too early to tell what the longer term effects of *Hobby Lobby* will be, it is clear that the victory for moral traditionalist has tremendous symbolic value.

In order to fully understand *Hobby Lobby*, I will first examine perhaps the most important Free Exercise case in the modern era—*Employment Division v. Smith* (1990). *Employment Division* concluded that Native Americans did not have a constitutional right to use peyote in their religious ceremonies. On the contrary, the Court said that the religious must adhere to laws that were “generally applicable.” The reaction to *Employment Division* was swift. An unusual coalition of culture warriors—some of whom normally found themselves on opposite sides of issues—combined to persuade Congress to “overrule” *Employment Division*. They achieved their goal when Congress passed the Religious Freedom Restoration Act (RFRA). *Employment Division* and RFRA set the stage for *Hobby Lobby* and future battles over the role of religion in a modern pluralistic society.¹⁴

As noted above, in each of the culture war issue areas, I will examine the arguments made by the culture warriors as evidenced in the amici briefs they file with the Court. How do their arguments differ? Do their arguments reflect differences in “world views”? Do they rely on different precedential cases or sources or do they simply use precedential cases differently, that is, do they extract different constitutional principles from the same cases and sources?

¹⁴ Other significant First Amendment religion cases deal with public funding of religion, school prayer and public displays, especially displays of the Ten Commandments. With respect to public funding of religion, *Lemon v. Kurtzman* (1971); *Agostini v. Felton* (1997) and *Zelman v. Simmons-Harris* (2002) are the most significant. On the issue of school prayer, the relevant cases are *Abington School District v. Schemp* (1963); *Wallace v. Jaffree* (1985); *Lee v. Weisman* (1992); and *Santa Fe Independent School District v. Doe* (2000). There are five cases that address questions regarding public displays and religion. Two of the most notable are *Lynch v. Donnelly* (1984) often referred to as the “crèche case” and *Van Orden v. Perry* (2005) which involves the public display of the Ten Commandments.

In the concluding chapter, I will synthesize this analysis. First, is there a cultural conflict among members of the Court? If there is a culture war going on among Supreme Court justices, what is its nature, form and intensity? Do Supreme Court justices have different worldviews that inform their jurisprudence or do they simply differ ideologically or jurisprudentially? Justice Scalia has on several occasions accused the Court of taking sides in the culture war and religious conservatives believe this to be routinely the case. But perhaps the Court is more akin to a United Nations peacekeeping force—there are differences of opinion among its members—but all agree that the Court’s basic role is to tamp down conflict among the combatants?¹⁵

Second, is there a culture war at the Court? Do the amici that file briefs differ in worldviews as Hunter suggest or do they simply differ on their policy preferences, after all, it is possible for individuals to disagree about the appropriateness and even the constitutionality of abortion, to take one example, without having competing world views? At least some self-proclaimed culture warriors on the right—Hunter’s traditionalists—certainly believe that not only is there a culture war, but that the Courts are a central battleground in the war. Judge Bork, in lamenting cultural traditionalists’ failure to stop cultural decline, places the blame squarely on the Supreme Court. The “cultural left prizes control of the courts, and especially the Supreme Court, perhaps more than any other institution of government” and the cultural left has been rewarded with “activist decisions” hostile to religion and traditionalism and enshrining “secular humanism.” (Bork 2002, 5) Moreover, they describe the war as one not only about issues—gay rights and abortion being the most prominent—but also about values and truth. A common theme is the danger posed by courts’ adoption of a “radical moral autonomy” that undermines

¹⁵ At this confirmation hearing, Justice Roberts suggested that the Court is simply a referee or umpire, impartially calling “balls and strikes.” Replacing the baseball analogy with a boxing metaphor, the Court is called to make sure that there are no “punches below the belt.” As many critics have pointed out, however, not only is the analogy unconvincing, but also at times misleading. Referees and umpires are regularly required to make vague or general rules or even ignore such rules in the interest of the game. *See* Graber (1999) and Blake (2012).

“both reason and revelation as sources of morality.” (Erler 2002, 147) While Phyllis Schlafly finds public schools a bigger threat than the courts (though she also spends a lot of time decrying “liberal” court decisions), she derides “indoctrination” against “objective truth, against authoritative notions of good and evil, against religion and tradition.” (Schlafly 2008, 491) Still others see liberal Supreme Court decisions as the culmination of the “Enlightenment project” which seeks to ground law on “secularism, relativism and individualism.” (Rice 202, 46) In short, traditional culture warriors say that they are engaged in precisely the struggle for the “soul of America” that Hunter describes.

Finally, if there is cultural warfare, has it intensified over the last 50 years or have the battles simply ebbed and flowed? Has one side gained the upper hands or has the battle settled into a stalemate, with neither side gaining the upper hand? What is the nature of Court warfare? Are some issues more central and controversial than others (e.g. abortion) or is cultural warfare fought on all cultural issue fronts? Finally, what are the prospects for cultural warfare on the Supreme Court in the future? Will the fight go on and if so, in what form? The issues facing the Court are not static. They change dramatically over time. The culture war issues so contentious today barely registered 100 years ago. Do patterns of the last 40 years tell us anything about what to expect in terms of the Court’s agenda in the near future?

Still, as the next chapter demonstrates, while the Supreme Court may be caught up in a culture war (or wars) among highly-motivated combatants, as measured by what the Court actually does, the culture war is barely a skirmish. Culture war issues take up very little room on the Court’s docket. Moreover, as later chapters will demonstrate (and contrary to Justice Scalia’s protestations), the Court has tip-toed carefully in the minefield of culture war issues. Again,

using the boxing metaphor, the Court has let the boxers fight and generally allowed the victor in the democratic arena to prevail in the judicial one.

But that is not to say that there is not a culture war going on or at the Supreme Court. Culture warriors have increasingly come to the Court with briefs in hand and judicial fighting between culture warriors has become more intense. There has been a steady increase in the number of “culture war” groups and with it a significant increase in amicus curiae briefs filed in culture war cases.

However, while it is clear that there are cultural battles being waged at the Court, it is not clear that they are fighting for the “soul of America.” As a review of briefs and opinions in the selected culture war cases will show, the culture war has been much more nuanced than Hunter’s theory would suggest. Yes, there are those fighting for the dominance of their “worldviews.” But many are just fighting for their view in a particular issue area without connecting it to a larger “worldview.” At this juncture, it is possible to proffer several hypotheses:

- There is a culture war at the Court and among the justices. The number of amici filing briefs in culture war cases has increased dramatically over time.
- There has been a splintering of elite opinion with respect to culture war issues. This is reflected in the number of briefs filed in culture war cases, the number of organizations filing briefs in these cases and in the opinions by the Court in these cases.
- The culture war is not simply a war between moral traditionalists and moral modernists. These groups do exist and they do attempt to advance their agenda with the Court, but the majority of briefs are filed not by full-scale culture warriors but by groups that are attempting to affect jurisprudence with respect only to a single issue.
- At the same time, many cultural warriors do advance arguments about the “meaning of America.”
- Finally, the Court has treaded cautiously with respect to culture war issues. Notwithstanding Justice Scalia’s suggestion (on more than one occasion) that the Court has taken sides in the culture war, the Court for the most part has moved slowly relegating culture war disputes to other arenas and allowing public opinion to resolve culture war disputes.

In short, there is cultural warfare at the Court and among the justices, but there is not full-scale Armageddon between moral modernists and traditionalists. Yes, there are some culture warriors who are fighting for the soul of America and there are some justices who fear for America's soul, but like any war, there are a variety of motivations for conflict and a variety of views as to how the war should be fought.

I now turn to a brief overview and descriptive analysis of culture war issues in the Supreme Court and the culture warriors who fight over these issues.

Chapter 2

To the casual observer, the Supreme Court appears to be the key battlefield in the culture wars. Based on press coverage of the Court, the casual observer could reasonably assume that the majority of issues coming before the Court are of the culture war variety. But notwithstanding the media coverage they receive, culture war issues make up a very small proportion of the business of the Court. That is not to say, however, that culture war issues are not controversial. In fact, an analysis of opinions and votes demonstrates that they are significantly more controversial than other issues.

A Brief History of the Court and Culture War Issues

While there has always been partisan and political wrangling within and at the Court, arguably it took on a new form and a new intensity beginning in the 1960s. Historically, the Court simply assumed (and asserted) the religious (and Christian) nature of the country: “Our civilization and our institutions are emphatically Christian” *Church of the Holy Trinity v. United States* (1892).¹⁶ The Court stressed the importance (even the undeniability) of religious belief: “One cannot speak of religious liberty . . . without assuming the existence of a belief in supreme allegiance to the will of God.” *United States v. Macintosh* (1931). In its decisions, the Court evidenced a willingness to referee conflicts between religious traditions and protect freedom of belief. The Court did not, however, seem to even recognize the possibility of irreligion or unbelief.

¹⁶ 143 U.S. 457,472 (1892).

This changed in 1961. Then, for the first time, the Court required a different kind of state neutrality with respect to religion: “[N]either the State nor the Federal government can constitutionally aid all religions as against *non-believers*, and neither can [they] aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.” *Torcaso v. Watkins* (1961)(emphasis added).¹⁷ To some degree, this new position was forced upon the Court by the nation’s growing religious diversity. Battles over religion were no longer being fought only by Protestants and Catholics, but now by adherents of a broad array of religious traditions. The Court explicitly noted Buddhism and Taoism, religions that - unlike monotheistic ones -- do not place a supreme being at the center of their belief system. The irreligious also entered the fray, with atheists challenging the role of religion in public life. In *Torcaso*, while not acknowledging atheism, the Court did mention ethical culture and secular humanism,¹⁸ traditions not as easily identified as religious.

Torcaso was arguably just a skirmish. To moral traditionalists, *Engel v. Vitale*, decided the following year, was the “Pearl Harbor” of the culture wars. In *Engel*, the Court ignited a firestorm among the religiously orthodox and opened wide the religious-secular divide. *Engel* struck down a state-drafted school prayer as being inconsistent with the Establishment Clause. While the decision did not prohibit voluntary school prayer, it was widely viewed as being anti-religious. As then Senator Sam Ervin of North Carolina commented: “I should like to ask whether we would be far wrong in saying that in this decision the Supreme Court has held that God is unconstitutional and . . . the public school must be segregated against Him?” (Gold, 2005, 103)

¹⁷ 367 U.S. 488, 495 (1961).

¹⁸ Both of these traditions have described themselves as religious, however, most scholars of religion tend to identify them as quasi-religious or the functional equivalent of religion.

Engel was followed the next year by *Abington School District* and *Murray v. Curlett*.¹⁹

In these cases, the Court extended the logic of *Engel*, declaring all state-mandated prayer unconstitutional. Religious conservatives erupted in anger, accusing the Court of having kicked God out of public schools. These cases spawned numerous Congressional hearings, calls for a corrective constitutional amendment, and some argue the rise of the Religious Right.

But moral traditionalists' anger at the Court was not limited to decisions regarding religious establishment and free exercise cases. Over the next ten years, the Warren Court handed down a variety of opinions that were viewed by religious traditionalists as having adopted a "secular" (or irreligious) point of view. In criminal procedure cases, the Court provided additional constitutional protections to criminal defendants and moved to limit capital punishment. In civil rights cases, the Court interpreted statutes and the Constitution in a manner helpful to minorities and women. Finally, in *Roe v. Wade*,²⁰ the Court found that constitutional privacy provisions protected a woman's right to an abortion. While it is far from obvious that these decisions reflect a "modernist" moral viewpoint bereft of a transcendent moral anchor, in the view of religious conservatives, the secularization of the law was now mostly complete. In the view of moral traditionalists, the Court had undermined the Christian foundation of the nation, jettisoned Old Testament standards for punishment of criminals, and sanctioned the murder of unborn life.

In all of these areas of the law, the Religious Right²¹ accused the Court of being anti-religious and of discarding traditional religious values. The Court became *the* favorite target of

¹⁹ 374 U.S. 203 (1963). (These cases were consolidated.)

²⁰ 410 U.S. 113 (1973).

²¹ "Religious Right" is often capitalized but sometimes not. Capitalization suggests a unity of belief and action among conservative religious believers that is, at best, inaccurate. The concept of the Religious Right has always been vague and nebulous. Many conservative Christians also find the term vaguely insulting, a term of derision.

the Religious Right. Godless secular humanism became the culprit and secular humanists the villains in the morality tale fashioned by religious conservatives.

How Important Are Culture War Issues in the Supreme Court?

Beginning with the 1962 term (the first term following the Court's decision in *Engel v. Vitale*), I have coded each case coming before the Court as a culture war or non-culture war case. I have further identified each case dealing with abortion, gay rights, guns (i.e. the right to keep and bear arms), and religion, both Establishment and Free Exercise cases. I have been generous in my coding. For example, I have included cases in which self-declared homosexuals sought protection for the rights of association or speech under the First Amendment and not simply cases dealing with whether homosexual behavior is constitutionally protected. Even still, culture war cases make up an extremely small proportion of the total number of cases heard by the Court.

Since 1962, for the period under review, the Court has heard and decided 6055 cases.²² Of these, only 135 involved culture war issues. Thus, culture war cases comprise a paltry 2.23% of the Court's caseload.

The culture war caseload has also been remarkably stable over time. While the 1960s are remembered as the era of an activist Court, in fact, the Court in the 1960s decided relatively few culture war cases. The second Reagan term is actually the period of the most culture war

Given the vagueness of the term, it may be more appropriate to refer to specific organizations, such as the Moral Majority and the Christian Coalition as opposed to a "movement." While these groups were politically important, abandoning the term "Religious Right" arguably understates the impact of religious conservatives. Accordingly, I will use the term "Religious Right" in its capitalized form.

²² The database for the analysis covers the 1962-2011 Supreme Court terms.

decisions. Between 1984 and 1989, the Court decided 35 culture war cases, or 25.9% of total culture war cases for the entire 50 year period.

Most culture war cases have involved religion. Eighty-six cases, almost 65% of total culture war cases, have involved the Establishment or Free Exercise provisions of the First Amendment. Thirty-nine involve abortion. Not surprisingly, only two cases deal with gun rights under the Second Amendment and only eight involve homosexual rights in some way.

Since there are so few culture war cases, it is hard to discern any overall patterns of issue evolution. It is worth noting that issues involving religion and the First Amendment have been part of the Court's agenda for virtually the entire period under review. For the approximately 50 years analyzed here, religion cases have been on the docket in 35 of those years. But cases involving gun rights and the rights of homosexuals are rare.

The issue of gay rights did not appear on the Court's docket until 1985 when the Court held that there was "no constitutional right to engage in sodomy."²³ The issue did not reappear until ten years later and then not as a question regarding the constitutional right to engage in same sex behavior but rather as a question of whether local ordinances protecting homosexuals could be overruled by statewide voters. Then less than twenty years after the first case involving homosexual behavior, the Court held in *Lawrence v. Texas* (2002) that the right of privacy did cover homosexual behavior. A sea change had occurred. That change continues in the Court's recent decisions in *United States v. Windsor* and *Hollingsworth v. Perry* where the Court rebuffed governmental efforts to "protect" traditional marriage.

²³ *Bowers v. Hardwick*, 478 U.S. 186 (1986)

The question of the meaning of the Second Amendment—is there an individual right to keep and bear arms?—appeared on the Court’s agenda for the first time in 2007, though advocates had spent over a decade laying the foundation for the case. In *District of Columbia v. Heller*, the Court held that there is an individual right to own a firearm but the Court also concluded that such a right was not absolute. In *McDonald v. Chicago*, the Court “incorporated” the Second Amendment into the Fourteenth Amendment, applying the Second Amendment’s guarantee to the states. While it is too soon to say for sure—*McDonald* is only four years old—it appears that the Court has answered the question of the Second Amendment’s meaning and the issue has now largely disappeared from the Court’s agenda. (The issue has not disappeared from the dockets of lower courts but all subsequent challenges to gun control ordinances have failed.)

By contrast, abortion has been on the Court’s docket in every decade of the period under review. The Court heard *Roe* and a companion case, *Doe v. Bolton*, in the 1970s; five cases in the 1980s; three cases in the 1990s and two cases in the 2000s. Arguably all of these subsequent cases circumscribed the decision in *Roe*.

Similarly, cases involving religion have also been heard by the Court in each decade of the period under review. Early cases as well as more recent cases deal with the issue of school prayer, though early cases dealt with school directed prayer and whether this constitutes an establishment of religion and later cases try to reconcile Establishment Clause jurisprudence with the Free Exercise right to engage in religious behavior in schools. Cases in the 1980s focused on holiday religious displays. The Court attempted to discern when and where religious symbols were permitted in holiday decorations. More recent cases have involved the posting of the Ten Commandments, whether in classrooms, courtrooms or in public spaces such as parks. As a 2012 case reveals, issues of religion and the state are likely to evolve further. In *Hosanna-Tabor*

v. EEOC (2012), the Court had to reconcile the rights of religious institutions with the demands of the modern administrative state.

The culture war also appears to have expanded over the period under review. Issues regarding the proper roles of church and state appeared on the Court's agenda, if not for the first time, then with much greater frequency than in the Warren era. Abortion became a Court issue in 1973. Both issues have remained culturally contested ever since. Newer issues—gay rights and gun rights—appeared on the Court's docket for the first time only 25 years ago.

Culture war cases have been more contentious than other cases. Of the total number of cases decided, the Court split 5-4 in 974 cases (out of a total of 6055) or 16.08% of the time. In culture war cases, 5-4 decisions occurred almost twice as frequently—31.11% of the time (42 out of 135 cases). Twenty of these occurred in the Burger Court, 17 during the Rehnquist era, and 5 in the recent Roberts Court.

The Court was also rarely unanimous in its culture war decisions. In only 22 cases out of the total of 135 (16.2%), did the Court unanimously agree. Not surprisingly, non-culture war cases were much more likely to be decided on a unanimous basis. Of the 6055 decisions, 1855 (30.64%) were decided by a unanimous Court.

Does “Party” Matter in Court Decisions?

President Eisenhower famously said that one of his biggest mistakes was appointing Earl Warren to the Supreme Court. If Warren disappointed Eisenhower, numerous other appointees have also disappointed their patrons. Recently, the conservative blogosphere was awash with

complaints about Justice Roberts’ “traitorous” vote upholding the Affordable Care Act (*i.e.* Obamacare).

Not surprisingly (since Republicans have occupied the White House for 28 of the last fifty years), Republican appointees have constituted a majority of the Court for most of the period under review. From 1962 to 1968, Democratic appointees held a 5 – 4 majority, but since that time Republican appointees have always had a majority on the Court.

But does “party” matter? How many case outcomes would have changed if cases had been decided along purely “partisan” lines? The answer — almost none.

In answering this question, I analyzed the vote in every culture war case and determined the majority position of each partisan block (e.g. did a majority of Republican (or Democratic) appointees favor the petitioner or the respondent?). I have then assumed that each Republican appointee voted with the majority of his or her fellow Republican appointees and every Democratic appointee always voted with his or her fellow Democratic appointees. In essence, I have identified “defectors” — those Justices that did not vote with the majority of their “partisan” colleagues. In only two cases—*Board of Education v. Allen* (1967) and *Christian Legal Society v. Martinez* (2009)—would partisan voting have changed the outcome. (Neither of these cases is considered “significant” by CQ.) The reason is straightforward. For most of the period of review, Republican appointees were the dominant majority on the Court. Since Republican appointees were the dominant majority on the Court, cases could be “close” only if there were Republican defectors from the majority Republican position. In numerous cases, one or two Republican appointees joined their Democratic colleagues in dissent, but this simply meant that the vote was 5-4 instead of 7-2. The case outcome did not change. This explains

much of conservative culture warriors' disappointment with the Court and Republican president appointees.

Of course, this may be changing. Graber (2013) suggests that even though many Warren Court decisions were controversial, they took place during a time of elite consensus. The Court was not polarized on partisan grounds because elites were not polarized along partisan lines. In contrast, “[t]he present polarization on the Supreme Court reflects the present polarization of elite opinion.” (Graber 2013,667) Strong conservatives have become more conservative. Strong liberals have become more liberal and both groups seek to dominate the Court. While strong conservatives are perhaps more aggressive than strong liberals in “vetting” Supreme Court candidates, both groups seek to ensure that no “stealth” moderates are appointed to the Court. As conservatives made clear when President Bush appointed Harriet Myers to the Court, only conservatives need apply: “no more David Souters.”²⁴

If this is true, then unless there is a coalescing of elite opinion or the clear dominance of one party for an extended period of time, then the nation could be facing a “constitutional yo-yo”—substantial and perhaps radical swings back and forth in constitutional doctrine. (Graber 2013, 712)

Culture war issues make up a very small proportion of the Court's business. Moreover, notwithstanding the high visibility of culture war cases and the attention given to 5-4 decisions, most culture war cases are not decided by one vote majorities. Yes culture war cases are often contentious, but when looking at the full landscape of culture war cases, there is less contention

²⁴ Graber argues that stealth candidates in the future are likely to be staunch conservatives or staunch liberals who managed “to [keep] their proclivities private . . .” (Graber 2013, 712) It is just as likely, however, that there will be no successful stealth candidates since neither staunch conservatives nor staunch liberals would accept a nominee whose jurisprudential proclivities were not known.

than is often assumed. Finally, while conservative culture warriors have been unable to overturn *Roe v. Wade*—and *Roe* was decided with six Republican appointees in the majority—conservatives have been quite successful in limiting the scope of liberal victories in culture war cases and winning culture war cases themselves. But if Graber is correct, these observations may be obsolete. Culture war cases may be on the way to becoming more contentious and their outcomes more volatile and culture case warfare may be expanding into other areas of the law.

Amici, the Culture War and Conflict Extension

As noted earlier, the number of briefs filed by amici has increased dramatically over the last several decades. This is no less true in the case of culture war cases and the increase reflects an increase in the number of culture war organizations represented before the Court.

A total of 721 briefs were filed by culture war amici in the 38 CQ culture war cases.²⁵ (As noted in chapter 1, a list of the number of amici briefs by case appears at Appendix 1.) Of the 38 CQ culture war cases, the largest number of briefs—80—were filed in an abortion case, *Webster v. Reproductive Health Services*. Coming in a close second is *District of Columbia v. Heller* where 71 briefs were filed. As a general rule, for the cases under review, there has been a continuing if not exactly steady increase in the number of briefs filed during the period under review. For example, in the case of abortion, in the ten year period after *Roe v. Wade*, there were five abortion cases (including *Roe*). In two of these cases, no briefs were filed. In total, only 34 briefs were filed and 26 of these were filed in *Roe*.

²⁵ These numbers do not include *Burwell v. Hobby Lobby* 573 U.S. ___ (2014) which is discussed in Chapter 6. As noted earlier, the reason is simple—*Hobby Lobby* is too new to be included in the most recent CQ list. A large number of briefs were also filed in *Hobby Lobby*—over 80.

In the case of gun rights, which did not emerge as a Supreme Court constitutional issue until 2007, a total of 131 briefs were filed by amici in just two cases. In the case of gay rights, 118 briefs were filed in four cases. In religion cases, the vast majority of briefs were filed by groups in the 1990s and 2000s. For example, with respect to public displays of religion, only six amici briefs were filed between 1984, when the first case was heard and 2004. In the two cases decided since then, 49 briefs were filed. Abortion seems to be the lone exception to this trend. While a significant number of briefs were filed in the two cases heard by the Court in the 2000s, the largest number of briefs was filed in the 1989 case of *Webster v. Reproductive Health Services*. This is probably explained by the fact that opponents of abortion saw *Webster* as their best chance to overrule *Roe v. Wade*.

It is not surprising that since the number of briefs filed in the cases has increased over time, the number of advocacy groups filing briefs has also increased. It is not simply that pre-existing groups suddenly (or even gradually) understood the value of filing amicus briefs. Rather, a whole new cadre of law-related interest groups formed with the express purpose of fighting culture war issues in the courts (Teles, 2008). A review of these cases reveals that over 170 conservative organizations filed briefs in these culture war cases. (For a list of conservative amici filing briefs, see Appendix 3).

Some organizations have been “friends” of the Court for the entire period of review. The American Civil Liberties Union (ACLU) and the Anti-Defamation League (ADL) have filed briefs in culture wars cases in every decade of the period of review. But many groups are new to the battle. Steven Teles has well documented the rise of the conservative legal movement as well as the “liberal legal network” that preceded it. (Teles, 2008) As Teles accurately notes, in the 1960s, a network of left-leaning organizations such as the Center for Law in the Public

Interest, Natural Resources Defense Council, Public Advocates, the ACLU, the NAACP Legal Defense Fund and others sought to both solidify the achievements of the New Deal and extend those gains. To many on the right of course, the policies that these advocates sought to enshrine and extend were not achievements or gains at all. Rather, they represented an unwarranted expansion of the administrative, welfare state. So, in response, conservative public interest legal groups arose to challenge the hegemony of the liberal legal establishment. The first conservative public interest law firm was the Pacific Legal Foundation (PLF). But it was soon followed by many others including the American Center for Law and Justice (ACLJ), the Institute for Justice (IJ), Liberty Counsel and the Becket Fund for Religious Liberty.

Chart 2.1 shows the 12 organizations filing briefs most frequently in culture war cases. Some, such as the American Civil Liberties Union (ACLU), are very familiar. Others, less so. Given that many of the conservative legal groups are relatively new, the list contains a surprising number of “newer” groups. Conservative groups don’t have the history that liberal legal network groups have, but they are “making up for lost time.” As Teles notes, the goal of the newer conservative legal groups was to act as counter-balance to established liberal legal network groups. Based upon amicus filings, they have largely succeeded.

Chart 2.1: Organizations Filing Briefs Most Frequently (Main Author)

ORGANIZATIONS SUBMITTING MOST BRIEFS	POLITICAL LEANING	NUMBER OF BRIEFS
American Jewish Congress	L	15
American Jewish Committee	L	13
Family Research Council	C	13
American Civil Liberties Union (ACLU)	L	12
Anti-Defamation League of B'nai B'rith	L	11
Rutherford Institute	C	11
American Center for Law and Justice	C	10
Catholic League for Religious and Civil Rights	C	10
Focus on the Family	C	10
American Psychological Association		9
Americans United for Separation of Church and State	L	9
Christian Legal Society	C	9

What is not so readily apparent from this list is the interrelationship among and between these advocacy groups. Many of these organizations file joint briefs as well as briefs in their own names. Some such as the Becket Fund for Religious Liberty specialize in one type of culture war issue, in their case, questions regarding the First Amendment. Others such as the ACLU and the PLF are more wide-ranging, filing briefs in a variety of cases. Clearly there is coordination among like-minded groups and like-minded parties. Chart 2.3 lists the twenty organizations noted above, indicating the issue areas in which they have filed briefs. As the chart shows, some are constitutional specialists and some are constitutional generalists.

Chart 2.2: Topic Briefs of Organizations Filing the Most Briefs (Main Author)

ORGANIZATIONS SUBMITTING MOST BRIEFS	Abortion	Establishment	Free Exercise	Gays	Guns
American Jewish Congress	x	X	x	x	o
American Jewish Committee	x	X	x	o	x
Family Research Council	x	X	x	x	o
American Civil Liberties Union (ACLU)	x	X	x	x	o
Anti-Defamation League	x	X	x	o	x
Rutherford Institute	x	X	o	x	x
American Center for Law and Justice	x	X	o	x	x
Catholic League for Religious and Civil Rights	x	X	x	x	o
Focus on the Family	x	X	x	o	o
American Psychological Association	x	O	o	x	o
Americans United for Separation of Church and State	x	X	x	o	o
Christian Legal Society	x	X	x	x	o

Key:

x = Brief(s) submitted for topic case as main author only.

o = No brief submitted.

A review of the Court’s docket over the last 50 years also reveals evidence of conflict “extension” as opposed to conflict displacement. While these concepts are borrowed from the literature on political parties, they are nonetheless of some relevance here. Traditionally, political scientists viewed competition between American political parties as an evolutionary process. The parties polarize on an issue agenda; new issues arise; aided by party activists, a new issue agenda replaces the old one and the parties converge on the previous line of cleavage. (Carmines and Stimson 1989; Miller and Schofield 2003; Sundquist 1983). Such partisan change thus takes the form of conflict displacement.

More recently, political scientists have begun to challenge the conflict displacement theory arguing that as issues evolve previous conflicts are not displaced, but rather they are extended. New policy disputes join the old ones; parties do not converge toward agreement on the old ones. Conflict is “extended to new issues” and party activists play a critical role in this process (Layman, *et al.* 2010). Looking at social welfare, racial and cultural issue attitudes, Layman *et al.*, concluded that differences between Republican and Democratic activists were quite large in 1972 (the beginning year of their data) and the gap has continued. At the same time, the differences on cultural issues “grew rapidly and substantially between 1972 and 1988.” (Layman *et al.* 2003, 331)

A similar process can be seen with respect to the activists at the Court. While a review of all social welfare, racial and cultural cases before the Court over the last fifty years is beyond the scope of this work, it is clear (as discussed earlier) that new cultural issues have been added to the Court’s agenda—gay rights and guns simply did not register as issues fifty or even forty years ago. It is also clear that social welfare issues and issues regarding race are still on the Court’s agenda and still divisive. Two cases make this point—*NFIB v. Sebelius* and *Shelby County v. Holder*. In the first case, the Court upheld a new “social welfare” program—the Affordable Care Act (aka Obamacare) by the slimmest of margins and even then a conservative majority concluded that it was not consistent with the Commerce Clause. In *Shelby County*, a conservative majority struck down provisions of the Voting Rights Act, a bill designed to protect the voting rights of minorities and one that had been passed overwhelmingly by Congress. In short, it is clear that social welfare and race issues remain key parts of the Supreme Court’s agenda.

One final point is relevant to this discussion. In conflict extension theory, activists are key players in policy extension. Activists bring issues to the fore, accommodate other interests and push these issues onto partisan agendas. The same process is at work here. Amici are often the driving force behind cases. They identify appropriate clients; develop the case; shop for a favorable venue and file or assist the name party in filing the case. Of course, some amici are more involved in cases than others. It is interesting to note that the National Rifle Association was opposed to filing *Heller*. After the case had been filed, they sought to wrest control of it from the plaintiffs. They feared an adverse judgment in the Supreme Court. Arguably, activists also have an easier time affecting the policy agenda facing the courts than they do affecting policy in Congress or even the positions of the parties. While taking a case to the Supreme Court is not easy, legal activists have many advantages that political activists do not, the most important of which is that legal activists can get a hearing for their issue merely by filing a lawsuit. They may not win, but they can appeal. The Supreme Court may not grant certiorari, but even a Court of Appeals decision gives the legal activists significant exposure.

Do Amici Matter?

Having reviewed the number and nature of amici participating in culture war cases, a threshold question must be addressed—do amici matter or more precisely, do amicus briefs influence the decisions of Supreme Court justices? The evidence is decidedly mixed. The general consensus has been that with the exception of briefs filed by the Solicitors General, amicus briefs have little influence on justices' merits decisions. Not surprisingly, attitudinalists suggest that amicus briefs (and in fact, all briefs) have minimal influence on justices. Amicus

briefs simply give justices legal ammunition to support preexisting policy positions. (See McGuire 2002; Segal and Spaeth 1993; Stumpf 1998; Walter and Epstein 1993).

Recent research, however, casts doubt on the general consensus. Collins (2008) states definitely: “When subjected to rigorous empirical testing, the results demonstrated that not only do amicus briefs influence the justices’ decision making, but also that for the overwhelming majority of the Court (95% of observations) ideology does not act as mediating variable. . . .” (Collins 2008, 172-3) In a more recent paper, Collins, *et al.* (2013) show that “justices systematically incorporate language from amicus briefs into the Court’s majority opinions based on their perception as to whether those briefs will enhance their ability to make effective law and policy.” (Collins, *et al.* 2013, 22) Collins rejects the general consensus that justices’ preexisting policy positions are all important in decision writing, but even if he were to be wrong on this point, he has demonstrated that amici briefs do play a role in case decision-making.

Certainly, amici believe that briefs influence Supreme Court Justices’ thinking. As noted earlier, amicus briefs are being filed in increasing numbers. Moreover, Justices themselves note the influence of amicus briefs. Collins (2008) quotes Justices Breyer, O’Connor and Douglas each of whom conclude that, in varying degrees, amicus briefs matter.

In my analysis, I do not attempt to determine the degree to which briefs influence justices, but I am interested in the nature of arguments made by amici compared to the nature of the arguments used by the Court in justifying a case outcome. It is my thesis that some types of arguments (*e.g.* historical and doctrinal) will prove to be more popular than others (*i.e.* ethical). My primary goal, however, is to determine the degree and nature of cultural warfare among amici. What are amici fighting about? Are they fighting merely about the meaning of precedent,

or the application of doctrine to specific facts, or are they fighting about more fundamental issues? Given the nature of culture war issues, it seems logical that the debates among culture warriors are in fact, ethical in nature regardless of the type of arguments being proffered.

Whether amicus briefs influence justices or not, they can still tell us much about the level and nature of disagreement among cultural combatants. Moreover, they tell us something about the nature of the culture war. As chart 2.3 shows, with the rise of the conservative legal movement, liberal and conservative groups are relatively balanced at the court. The groups filing the most cases are almost equally balanced ideologically. Moreover, their success rates are fairly evenly balanced—though this picture is somewhat distorted by the fact that liberal groups were much more successful in the earlier part of the period under review and since they are newer, conservative groups have been successful more recently. Nonetheless, the groups that have been most successful are newer, conservative groups.

Chart 2.3: Top Filing Organizations with Percentage of Rate on Prevailing Side

Organizations	No. of Briefs (Main Author)	Rate on Prevailing Side
American Center for Law and Justice	10	70.00%
Catholic League for Religious and Civil Rights	10	60.00%
Rutherford Institutes	11	54.55%
Family Research Council of America	13	53.85%
American Civil Liberties Union	12	50.00%
Focus on the Family	10	50.00%
American Jewish Committee	13	46.15%
Anti-Defamation League of B'nai B'rith	11	45.45%
American Psychological Association	9	44.44%
Christian Legal Society	9	44.44%
American Jewish Congress	15	40.00%
Americans United for Separation of Church and State	9	33.33%

Methodology

As noted earlier, my purpose is to look at the nature of the arguments made in amicus briefs. Are amici fighting Hunter’s culture war with arguments about moral fundamentalism and moral relativism? Or are their arguments more issue and outcome specific? Are they simply trying to win a case or are they fighting for the “soul of America”? Moreover, there is the question of how the debate among the amici relates to the fight between the parties. It may be that the parties themselves believe that they are fighting a culture war and they reflect this in their briefs. On the other hand, the parties to the case may not be looking beyond the specific issues in the case and they do not see the case as a cultural showdown. Amici may have a different view. Finally, there is the question of how the Court sees the case and how it disposes of the case. Does it view the case as another battle in the culture war? In *Romer v. Evans*,

Justice Scalia says that that the Court has “now taken sides” in the culture war, for example.

Alternatively, perhaps the Court, notwithstanding the perspectives of the parties and amici, views the case more narrowly—limited to its facts and not a part of some large culture war.

To answer these questions and shed light on the nature of the culture war, I have analyzed the arguments in the amici briefs in selected cases from the CQ list. I have also analyzed the briefs of the parties. In order to analyze the nature of the arguments, I have examined the main headings of the “Arguments” section in the “Index” of each brief. This section sets forth in summary form the main arguments and auxiliary arguments made in the brief. This methodology is widely acknowledged to be an appropriate method for coding arguments. (Spriggs and Wahlbeck 1997; Collins 2008 (though Collins uses a “hybrid methodology” that also looks at authorities cited)) For each brief, I have classified the arguments contained in the brief based upon two dimensions. In the first instance, I have coded the type of argument being made. I begin with Philip Bobbitt’s “modalities” or archetypes of constitutional argument. (Bobbitt 1982, 7). In *Constitutional Fate*, Bobbitt suggest that these modalities capture our “legal grammar” or “law-talk.” He identifies six modalities:

- Textual
- Historical
- Structural
- Doctrinal
- Prudential
- Ethical

The first three modalities are self-descriptively obvious and are widely employed by the Court and by advocates. First, what does the Constitution say? What do the words mean?

Unfortunately (as least from the standpoint of those looking for clear answers to constitutional questions), the text is often vague and unhelpful. This does not stop advocates or justices from advancing textual arguments often by arguing for the “plain meaning” of the text.

Historical arguments are also extremely popular and have become more popular in the “age of originalism.” Originalists suggest that historical understandings of intent and/or meaning are the key means of properly understanding the Constitution’s text. Historical arguments are closely related to textual arguments, because they are usually arguments about the constitutional text. In the event that the text of the Constitution is not “plain” (and in most constitutional cases it rarely is), historical understanding, it is argued, can bring clarity to the text.

Structural arguments derive from the federalist structure of the Constitution and the separation of powers within the Constitution. Such arguments are often important and dispositive in economic regulatory cases but less so in culture war cases. However, they do appear in culture war cases. Culture war cases do involve questions regarding whether a state’s actions are consistent with the Bill of Rights, states do proffer structural arguments in defense of their actions.

Doctrinal arguments are somewhat more difficult to characterize but the foundation of such arguments is the notion of the “Rule of Law.” Like cases are to be treated alike by using reasoned analysis to logically apply appropriate rules. Precedent is to be respected, hence the concept of *stare decisis*. Also, as Bobbitt points out, doctrinal arguments tend to be “generalized.” Often, doctrines are “tests” derived from text that allow (perhaps) the text to be applied in a variety of factual circumstances. Finally, there are also doctrines that allow the Court to decide “not to decide.” Principles of justiciability and standing are embedded in

doctrinal rules adopted by the Court to ensure that the Court remains within appropriate Constitutional boundaries. Of course, these rules or doctrines also allow the Court to avoid issues that it does not want to decide. The Court's recent decision in the California gay marriage case, *Hollingsworth v. Perry*, is a prime example of this.

Prudential arguments advance social, political and economic factors as being relevant to constitutional decision-making. For example, while the First Amendment states that "Congress shall make no law," a prudentialist might argue that in time of national emergency, circumstances might justify some restrictions on speech. "No law" is not to be read literally, but rather, it is to be understood in the context of social, political and economic events at the time. Prudential arguments are thus often characterized as antithetical to textual arguments (though there is no logical reason why both type of arguments cannot be used by an advocate at the same time.)

This brings me to Bobbitt's final category—ethical arguments. In explaining ethical arguments, Bobbitt writes:

By ethical argument, I mean constitutional argument whose force relies on a characterization of American institutions and the role within them of the American People. It is the character, or *ethos*, of the American polity that is advanced in ethical argument as the source from which particular decisions derive. (Bobbitt 1982, 94)

Thus Bobbitt's use of "ethical" does not imply that the arguments are "moral." In fact, "[e]thical arguments are not *moral* arguments." (Bobbitt 1982, 94) They "do not claim that a particular solution is right or wrong in any sense larger than that the solution comports with the sort of people we are and the means we have chosen to solve political and customary constitutional problems." (Bobbitt 1982, 94-5).

Ethical arguments can be derived by reference to the Constitutional text but they can also be derived from historical references—what the Founders intended in developing and enacting the constitutional text. References to “history and tradition” indicate the presence of an ethos-based argument. (History here is not tied to a particular moment or period in time used for the purpose of elucidating Constitutional text.) Stated differently, ethical arguments embed Constitutional values.

We can think of various examples of such arguments:

- Our government is one of limited powers.
- Our is a government “by the People.”
- A legitimate government treats all people as equals.
- A legitimate government protects liberty.

This list is not exhaustive, but it is representative of some of the most important constitutional values. Of course, ethical arguments can conflict and as we will see, they often do in Constitutional adjudication.

Bobbitt recognizes that even suggesting that ethical argument exist as a descriptive category in constitutional argumentation and suggesting a central place for such arguments is controversial. He notes that there “is an almost utter absence of the discussion of ethical arguments *as arguments* in the teaching of constitutional law.” (Bobbitt 1982, 9). Moreover, he notes that such arguments are often viewed as invalid or inappropriate and that the Court strives to avoid such arguments.

Notwithstanding these cautionary notes, there is evidence that the Court does rely on these types of arguments in its decisions. Moreover, there is evidence that culture warriors advance and rely upon these types of arguments in their advocacy. My goal is to determine the

degree to which such arguments are advanced and to analyze how such arguments are used. For example, do they appear more often in cases involving abortion than in other culture war issues or are they advanced in all issue areas? Who uses these arguments? The parties to the case? Certain types of amici? And how does the Court respond to such arguments (assuming it does)?

One final note regarding this category of arguments—Bobbitt recognizes that the term “ethical” may be confusing, understood by many readers as referring to “moral” as opposed to referencing ethos/cultural claims. He nonetheless retains the term and defends its use. Rejecting alternative terms such as ethological (“it has been taken over by cultural anthropologists”) or invented words such as ethetic, he defends the use of “ethical” based upon its etymological basis. While his position is not without merit, it leads to some confusion. “Ethical” has been “taken over by popular culture” to mean “moral” and even though Bobbitt defines how he intends to use the term, this does not insulate the term from popular misconceptions. Accordingly, I will retain this category but redefine the arguments as “ethos-cultural.” While this term is rather cumbersome, it is more accurately descriptive and conjures the appropriate categorical image.

If Hunter is even partially correct in his notion of a culture war, these types of arguments should be important to culture warriors. These ethos-cultural arguments attempt to define “the meaning” of America and it is very likely that in attempting to describe the cultural “ethos,” cultural warriors will reach very different conclusions. It is for this reason that my analysis will focus particularly on identifying ethos-cultural arguments and describing their content and implications.

Two additional points regarding these modalities—first, they differ somewhat from those more recently used to classify arguments in amicus briefs. Collins (2008) for example relies on

only four categories: legal, policy, separation of powers and other. (Collins 2008, 64) Similar categorization is used by Comparato (2003), Epstein and Knight (1998, 1999) Kearney and Merrill (2000) and Spriggs and Wahlbeck (1997). In my view, the Bobbitt typology is superior to these others in that it sheds more light on the nature of arguments being used. For example, “legal” is very broad and could encompass textual, doctrinal and historical arguments. Bobbitt’s typology allows more subtle categorization of arguments.

However, a review of competing typologies does reveal a shortcoming in Bobbitt’s typology. It does not take account of policy arguments. Policy arguments do not fit well into any of Bobbitt’s existing modalities. While they are a type of prudential argument, they are different in nature from purely consequentialist arguments of the type Bobbitt has in mind. Accordingly, I have added “policy” as a sixth modality of argument.

Finally, I have also included a category for moral arguments, precisely the type of arguments that Bobbitt intended to exclude from his ethical category. I do so because these types of arguments are most relevant to Hunter’s theory of cultural warfare. Moral traditionalists make moral arguments and moral modernists generally eschew such arguments. Of course, it must be noted that at least for the past 80 years, moral arguments have been disfavored in legal disputes. Natural law theory which presumed and asserted that there were right and wrong answers to legal questions was replaced by legal positivism and legal realism. Moral arguments hold no sway in this approach to the law. Thus, moral traditionalists will find a judiciary less than hospitable to moral arguments. Nonetheless, with respect to culture war issues, it is important to determine whether such arguments are being offered.

In addition to these general categories of arguments, within each issue area I have also identified a number of specific arguments being made. As an example, I have coded arguments that are “originalist” in nature, identifying those that rely upon “original intent” and those that rely upon “original meaning.” While these are a type of historical arguments, they are a particular type of historical argument and being able to identify arguments at this level of particularity will allow for certain conclusions regarding the nature of the culture war.

In addition, I would note that some of these specific arguments are case or topic specific and some are not. For example, with respect to the meaning of the Second Amendment, amici disagree over the appropriateness of using the Privileges and Immunities Clause as the basis for “incorporating” the Second Amendment. This argument is unique to *McDonald v. Chicago* since incorporation arguments have long ago been settled with respect to other Bill of Rights guarantees. By contrast, an argument that the Court should not upset settled precedent or that it should defer to state policy decisions are not unique to any one case.

Second, it is also important to note that these modalities are not precisely determined, distinct categories. Types of arguments can and do overlap. One type of argument can morph into another and two (or more) types of arguments can easily be combined. Thus, coding of modalities is not a straightforward, objective exercise. Judgments must be made about the nature of the arguments being advanced. As even a quick perusal of a random number of briefs reveals, they vary significantly in quality and precision. Some have tightly structured arguments, logically ordered. Others do not. I have attempted to be consistent in my categorization of the arguments and consistency should be increased by identification of particular, specific arguments (e.g. any reference to precedent is by definition a doctrinal argument). Notwithstanding these

caveats, I believe that these modalities are useful categorizations and will provide a valuable portrait of what advocates and justices are doing in culture war cases.

Finally, I would note that this analytic typology fails to take into account one type of argument, one central to Hunter's culture war thesis. Hunter posits that there is a contest over the "meaning of America" and that this contest is rooted in two very different views about "the matter of moral authority." Traditionalists believe in "an external, definable, and transcendent authority" and modernists do not. Arguments about "the meaning of America" are the type of argument that Bobbitt has in mind in his description of ethical arguments. But Bobbitt disclaims that ethical arguments include moral arguments. If Hunter is right not only about the nature of the culture war but also its cause, traditionalists should advance not just ethical (or ethos-cultural) arguments but also moral ones, that is, they should make claims not only about the "meaning of America" but also claims that a particular solution is right or wrong, just or unjust. I shall be particularly attentive for such claims and identify any "moral" claims as such. I will include such claims within the ethos-cultural category, but if they are present, they constitute a "heightened" type of such argument.

The presence of such moral claims would lend credence to Hunter's theory of cultural warfare, but the absence of such claims will not automatically undermine his theory. Legal argumentation is a specialized form of argument, different from political discourse or public discourse. It follows certain conventions. One of these is that moral arguments are inappropriate in legal disagreements, even if those legal disagreements are about such moral issues as abortion, self-defense, sexual practices or the role of religion in the public sphere. For example, as numerous commentators have noted, the Court strived mightily (and ultimately unsuccessfully) to make abortion a "legal" issue and not a moral issue. Advocates understand which arguments

are persuasive and which are not. Appeals to natural law, “right reason” or theological dogma are viewed as out of bounds and inappropriate. So the absence of such reasons does not confirm that culture warriors do not have different views of moral authority. That said, the total absence of such arguments—especially with respect to First Amendment religion claims—will be highly suggestive that the culture war is not as simple as Hunter suggests.

In *Constitutional Fate*, Bobbitt notes that “[i]f you were to take a set of colored pencils, assign a separate color to each of the kinds of arguments, and mark through passages in an opinion of the Supreme Court deciding a constitutional matter, you would probably have a multi-colored picture when you finished. Bobbitt (1982, 93-94) I have done exactly this with the briefs filed in the selected culture war cases. As we will see, each set of case briefs—which I will refer to as “case argument maps”—has its own “colored picture.” These pictures vary by issue area and vary between the contesting parties in a case. Nevertheless, interesting patterns do emerge.

With this as background, I now turn to a discussion of individual culture war issues and cases, beginning with gun rights and the Second Amendment.

Chapter 3: Guns

I have suggested that cultural warfare at the Supreme Court is best characterized as a series of interrelated skirmishes among cultural warriors and not a full-fledged fight for the “soul of America.” Cultural warriors are not monolithic members of competing armies. Rather, they are more appropriately thought of as a series of loosely affiliated militias. There are predictable coalitions of “militias” and these coalitions do have differing visions about the “meaning of America” but these differences do not stem primarily from differences about moral authority, as Hunter suggests. Rather, they simply reflect differing judgments as to which values are truly reflective of the American experience or ethos.

In this chapter, I begin to test this thesis by examining legal battles over the meaning of the Second Amendment’s “right to bear arms.” There are two cases that deal with the meaning of the Second Amendment. In *District of Columbia v. Heller*,²⁶ for the first time, the Court addressed the question—does the Second Amendment create an individual right to own a firearm? The decision in *Heller* was the result of a twenty year effort by conservatives to constitutionally protect gun rights. A second case, *McDonald v. City of Chicago*,²⁷ also deals with gun rights, but it is more accurately characterized as an “incorporation” case and not a gun rights case. The central question in *McDonald* is whether the Second Amendment should be “incorporated” into the Fourteenth Amendment and thereby applied to the states. There is a discussion of the meaning of the Second Amendment, but for the most part, *McDonald* simply restates the arguments from *Heller*. Accordingly, I will ignore *McDonald* in my analysis.

²⁶ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

²⁷ *McDonald et. al. v. City of Chicago, Illinois, et. al.*, 561 U.S. 3025 (2010).

I begin by examining the briefs filed in *Heller*. I will look at the nature (*i.e.* modality) of the arguments in each of the briefs filed as well as the individual substantive arguments. I will compare both the modalities and the substantive arguments made by the parties, petitioner amici and respondent amici. I then turn to the Court’s decision in *Heller* as well as the dissenting opinion. In examining the opinions, I place the case in the context of the ongoing debate over the proper mode of constitutional analysis, and I then summarize the nature (modality) of the arguments made in the majority and dissenting opinions. Next, I will connect the arguments in the briefs to the analyses offered by the majority and dissenting opinions. Finally, I conclude by relating this analysis to my core thesis—that cultural warriors seek to advance their vision of the “meaning of America” but they are not fighting an epistemological battle over the source of moral authority.

Gun Rights and the Culture War

Gun rights might seem a surprising issue with which to start the discussion of cultural warfare and the Supreme Court. First, the question of the right to “keep and bear arms” is a relatively new issue on the Court’s agenda. In the last century, there was only one Supreme Court case dealing with the meaning of the Second Amendment. That case, *United States v. Miller*²⁸ (decided in 1939), concluded that the Second Amendment did not protect the right to own a sawed-off shotgun. While the decision was not a model of clarity, it seemed to suggest that the right to possess arms was tied to the preservation of a “well-regulated militia.” The issue of gun rights and the Second Amendment then lay dormant for the next seventy years—at least

²⁸ *United States v. Miller*, 307 U.S. 174 (1939).

with respect to the Supreme Court. While issues like the role of religion in public life and abortion began appearing regularly on the Court's docket beginning in the 1960s and 1970s, the Court did not address the meaning of the Second Amendment again until 2008.

There are several explanations for this. First, there has been very little reason for the Supreme Court to address the question of gun rights under the Second Amendment. Most state constitutions provide for an individual right to own a firearm so anyone wishing to challenge state gun regulations could do so under the appropriate state constitution. There has simply been no need to fight this battle at the Supreme Court.

Second, unlike other issues where culture warriors are fairly evenly matched, the battle over gun rights has been dominated by one side in the debate. Gun rights advocates led by the National Rifle Association (NRA) have controlled the discussion. Proponents of gun control have only a small fraction of the NRA's financial resources²⁹ and proponents of gun regulation seem to gain visibility (and a surge of donations) only in the aftermath of a mass shooting. The NRA has been very successful in ensuring that gun regulations are not enacted by states and in expanding gun rights, promoting for example "open carry" laws. This success obviates the need for litigation and in fact the NRA has been wary of litigation, fearing that the Court might conclude that the Second Amendment does not provide an individual right to arms. (The NRA initially opposed the *Heller* litigation for this reason.)

²⁹ See "Gun Control vs. Gun Rights," *OpenSecrets.org*, *Center for Responsive Politics*. <https://www.opensecrets.org/news/issues/guns>. "Cash is their ammunition, and they have no shortage of it. Gun rights groups have given more than \$30 million in individual, PAC and soft money contributions to federal candidates and party committees since 1989, with nearly \$27 million -- or 87% -- of it going to Republicans. And in the 2010 and 2012 election cycles, they let loose another \$41.2 million (at least) in outside spending, almost all of which has put Democrats in their crosshairs. The NRA has provided the lion's share of the funds, having contributed more than \$21 million since 89 and further opening its coffers to make \$25 million in outside expenditures. Gun control groups, by comparison, have been barely a blip on the radar screen. They've given a total of just under \$2 million since 1989, of which 94 percent has gone to Democrats. In the 2012 election cycle, they gave only \$5,000."

Unlike some other culture war issues, there has been an almost remarkable consensus among Americans about both the meaning of the Second Amendment and appropriate public policy regarding gun regulation³⁰ (though this is not itself a reason for the lack of litigation on the subject). Most Americans believe that the Second Amendment confers an individual right to own firearms.³¹ The Second Amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” While the Second Amendment is less than clear in its construction—how are we to interpret the dependent clause that opens the Amendment—most Americans do not ponder (or perhaps are not aware) of the ambiguity arising from the construction of the Second Amendment. Most Americans, including those who support gun control measures, believe that the Second Amendment gives Americans the right to own guns.

In *Gun Fight, the Battle over the Right to Bear Arms in America*, Adam Winkler describes the disconnect that exists between and among cultural elites as to the meaning of the Second Amendment and appropriate gun regulation. For staunch protectors of gun rights (“gun nuts” in Winkler’s terminology), the prefatory clause in the Second Amendment is mere surplusage: the Second Amendment confers an individual right to possess firearms that cannot be abrogated by the government. For gun nuts, the Second Amendment is all right and no regulation. Any regulation of firearms is viewed as inconsistent with the Second Amendment.

⁵For example, by significant margins, Americans favor universal background checks, limits on certain types of guns and ammunition and registration, however, the NRA has been successful in blocking all such legislation. Following the massacre at Sandy Hook Elementary School, Senator Manchin (D-WV) and Senator Toomey (R-PA) introduced bipartisan legislation to require background checks on all commercial sales of guns, expanding the checks to gun shows and Internet sales, (but not requiring checks on family members or friends giving or selling guns to each other.) This legislation, overwhelmingly favored by the public, failed to obtain the 60 votes necessary to overcome a filibuster.

³¹ “73% believes the Second Amendment to the Constitution guarantees the rights of Americans to own guns.” See Jones, Jeffrey M., Public Believes Americans Have Right to Own Guns, March 27, 2008 at <http://www.gallup.com/poll/105721/Public-Believes-Americans-Right-Own-Guns.aspx>. Accessed April 16, 2014.

By contrast, proponents of gun control (“gun grabbers” in Winkler’s shorthand) find no individual right to own firearms within the Second Amendment. In their interpretation, the Second Amendment was drafted as a restriction on the ability of the federal government to regulate state militias) and any right to a firearm was related solely to participation in a militia. Since militias no longer exist (at least not in their 18th century form), any individual right to arms no longer exists. In this view, the Second Amendment serves as no barrier to civilian disarmament.

The battle over the meaning of the Second Amendment—at least within the academic community—began thirty years ago with a pioneering article by Don Kates in the *Michigan Law Review*.³² In “Handgun Prohibition and the Original Meaning of the Second Amendment,” Kates argued against the then prevailing general consensus that the Second Amendment guaranteed individuals a right to own and carry firearms. The prevailing view at the time was that the right was a collective right related to service in a militia. The debate gained steam with an article published by the liberal constitutional scholar, Sanford Levinson, in 1989. In “The Embarrassing Second Amendment,” Levinson took liberals to task for failing to take seriously the Second Amendment. “For too long, most members of the legal academy have treated the Second Amendment as the equivalent of an embarrassing relative, whose mention brings a quick change to other, more respectable family members.” (Levinson 1989, 358) In the years that followed and up until the Court’s decision in *District of Columbia v. Heller*, a veritable academic cottage industry developed around the collective versus individual right debate. Based upon the growing predominance of originalism as an interpretive method, the individual rights argument

³²There was also an effort in the 1980s-90s to hold gun manufacturers responsible for violence and mayhem. In fact, there was considerable effort by the NAACP and several other large organizations, as well as major cities, to use class-actions against gun manufacturers. *See e.g.*, Lytton (2006).

gained ground—at least within the academic literature. Some even suggested that the collectivist right theory was the newcomer: “The collective rights view did not begin to gain acceptance in the Federal courts until the 1940s, and did not become widespread until the 1970s.” (Hardy 2011, 2) But the collective theory did not go quietly. Some used originalist methods to argue for the collective rights view. (Cress 1984, 34) Others, using the same approach argued that the Second Amendment was a “structural provision” meant to guarantee that the federal government would not disarm the southern militias used to control slaves. (Bogus 1998) The thirty year war culminated in *Heller*, and in *Heller*, the individual right position prevailed. A 5-4 majority sided with the individual right position.

Heller (and McDonald)

Unlike abortion or the issue of the role of religion in public life which have been fought out in numerous cases, the battle over the meaning of the Second Amendment involves only one significant case, *District of Columbia v. Heller* (2008.) (As noted earlier, *McDonald v. Chicago* (2010) is significant for “incorporation” reasons.) The facts of *Heller* are rather straightforward. In 1974, the District of Columbia adopted an ordinance that effectively prohibited the possession of a handgun within the borders of the District. The statute made it a crime to carry an unregistered firearm and prohibited the registration of handguns. Effectively, the statute outlawed handguns. The law also required residents to keep their lawfully owned firearms such as rifles, “unloaded and disassembled or bound by a trigger lock or a similar device” unless located in a place of business or in use for recreational activities. (D.C. Code §7-2507.02). Dick Heller, a D.C. special police officer, challenged the statute on the grounds that it violated the Second Amendment. Heller was authorized to carry a handgun while on duty at the Federal Judicial Center but when he applied for a registration certificate to keep a handgun at home, his request

was denied. He then sought to enjoin the District from enforcing the registration, licensure and trigger-lock requirements. The federal district court dismissed his suit. The Court of Appeals for the District of Columbia reversed, concluding that the Second Amendment “protects an individual right to possess firearms and that the City’s total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right.” (*Heller* at 570.) At the time of the decision, it was one of only two courts to conclude that the Second Amendment protected an individual right. Nine other circuits had adopted the collective right view of the Amendment.

Heller applied only to the District of Columbia, a “federal enclave.” *McDonald* addressed the issue of whether *Heller*’s understanding of the Second Amendment applied to the states through the Fourteenth Amendment. The city of Chicago and the village of Oak Park had laws substantially similar to the D.C. statute at issue in *Heller*. Chicago and Oak Park argued that their statutes were constitutional because the Second Amendment did not apply to the states. The Court disagreed concluding that the Second Amendment, like other Bill of Rights provisions was “incorporated” through the Fourteenth Amendment to apply to the states. *McDonald* did not, however, break any new ground with respect to the meaning of the Second Amendment. The majority and dissenting opinions mostly restated the positions in *Heller*.

In order to understand the place of *Heller* in the culture war, it is important to note that with respect to the meaning of the Second Amendment, the Court was writing on a virtual *tabula rasa*. Unlike other culture war issues, where precedent is more developed and *stare decisis* comes into play, in the case of the Second Amendment, there were virtually no Second Amendment decisions preceding *Heller*. In only one case, *United States v. Miller* (1939), had the Court considered the meaning of the Second Amendment, and the Court did not (or at least not in

an explicit fashion) address the individual right-collective right debate. Thus, the Court was free to fashion a “new” Second Amendment jurisprudence. With this as background, I now turn to the briefs filed in *Heller*.

The Parties and their Arguments

In order to put the amici briefs in context, it is useful to begin with an examination of the arguments made by the parties, and since respondent Heller prevailed at the Circuit Court, I turn first to his arguments. Respondent opens with a textual argument: “The operative rights-securing clause is grammatically and logically independent of the preamble.” In other words, the right to “keep and bear” arms in the second clause of the Amendment is not limited by the reference to “a well regulated Militia” in the opening or prefatory clause. Heller refers to the prefatory clause as a “preamble” and relies upon a “rule of construction” to defend his reading of the Amendment: “when the words of the enacting clause are clear and positive, recourse must not be had to the preamble” (Respondent’s Brief at 7, cite omitted). Heller thus combines a doctrinal argument with his textual argument to conclude that the prefatory clause is of no import. Of course, it must be noted, as petitioners do in their brief, that there is a competing rule of construction, namely that “every word and clause is to be given effect.” The parties are thus left in disagreement over the meaning of the text as well as how this meaning is to be obtained. For respondent, the “Second Amendment’s plain text secures an individual right.” (Respondent’s brief at 9.) For petitioner, it secures only a collective right.

Respondent reinforces his textual argument with an historical argument: The Framers secured an individual right to keep and bear arms in “reaction to the British Colonial

experience.” (Respondent’s brief at 19.) Over the course of several pages, respondent describes the forcible seizure of “guns and powder” by the British and the reaction of the colonists: “Disarmament as a grievance became a common theme among the Patriots.” (Respondent’s brief at 21.) Respondent then continues with a lengthy discussion of the enactment of the Second Amendment arguing that it was included in the Bill of Rights as a result of the Founders’ experience during the revolutionary period.

Intertwined with the historical argument are two further claims, claims that arguably transcend merely historical claims and may more appropriately be characterized as “ethos-cultural.” First, respondent argues that, following English common law, there is an inherent individual right to self-defense. Second, they argue that the Second Amendment “offers a strong moral check against the usurpation and arbitrary power of rulers.” (Respondent’s brief at 30.)

Respondent concludes:

The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only one.” (Respondent’s brief at 31.)

Not surprisingly, petitioner strongly disagrees with respondent’s reading of the text and respondent’s arguments as to what is relevant history. As noted above, petitioner argues that the prefatory clause must be given meaning—the right to arms is granted within the context of participation in a militia. Further, the words of the operative clause—“keep and bear arms”—must be read in this light. With respect to the historical arguments, it is not that the parties tell different versions of the same history. Rather, they concentrate on differing periods of history. For respondent, it is the revolutionary period that is of critical import. Disarmament of

colonialists by the British is the backdrop against which the Second Amendment was adopted. In contrast, petitioner virtually ignores the revolutionary period and suggests that these events are “irrelevant.” (Respondent’s brief at 11) Rather, petitioner concentrates on the drafting period. In petitioner’s view, the Second Amendment is a response to a “compromise stuck in Article One, which gave Congress authority to ensure the militias were capable of performing their duties, while preserving to the individual states some control over them.” (Petitioner’s brief at 10.) Article I, Section 8 of the Constitution grants Congress the power to “provide for calling forth the Militia to execute the Laws of the Union, suppress insurrection and repel invasions.” Concern over this grant of power to the federal government, the Second Amendment was adopted to protect states and their militias from disarmament by the federal government. In petitioner’s view, the Second Amendment is first and foremost, a federalism amendment. It was adopted not with a look back to the actions of the British in disarming colonists, but rather looking ahead to the relationship between states and the new federal government.

Petitioner also rejects respondent’s ethos-cultural arguments. With respect to the argument that the Second Amendment protects the means (and perhaps the right) to insurrection, petitioner states bluntly: “the Constitution does not encourage treason but criminalizes it.” (Petitioner’s brief at 10; cite omitted) If the Constitution contains a method to resist tyranny, it is not through individual gun ownership:

Some modern critics may believe that *private* gun ownership is necessary to prevent tyranny. But that was not the view of the Framers, who feared that the wrath of an unregulated and armed people would lead to anarchy. Under the Framers’ vision, it was the people acting *through* the ‘well regulated Militia’ who would instead safeguard against oppression. (Petitioner’s brief at 13)

With respect to the right of self-defense, petitioner argues that respondent Heller confuses the common law right of self-defense with a right to arms. There were common law rights of

personal security and self-defense. But according to petitioner, these rights did not encompass “any right to own firearms—let alone to ‘keep and bear Arms.’” (Petitioner’s brief at 15; cite omitted)

Finally, the parties disagree over a core doctrinal issue: what standard of review is the Court to use in considering the District’s gun law? Of course, the answer to this question turns on how the Second Amendment is to be understood. Respondent argues that since the Amendment protects an individual “fundamental” right, the Court must apply “strict scrutiny” to the statute at issue. Petitioner counters that the gun law is “reasonable.” It reflects a thoughtful “legislative decision balancing public safety against self-defense in an exclusively urban environment. (Petitioner’s brief at 19.)

Several observations about the parties’ briefs are in order. First, given that the case was widely seen as a battle over originalism, it is surprising that the parties’ briefs do not even raise this interpretive framework. Of course, as noted above, both parties render what they perceive to be relevant history, but neither brief uses the terms “originalism,” “original intent” or “original understanding.” These terms appear only in the titles of academic articles cited by the parties.

Second, the parties do not make use of all of the analytic methods at their disposal. Textual and historical arguments are central in both briefs and doctrinal arguments supplement and support the textual arguments. Doctrinal arguments are made with respect to how the Court is to properly read the text and how the Court is to assess the District’s statute. Neither side makes a prudential argument nor does either side advance policy arguments. This is somewhat surprising given that the District was defending its statute partially on the grounds that it was a response to issues of public safety.

Finally, as noted in chapter 2, the analysis here demonstrates how difficult it can be to disentangle analytic methods. The boundaries between analytic methods are porous and multiple analytic methods are often intertwined. In the case of respondent, I have characterized arguments regarding tyranny and the right to self-defense as ethos-cultural arguments even though they are offered in the context of a historical analysis. I do so because they are offered as more than historical arguments. They are arguments about the “meaning” of America. At the heart of the debate between petitioner and respondent, is a disagreement about the very nature of government itself. As we will see more clearly stated in the briefs by certain amici, one view argues that the people stand against the government. Government is incapable of protecting the citizenry from violence and so the right to self-defense must reside with individuals. Moreover, government can be corrupt and the people must have the right to bear arms to oppose tyranny. In the competing vision, the government is “the people.” If government becomes tyrannical, there are constitutional means to defeating tyranny that do not involve taking up arms. Further, while self-defense (as opposed to arms) is a right, government can and must balance this right with the goal of public safety. In short, it does appear that the parties are fighting a cultural battle. It is not yet clear, however, that they are fighting Hunter’s culture war.

Amici and Their Arguments

In addition to the parties’ briefs, sixty-seven amicus briefs were filed in *Heller*, the third highest number of amicus briefs ever filed in a single case. Forty-seven of the amici briefs were filed on behalf of respondent Heller. The organizations filing briefs in the case include many of the “usual suspects” of culture war battles. Of the ten organizations filing the most culture war

briefs during the period under review, five of these organizations filed briefs in *Heller*: the American Jewish Congress, the American Jewish Committee, the Anti-Defamation League of B'nai B'rith, the Rutherford Institutes, and the American Center for Law and Justice. They were joined by a wide assortment of organizations—libertarian organizations, public health organizations, academics, former Department of Justice officials and grassroots gun rights associations. The case also makes for some strange litigation bedfellows as groups representing feminists, gays and lesbians also filed briefs on behalf of respondent. A total of 115 amici filed or joined briefs on behalf of petitioner (see Table 3.1) and 89 on behalf of respondent (see Table 3.2).

TABLE 3.1: PETITIONER AMICI

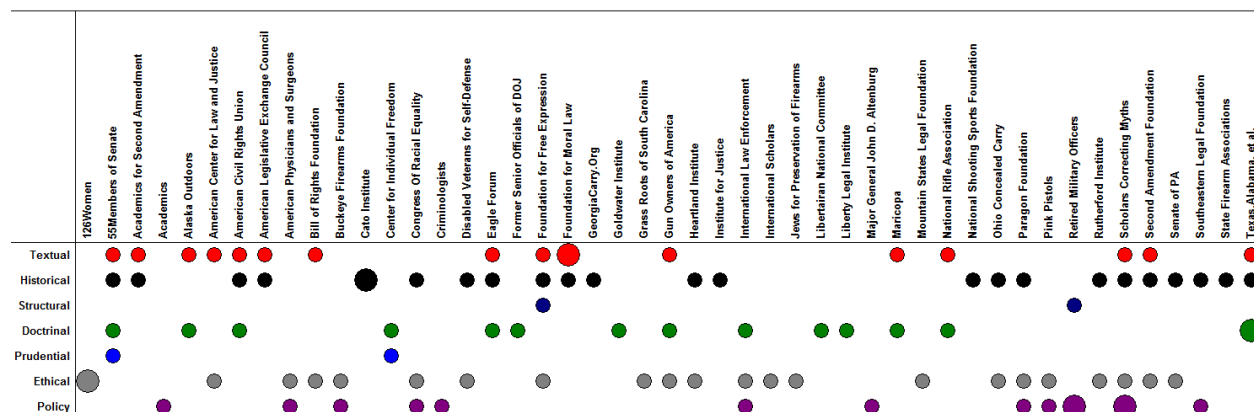
Action Ohio	Legal Momentum, Louisiana Coalition Against Domestic Violence, Inc.
Alabama Coalition Against Domestic Violence	Lois G. Schwoerer
American Academy of Pediatrics	Major American Cities
American Association of Suicidology	Major Cities Chiefs
American Bar Association	Methodist Federation For Social Action
American College of Preventive Medicine	Michigan Coalition Against Domestic and Sexual Violence
American Jewish Committee	Mississippi Coalition Against Domestic Violence
American Jewish Congress	Montana Coalition Against Domestic and Sexual Violence
American Public Health Association	NAACP Legal Defense & Educational Fund, Inc.
American Trauma Society	National Alliance to End Sexual Violence
Anti-Defamation League	National Association For The Advancement Of Colored People
Arizona Coalition Against Domestic Violence	National Black Police Association
Arkansas Coalition Against Domestic Violence	National Center on Domestic and Sexual Violence
Baptist Peace Fellowship Of North America	National Council Of Jewish Women
Board of Education of the City of Chicago	National Latino Peace Officers Association
Brady Center To Prevent Gun Violence	National Network to End Domestic Violence Fund
California Partnership to End Domestic Violence	National Network to End Domestic Violence
Ceasefire NJ	National Organization Of Black Law Enforcement Executives
Central Conference Of American Rabbis	Nevada Network Against Domestic Violence
Certain Individual Victims And Families Of Victims Of Gun Violence	New England Coalition To Prevent Gun Violence
Children's Defense Fund	New Hampshire Coalition Against Domestic and Sexual Violence
Citizens For A Safer Minnesota	New Jersey Coalition for Battered Women
City of Chicago	New Yorkers Against Gun Violence
Connecticut Coalition Against Domestic Violence	North Carolina Coalition Against Domestic Violence
D.C. Appleseed Center for Law and Justice	North Carolinians Against Gun Violence Education Fund
D.C. Chamber of Commerce	North Dakota Council on Abused Women's Services/Coalition
D.C. for Democracy	Against Sexual Assault in North Dakota
D.C. League of Women Voters	Ohio Coalition Against Gun Violence
D.C. Statehood Green Party	Ohio Domestic Violence Network
David T. Konig	Oregon Coalition Against Domestic and Sexual Violence
Delaware Coalition Against Domestic Violence	Pennsylvania Coalition Against Domestic Violence
District of Columbia Coalition Against Domestic Violence	Police Chiefs For The Cities Of LA, Minneapolis, And Seattle
Educational Fund To Stop Gun Violence	Police Executive Research Forum
Family Violence Prevention Fund	Presbyterian Church (U.S.A.)
Federal City Council	Puerto Rico Coalition Against Domestic Violence/ Sexual Assault
Florida Coalition Against Domestic Violence	Renee Olumbuni Rondeau Peace Foundation
Freedom States Alliance	Rhode Island Coalition Against Domestic Violence
Friends Committee On National Legislation	Root (Reaching Out To Others Together) Inc.
Georgia Coalition Against Domestic Violence	Saul Cornell
Gray Panthers	School Safety Advocacy Council
Gunfreekids.Org	Society for Adolescent Medicine
Hawaii State Coalition Against Domestic Violence	South Carolina Coalition Against Domestic Violence/Sexual Assault
Hispanic American Police Command Officers Association	South Dakota Coalition Against Domestic Violence /Sexual Assault
Idaho Coalition Against Sexual & Domestic Violence	Tennessee Coalition Against Domestic and Sexual Violence
Illinois Council Against Handgun Violence	Union For Reform Judaism
Illinoisvictims.Org	United States Conference of Mayors
Indiana Coalition Against Domestic Violence, Inc.	Vermont Network Against Domestic and Sexual Violence
International Association Of Chiefs Of Police	Violence Policy Center
International Brotherhood Of Police Officers	Virginia Center For Public Safety
Iowa Coalition Against Domestic Violence	Washington Council of Lawyers
Iowans For The Prevention Of Gun Violence	Washington State Coalition Against Domestic Violence
Jack N. Rakove	West Virginia Coalition Against Domestic Violence
Jane Doe Inc.	William J. Novak
Jenna Foundation For Nonviolence, Inc.	Wisconsin Anti-Violence Effort
Kansas Coalition Against Sexual and Domestic Violence	Wisconsin Coalition Against Domestic Violence
Karla Zimmerman Memorial Foundation	Women Against Gun Violence
Kentucky Domestic Violence Association	Wyoming Coalition Against Domestic Violence and Sexual Assault
Legal Community Against Violence	Youth Alive!

Table 3.2: Heller – Respondent Amici

29 Elected California District Attorneys	Long Beach Police Officers Association
60 Plus Association, Inc.	Major General John D. Altenburg, Jr.
Alaska Fish and Wildlife Conservation Fund	Major General John. G. Meyer, Jr.
Alaska Outdoor Council	Maryland State Lodge,
Alaska Territorial Sportsmen, Inc.	Mendocino County, Calif.
American Center For Law And Justice (ACLU)	Michigan Council of Private Investigators
American Civil Rights Union	Mountain States Legal Foundation
American Hunters and Shooters Association	National Council for Investigation and Security Services
American Legislative Exchange Council	National Police Defense Foundation
Association of American Physicians and Surgeons, Inc.	National Rifle Association
Buckeye Firearms Foundation LLC	National Shooting Sports Foundation
Cato Institute	New York State Association of Auxiliary Police
Center for Individual Freedom	NRA Civil Rights Defense Fund
Claremont Institute	Ohio Association of Private Detective Agencies, Inc., DBA Ohio Association of
Congress of Racial Equality	Security and Investigation Services (OASIS)
Conservative Legal Defense and Education Fund	Ohio Concealed Carry Permitholders
Criminologists, Social Scientists, Other Distinguished Scholars	Oregon State Rep. Andy Olson
Disabled Veterans for Self-Defense	Organizations and Scholars Correcting Myths and Misrepresentations
Dr. Suzanna Gratia Hupp, D.C.	Commonly Deployed by Opponents of an Individual Rights-Based
Eagle Forum Education & Legal Defense Fund	Interpretation of the Second Amendment
Foundation for Free Expression	Paragon Foundation
Foundation for Moral Law	Pink Pistols and Gays and Lesbians
Fraternal Order of Police	Retired Military Officers
General John Tilelli	Rutherford Institute
General Ronald H. Griffith	San Francisco Veteran Police Officers Association
General William H. Hartzog	Second Amendment Foundation
GeorgiaCarry.Org	Second Amendment Sisters
Goldwater Institute	Sheriff Thomas D. Allman
Grass Roots of South Carolina, Inc.	Sitka Sportsman's Assoc.
Gun Owners Foundation, Maryland Shall Issue, Inc.	Southeastern Legal Foundation
Gun Owners of America	Southern States Police Benevolent Association
Gun Owners of California	State Firearm Associations
Heartland Institute	Texas Municipal Police Association
History Professor Joyce Lee Malcolm	Texas Police Chiefs Association
Honorable Joe R. Reeder	Virginia Citizens Defense League
Independence Institute	Virginia1774.Org
Indiana Association of Professional Investigators,	Women Against Gun Control
Institute For Justice	
International Association of Law Enforcement Firearms Instructors (IALEFI)	
International Law Enforcement Educators and Trainers Association (ILEETA)	
International Scholars	
Jews for the Preservation of Firearms Ownership	
Juneau Gun Club	
Juneau Rifle and Pistol Club	
Kentucky Professional Investigators Association	
Kestra Childers	
Law Enforcement Alliance of America	
Libertarian National Committee	
Liberty Legal Institute	
Lieutenant General Charles E. Dominy	
Lieutenant General Dutch Shoffner	
Lieutenant General Jay M. Garner	
Lieutenant General Ronald V. Hite	
Lieutenant General Tom Fields	
Lincoln Institute for Research and Education	

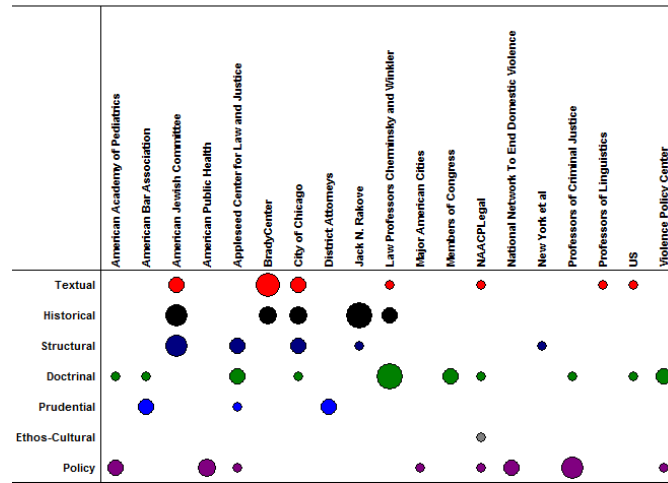
Before turning specifically to petitioner amici briefs and respondent amici briefs, several general observations are in order. First, unlike the parties’ briefs, amici’s arguments in *Heller* reflect all seven modalities, though obviously not all amici make each of the seven types of arguments. The most popular modalities for respondent amici were textual and doctrinal. (See Chart 3.1) This follows the pattern set by the respondent brief.

**Chart 3.1
Heller Respondent - Modalities**



For petitioner briefs the most frequent modalities were doctrinal and policy. (See Chart 3.2) Given that the case was positioned by respondent Heller as a test case on originalism, it is somewhat surprising that textual and historical arguments do not figure more prominently in petitioners’ briefs. Perhaps this reflects a “division of effort” with counsel for petitioner since petitioner had countered the respondent’s textual and historical arguments with textual and historical arguments of its own. As noted above, the petitioner did not make policy arguments. Petitioner amici do not shy away from these. They cite various public health virtues of gun regulation including reductions in homicides, suicides, accidental shootings and domestic violence as justifications for the D.C. statute.

Chart 3.2
Heller Petitioner Amici - Modalities



It is also interesting that with respect to the individual right-collective right debate, respondent amici had much more academic support than petitioner amici. This may reflect petitioner amici’s evaluation of jurisprudential reality. The Circuit Court had concluded that the Second Amendment guaranteed an individual right. There was good reason to believe that the Supreme Court had taken the case to reinforce this holding. Besides, petitioners and petitioner amici were well aware that they did not have to win the day on the question of whether the Second Amendment created an individual right. As long as they could convince the Supreme Court that prohibitions on the Second Amendment right were to be viewed with something less than strict scrutiny and that the D.C. regulations were “reasonable,” they could prevail. In their view, even if the Court found that gun possession is an individual right, reasonable restrictions would certainly be permissible. Thus, academics that supported the individual right perspective saw which way the winds were blowing and saw no great reason to intervene. On the other hand, it may also mean that academics who supported the collective rights view had simply gained the upper hand since Kates’ article in 1983.

In turning specifically to petitioner amici briefs, petitioner amici concentrated on four specific arguments:

1. The text of the Second Amendment protects a collective right, not an individual right.
2. Based upon principles of federalism, the Court should defer to the judgments of state and local governments
3. Even if the Second Amendment creates an individual right to own firearms, the Court should review gun regulations with the lowest level of scrutiny. Thus, the law at issue merely needs to be “reasonable” and it is.
4. The law at issue is reasonable because it is critical to protecting public health.

The first point needs little discussion. We will see this argument in Justice Stevens’ dissenting opinion. The right to own firearms is tied to service in a militia. Many of the resources upon which Justice Stevens relies are contained in these briefs. But as discussed above, this was not the “must-win” part of petitioner amici’s argument, and this is reflected in the time spent on this argument as opposed to others.

Also, it should be noted that petitioner amici are not unanimous in this position. The Solicitor General, on behalf of the United States, concedes that the Second Amendment does create an individual right, but argues that the right is not without limits. Attempting to protect federal restrictions on certain arms such as machine guns and restrictions on possession of firearms by “persons deemed to be unfit” to keep weapons, the United States argued that the case should be remanded with instructions that the lower court determine whether the regulations were “reasonable.” The United States’ brief suggests that the District’s ban would not survive such an analysis but implicitly assumes that the type of regulations it discusses would. We will see this position reflected in the analysis ultimately adopted by the Court.

The next three arguments may be described as “fallback” arguments, arguments made in case the collective right position was not adopted by the Court. Over half of the briefs argue that the District’s restrictions are reasonable and necessary to protect public health. The briefs cite evidence that guns in the home lead to higher rates of suicide, higher rates of murder (especially in the case of domestic violence), and accidental shootings. As the brief for the American Public Health Association states: “The District of Columbia’s laws banning most handguns and requiring safe storage of all firearms are consistent with public health research and data demonstrating the risks associated with handguns and the benefits of the laws themselves.” Other amici further argue that the District law “works”—that is has led to reduced crime and violence. (This argument is strenuously rejected by respondent amici.)

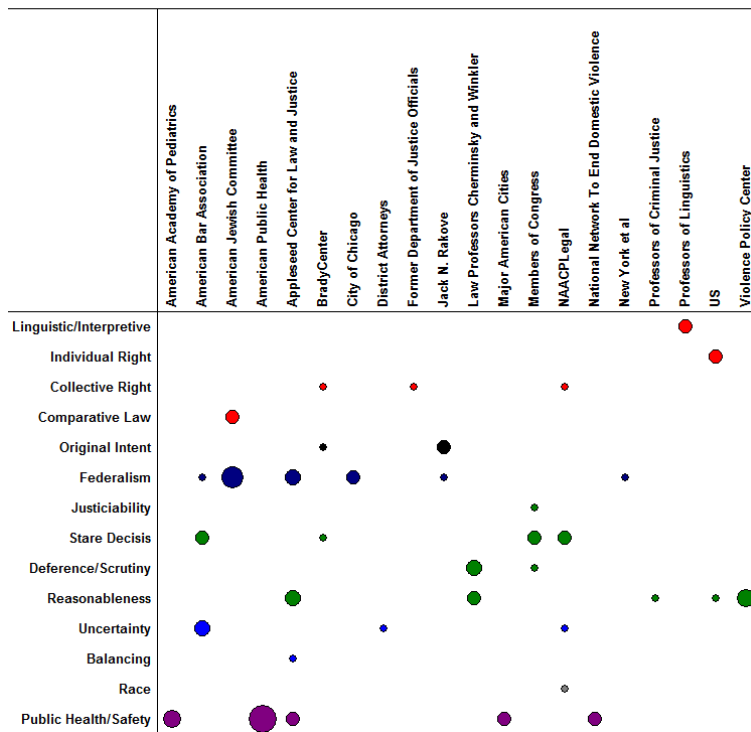
Finally, six amici argue that for federalism reasons, the Court should defer to state and local governments in their decisions regarding firearm regulation. Such regulation is within the police power of the state, a position suggested by Justice Scalia in his decision in *United States v. Lopez* (where the Court struck down a federal law making it a crime to carry a gun in a school zone).

Interestingly, only one petitioner amicus—the NAACP Legal Defense and Educational Fund—makes an ethos-cultural argument. With this exception, the petitioner amici briefs do not discuss the role of guns in American society. Given that there are more than 300 million guns in America and that guns are such a significant part of the cultural landscape, this is somewhat surprising. Petitioner briefs simply do not engage directly in the cultural aspect of gun ownership. One is tempted to say that petitioner amici do not even realize that they are fighting a culture war issue.

Winkler and others have suggested this (though not with respect to litigation). They argue that cultural progressives believe that the argument on gun rights and gun control can be won on the basis of data and statistics. Referencing and highlighting the harm done by unregulated firearms will alone be sufficient to change cultural values regarding guns. They have suggested that gun rights advocates must offer an alternative cultural narrative. That narrative, if it exists, is missing in these briefs.

One final note about the NAACP's "ethos-cultural" argument (which might be better characterized as an "anti-ethos-cultural" argument)--some scholars have attempted to tie gun restrictions to racial attitudes. The simplistic version of this argument says that most if not all restrictions on gun ownership were thinly veiled attempts to disarm African-Americans. For this reason, gun restrictions should be opposed because they are inherently discriminatory. The constitutional protection of gun rights will put to rest this dark underside of the American ethos. The NAACP's brief, while not advancing its own argument about the American ethos, does reject the ethos-based argument of gun regulation opponents. They state flatly that modern firearms regulations "should not be confused" with Black Codes or other racially discriminatory laws.

Chart 3.3
Petitioner Amici - Arguments

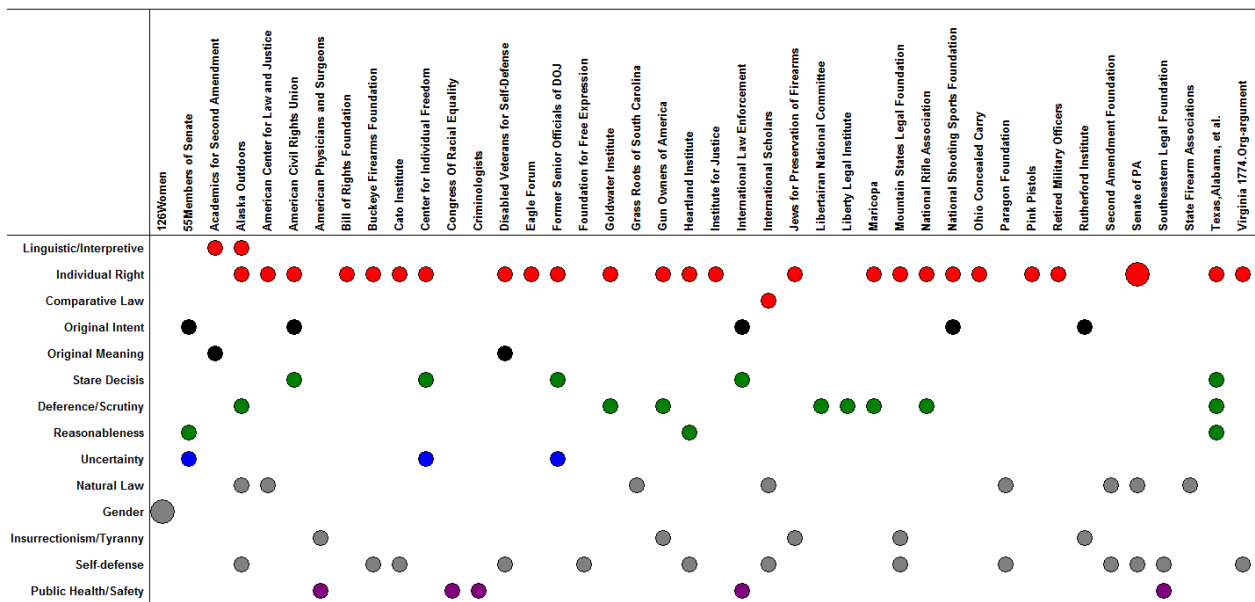


For the most part, respondent amici briefs mirror the arguments made by petitioner amici, (see Chart 3.4), with the exception that respondent amici offer a number of ethos-cultural arguments. Twenty-five of the briefs argue that the Second Amendment creates an individual right to arms and that this can be seen by looking at both the “plain” language of the Amendment, the history of the Amendment or both. Briefs make both “original intent” and “original meaning” arguments though original intent arguments are more popular. Most of these twenty-five briefs intertwine the textual and historical analysis. This intertwining of textual and historical analysis will be seen in Scalia’s majority opinion.

Very few of the respondent amici briefs make doctrinal or prudential arguments. There is some reference to *stare decisis* but given the dearth of precedent, the arguments simply contend that the Court is not constrained by precedent. As for prudential arguments, petitioner amici had

suggested that a finding that the Second Amendment contained an individual right would create uncertainty, calling a number of gun restrictions into questions. Two respondent amici parry this suggestion by arguing that most gun laws presume an individual right to firearms and thus, a finding to that effect by the Court would not upset these laws. It is probably a good assumption that the remaining 45 respondent amici failed to address this point because they indeed hoped that a decision in their favor would call into question additional gun control statutes.

Chart 3.4
Respondent Amici - Arguments



Interestingly, the respondent amici also make a number of policy based arguments in support of their reading of the Second Amendment. Conservatives who argue for a “strict interpretation” of the Constitution usually contend that policy arguments are inappropriate in a judicial setting. Such arguments, they contend, have relevance in a Congressional hearing but they do not help the Court to determine the meaning of the Constitution. Yet, in *Heller*, respondent amici do not shy away from policy arguments.

For example, the Claremont Institute argues that not only are the studies relied upon by the District and its amici flawed and their findings without merit, but that better evidence suggests that more guns equals less crime. The brief by 126 women argues that gun ownership by women makes women safer since women are then able to defend themselves against physically stronger men. Still other amici suggest that gun restrictions are a legacy of racism and discriminatory against minorities and poor citizens.

Amici for petitioners and respondents also disagree as to the factual effectiveness of the District’s ban. The Congress of Racial Equality (CORE) calls the District’s regulatory regime “a disaster.” Others cite statistics regarding historical levels of violent crime to argue that the regulations have been totally ineffective.

Finally, twenty-two of the forty-seven respondent amici briefs in *Heller* advance ethos-cultural arguments. These arguments may be summarized in one general proposition: *All people possess the right to self-defense and this right precedes and is not dependent upon the Constitution.* The right to arms in the Constitution is thus an “operational” right securing this pre-existing right. It is this right to self-defense which is embodied in the Second Amendment and which lies at the core of the “meaning of America.”

At the same time, it is not clear where this right originates. Most of the amicus arguments regarding the right to self-defense find the right located in English common law and codified in the Constitution. However, a few amici describe the right as a “natural” right. Echoing Hunter’s moral traditionalists, the Foundation for Moral Law describes the right to arms as intertwined with our “Godgiven” (sic) freedom.” (Brief at 1).

A second set of ethos-cultural arguments describe the right to arms as embedded in the American “ethos” and American cultural heritage. These briefs start with a historical argument that the Founders were distrustful of government and centralized power. Government was created by “the people” and “the people” could and should reconstitute government if and when it became tyrannical. To prevent tyranny, the Founders decentralized power—among the branches of government and between the states and the federal government. But the Founders also articulated and vouchsafed various individual rights as a guard against tyrannical government. The right to arms is foremost among these and critical to protecting against tyranny.

Finally, it is worth noting that the cultural “myth” of the independent frontiersman is also found in one of respondent amici briefs. The brief by the Mountain States Legal Foundation argues that because of armed native Americans, “life itself would have been impossible for the new people who would be called ‘Americans’ as the new settlers frequently had to defend themselves with their own guns.” Further, because “Western expansion was often met with armed resistance, “arms were essential for self-defense from the seventeenth through the twentieth centuries.” (Brief at 16.)

Amici and the Culture War?

So, what do the briefs in *Heller* tell us about the nature of the culture war regarding gun rights (or even if there is a culture war)? Does *Heller* reveal that there is a battle for the soul of America?

As the preceding discussion suggests, there is evidence that the parties in *Heller* (and because of this, the Court itself) are engaged in a cultural struggle over the place and meaning of the Second Amendment in 21st century America. Moreover, this struggle is not simply a dispute over whether Americans can own guns. In Hunter's terms, there does seem to be a contest to define the "meaning" of America (Hunter 1991, 50) but contra Hunter, there is little or no evidence that this conflict stems from different views of "moral authority." There are no moral arguments in the briefs. There is an appeal to authority in the briefs and in the Court's opinions, but it is an appeal to the authority of the Founders, not an appeal to the authority of God, natural law or even "reason rightly understood."

Of course, it may be that an appeal to the "Founders," as opposed to the "founders," suggests that it is revealed wisdom as opposed to mere tradition or even an "original understanding" that lies at the core of the gun rights position. Merkel (2010) suggests that for some gun rights activists, the Founders "received a divine dispensation to cherish, worship, and employ the gun in pursuit of a heightened state of libertarian piety, from which the later lesser generations have tragically fallen away." (2010, 1260) There is no explicit statement of such a view in the briefs, however. That is not to say that some respondent amici do not share this view, but it is not reflected in the briefs.

At the heart of the conflict in *Heller* are competing individual rights and collective rights understandings of the Second Amendment. While these are presented as historical arguments over the true meaning and proper reading of the Second Amendment, they actually represent very different visions of the meaning of America, grounded in different understandings of the relationship between government and “the people.” As Burkett (2008) notes: “In its most basic incarnation, this argument [over the meaning of the Second Amendment] takes the form of a clash between a strongly avowed reverence for the nation’s individualistic frontier spirit and an equally strong expressed desire for a communitarian approach to American public life and policymaking.” (Burkett 2008, 3)

These different values also are connected to different evaluations of the nature, role and competence of government. For “collectivists,” there is no distinction between government and “the people.” The people are the government and it is the citizenry’s responsibility to provide for the republic’s defense through the militia. Obviously, much has changed since 1787 and the standing army has displaced militias, but the notion that underlies this understanding of government is the same. It is government, through the police and other public safety personnel, that is responsible for keeping the people safe. Public safety does not depend upon individual’s possession and use of firearms.

For “individualists,” there is at best ambivalence towards government and for some, a distrust of and even an animosity towards government. As noted above, CORE declared that the District’s regulatory regime was an utter failure. The Pink Pistols’ brief argued that the police do not protect LGBT individuals. The awkward but descriptively titled, “Organizations and Scholars Correcting Myths and Misrepresentations Commonly Deployed by Opponents of an Individual Rights-Based Interpretation of the Second Amendment” argue that District gun laws

did not reduce crime, homicides, suicides, or domestic violence. Rather, the gun laws exacerbated such problems. In their view, government (in this case, the police) failed to keep people safe and the gun restrictions then prevented the people from protecting themselves. Not only was government not the answer; it was the problem.

For some respondent amici—the Gun Owners of America, the Rutherford Institute, Mountain States Legal Foundation, Jews for the Preservation of Firearms and Physicians and Surgeons—embedded in this individualistic worldview is an even more sinister view of government—“a deep fear and hostility toward the government” (Bogus 2008, 266-7). For these amici, gun ownership provides a constitutional check on tyranny. Originally “insurrectionism” was mentioned only in the literature of gun rights advocates but it then migrated to political and legal literature (Bogus 2008, 266). As noted earlier, this argument also appears in the respondent’s brief. It is important to keep this in perspective however. Tyranny and insurrectionism are mentioned in only 5 of the 47 respondent briefs.

As noted earlier, the right to self-defense is a core proposition of the respondent’s argument. But, the respondent amici briefs in *Heller* make almost no mention of such a right. Only thirteen briefs mention such a right (although two others implicate such a right by arguing that “a man’s home is his castle”). (Focused as they are on the connection of arms to militia service, no petitioner amici brief even mentions a right of self-defense.)

Respondent amici briefs are not always clear on the source of the right to self-defense. The Cato Institute argues that the right is inherited from English law. The Foundation for Free Expression argues that “defense of self or others’ has long been recognized as a “natural right” and grounds this natural right in the Declaration of Independence. Nelson Lund, a legal scholar

in the vanguard of promoting the individual right understanding of the Second Amendment, calls it a “fundamental natural right.” The Foundation for Moral Law mentions the “need for self defense” (sic) but does not further discuss this point. The Heartland Institute’s brief does not discuss the nature of the right only the nature of arms necessary to effectuate the right. The International Law Enforcement Educators and Trainers detail the “social benefits” of self-defense.

In short, some petitioner amici and some respondent amici do have differing cultural “visions.” These differing visions derive in large part from their differing views about the proper nature and capacity of government and the proper relationship between government and the people. Many of the respondent amici (along with respondent) are libertarian individualists, distrustful of government. Petitioner amici do not share this view. They equate government with the people and are most positive with respect to the capacities of government.

A significant number of briefs, however, advance no “vision” of America (at least not in any explicit sense). These briefs are content to advance only historical, textual or policy arguments with little concern about the “meaning of America.” Moreover, no party or amici suggest a moral basis for gun ownership even when arguing for the right to self-defense. The absence of such arguments does not prove that there are not disagreements about “moral authority,” but on their face, the briefs provide little evidence that parties and amici are engaged in Hunter’s culture war.

The Court, History and Ethos

As noted above, the two primary modes of argument for respondent amici were textual and historical. This approach is reflected in Justice Scalia's majority opinion.

Justice Scalia begins his analysis by looking to the text of the Second Amendment and he wrestles with the proper approach to understanding the prefatory and operative clauses (i.e. the "militia" clause and the "right" clause). He then turns quickly to historical sources to understand the meaning, or more precisely, the original understanding of the text. The structure of Justice Scalia's analysis in *Heller* can be summarized as follows:

1. There are two clauses in the Second Amendment: the prefatory clause and the operative clause. To properly understand the Amendment, one must start with the operative clause (notwithstanding the fact that it does not come first in the Second Amendment).
2. The operative clause has two parts: "The Right of the People" and "To Keep and bear Arms."
3. "The People" in its usages in the Constitution refers to all "members of the political community" and thus, the operative clause should be interpreted in the same manner. The holder of the right is the "people" not the militia.
4. "Arms" does not merely refer to weapons designed for military use. "Keep and bear" is not an idiomatic phrase. It refers to the right to possess and the right to carry weapons. "Arms" refers to weapons "in common use."
5. Thus, the operative clause guarantees "the individual right to possess and carry weapons in case of confrontation." (*Heller* at 592). Moreover, the Second Amendment codifies a right that predates the Constitution—the right to self-defense.
6. The prefatory clause which refers to a well-regulated militia announces the purpose for which the right was codified: to prevent elimination of the militia. It does not limit the scope of the individual right.

7. This understanding is consistent with pre- and post-Civil War cases and commentaries.
8. Previous Supreme Court cases—*Cruikshank*, *Presser* and *Miller*—do not foreclose these conclusions.
9. Thus, “the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable” since these requirements make the “right to self-defense” a meaningless and empty right.

Justice Scalia concludes his opinion as follows:

Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of the Court to pronounce the Second Amendment extinct. (*Heller* at 636.)

For those who agree with the Court’s conclusion, *Heller* is not just correctly decided. It is also a triumph of originalism. For conservative culture warriors, *Heller* is important for its holding, but it is even more important for the way the Court goes about reaching its conclusion. *Heller* protects a central and significant right, an individual’s right to possess firearms, but it also lays a foundation for future victories in the culture war. By relying expressly on an “original meaning” understanding of the Second Amendment, the way is paved to roll back liberal culture war opinions in other issue areas and replace them with conservative ones. It is thus important to understand exactly what the Court does in *Heller*.

Upon initial review, *Heller* seems to be a thoroughly originalist opinion. Justice Scalia says explicitly that he is engaged in an originalist enterprise. More precisely, he makes clear that he is engaged in the “new” originalism not the “old.” The old originalism sought to find the “intent” of the drafters (and perhaps ratifiers) of the Constitution—what did James Madison

intend when he drafted the Second Amendment? Faced with blistering critiques, practitioners of originalism abandoned originalism 1.0 and replaced it with a new and “improved” version of originalism—original meaning originalism. Rather than determining what Madison or other Founders intended, the goal of constitutional analysis is to determine how constitutional provisions were understood by “the people” at the time of the Founding. It is not my purpose here to critique the old versus the new originalism—much has already been written on this subject. (*See e.g.* Tushnet, *etc.*) Suffice it to say, that the new originalism has fared no better among its critics than did the old originalism. For the critics, the new originalism simply replaced one set of theoretical problems with another, newer set.

But notwithstanding the critiques of originalism, not only does Justice Scalia embrace this approach, so does the dissent. To a large extent (although not entirely), Justice Stevens’ dissent is an originalist mirror image of Scalia’s opinion. Justice Stevens employs an approach similar to Scalia’s, but he reaches a conclusion diametrically opposed to Justice Scalia’s. He and the other dissenting justices disagree with the majority on the proper way of conducting a textual analysis of the Amendment and the textual conclusions of the majority: “When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia.” (*Heller* at 651.) The dissent continues: “Indeed, not a word in the constitutional text even arguable supports the Court’s overwrought and novel description of the Second Amendment as ‘eleva[ting] above all other interests’ ‘the right of law-abiding, responsible citizens to use arms in defense of hearth and home.’” (*Heller* at 652.)

The dissenting justices also disagree as to what constitutes relevant historical source material and the proper interpretation of these sources. Justice Stevens and the dissenting

Justices criticize the majority for their reliance on English common law and precedent as well as post-enactment historical sources, some of which is long removed from the period of enactment of the Second Amendment. But they also criticize the majority for their use and interpretation of these sources, concluding that the majority is “simply wrong” in its historical analysis.

(*Heller* at 678.)

So what are we to make of this “originalist” debate? Originalist critics of Steven’s dissent suggest that Stevens engaged in “bad” originalism. He relied on the old originalism and not the new originalism and he thus reached faulty originalist conclusions. Stevens provides some evidence to support this criticism: “[T]here is no indication that the Framers of the Amendment *intended* to enshrine the common-law right of self-defense in the Constitution.” (*Heller* at 637); emphasis added). But this criticism is too facile ignoring the lengthy analysis in Steven’s opinion. Stevens reviews the drafting history of the Second Amendment, the pre-drafting sources upon which Scalia relies, post-enactment commentary and Supreme Court precedent—*Cruikshank*, *Presser* and *Miller*. He looks not just at the intent of the Framers but the understanding of their work by contemporaries and those who followed later.

Stevens concludes:

The Court concludes its opinion by declaring that it is not the proper role of this Court to change the meaning of rights ‘enshrine[d]’ in the Constitution. [cite omitted] But the right the Court announces was not ‘enshrined’ in the Second Amendment by the Framers; it is the product of today’s law-changing decision. The majority’s exegesis has utterly failed to establish that as a matter of text or history, ‘the right of law-abiding, responsible citizens to use arms in defense of hearth and home’ is ‘elevate[d] above all other interests by the Second Amendment. (*Heller* at 679.)

Several things should be noted about the dueling originalist opinions in *Heller*. First, *Heller* can be read as calling into question the originalist project. Originalism’s promise is to provide firm ground upon which to anchor constitutional decisions. Originalism’s proponents suggest that it will limit inappropriate judicial “law-making.” Using originalism’s tools, judges will “interpret” the law not make it up. Originalism promises to provide “right” answers to constitutional questions replacing relativistic and ungrounded analysis. But *Heller* casts doubt on originalism’s promises. In *Heller*, the justices look at the same sources and employ the same analytic tools, but they then reach opposite conclusions as to the meaning of the Second Amendment. Originalism—in either its new or old form—does not seem to be a very strong foundation upon which to anchor this Constitutional decision. Moreover, the justices reached predictably differing conclusions. No one was surprised by the conclusions reached by Scalia or Stevens or by the votes of those who joined their opinions. The outcome in *Heller* was entirely predictable. If originalism was to have eliminated individual views from the decision-making process, it seems to have failed.

But the majority opinion can also be faulted as not being originalist at all, notwithstanding its lengthy discussion of history. In a key paragraph in the majority opinion, Justice Scalia writes:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. (*Heller* at 626.)

Justice Scalia offers no explanation for why these prohibitions do not violate the Second Amendment nor does he attempt any sort of historical analysis of these prohibitions. This paragraph is widely viewed as a necessary accommodation by Justice Scalia to obtain Justice

Kennedy's needed fifth vote for his opinion. Whether true or not, the paragraph is no less "un-originalist." Moreover, this paragraph seems to run counter to the core reason given by Scalia for his interpretation of the Second Amendment. Indeed, some authors have contended that Scalia is actually embracing "popular constitutionalism." While Justice Scalia used originalism to discern whether a right to arms exists under the Second Amendment, "there is almost nothing originalist about the opinion's pronouncement on the *content* of the right to bear arms." (Leider, 2012, 73) Justice Scalia appears to adopt an "evolving standard" of appropriate weaponry in giving pride of place to handguns instead of rifles. In short, there is nothing "originalist" about the paragraph quoted above.

In dismissing the collectivist interpretation of the Second Amendment, Scalia grounds the right to own firearms in the right to self-defense. But if this is the case, what are we to make of the limitations on that right in the paragraph quoted above. Do former felons or the mentally ill not enjoy a right to self-defense? As some commentators have pointed out, former felons may in fact have a heightened need for self-defense.³³ Further, does one's right to self-defense not apply in public places? In light of the spate of shootings in schools and movie theatres over the last several years, there is a good argument that the need for self-defense is greater in public places than in one's home. Justice Scalia does not address these issues.

The term "self-defense" appears 31 times in his opinion, but without a clear explanation as to the source of this right. In one instance, Justice Scalia refers to the right as a "core" right. At another juncture, it is an "inherent right." His long historical discussion makes clear that the right predates the Constitution and that the Constitution enshrines this right. But what is the

³³ Berman, Douglas A. Sentencing Law and Policy Blog, June 26, 2008 at <http://sentencing.typepad.com>. "After all, felons are Americans with a need to protect themselves and their families through keeping guns in their home. . . ." (Mr. Berman is a professor at the Ohio State University Moritz College of Law.)

nature of this right? Does the fact that the right is inherent make it a common law right or a God-given right? Are there whiffs of Hunter's cultural fundamentalism here or alternatively, is the right recognized in *Heller* simply a common law right, institutionalized by men at some point prior to the Constitution? Justice Scalia seems to suggest that the right to self-defense is simply a common law right, but his explanation of the right of self-defense is vague, perhaps consciously so.

Not surprisingly, historical analysis is at the core of parties' briefs, amici briefs and the Court's decision in *Heller*. Both Justice Scalia and Justice Stevens spend a lot of time analyzing the historical record to determine the meaning of the Second Amendment. History is important to both because both believe it is relevant to an understanding of the meaning of the Second Amendment at the time of the founding.

Similarly, the majority and dissenting opinions both engage in textual analysis. As noted earlier, they both seek to understand key terms in the Second Amendment: "the People" and "keep and bear Arms" being the most significant. They apply different interpretive rules to their textual interpretive task, but both engage in a serious analysis of the words themselves.

Structural and doctrinal arguments are not very important to either opinion. There is no three or four part "test" to be found in either opinion and neither deems the structure of the Constitution to be particularly important to their argument. Justice Stevens, in dissent, does make something of a structural argument in seeking to understand the meaning of the Second Amendment in light of the relationship between the federal government and the states. He argues that the Second Amendment is really about whether the federal government could control

state militias. But while this argument has a federalism/structuralism gloss to it, it is more accurately characterized as a historical analysis of the Second Amendment.

Justice Stevens relies significantly on prudential arguments as would be expected from a justice less impressed with originalism than his conservative colleagues. In contrast, the majority opinion does not rely on such arguments and it dismisses such concerns. Justice Stevens writes: “Since our decision in *Miller* [which did not conclude that there is an individual right to arms or a right of self-defense], hundreds of judges have relied on the view of the Amendment we endorsed there” (*Heller* at 638.) Bobbitt describes a prudential argument as a “constitutional argument which is actuated by the political and economic circumstances surrounding the decision.” Bobbitt (1982, 61.) Often, prudential arguments involve “balancing”—weighing the benefits of a decision versus social harms that might occur. In *Heller*, Stevens suggests that the confusion that would result from the endorsement of an individual rights interpretation of the Second Amendment outweighs whatever clarity might exist as a result of the majority’s decision. In fact, Justice Stevens suggests that in light of the majority’s sanction of various gun restrictions, there is little or nothing to be gained in legal clarity from the majority’s holding that there is a Second Amendment right to self-defense.

Finally, as with petitioner, respondent and amici briefs, there is an “ethos-cultural” argument that underlies and is embedded in both the majority and dissenting opinions. The core conflict in *Heller* is over whether the Second Amendment creates an individual or a collective right. On one side are conservatives and libertarians. The Second Amendment protects an individual liberty interest. Government should not interfere with an individual’s right to protect him- or herself. On the other side is the communitarian argument. It is “the people” organized through militias that enjoy Second Amendment rights, not individuals qua individuals.

As noted earlier, this debate also reveals much about the competing camps' view of government. In this and other cases, conservatives on the Court have express their reservations about (and at times disdain for) government. By contrast, the dissenters in *Heller*, are less critical and more willing to let democratic majorities have their say in policy issues such as gun control.

Whither Hunter's Culture War?

Burkett (2008) argues that the debate over the Second Amendment “derives from intensely embraced cultural values and cultural myths.” (Burkett 2008, 3) She goes on: “In its most basic incarnation, this argument takes the form of a clash between a strongly avowed reverence for the nation’s individualistic frontier spirit and an equally strongly expressed desire for a communitarian approach to American public life and policymaking.” (*Id.*) In *Heller*, this clash is reflected in the individual rights versus collective rights theories advanced by the parties and amici and resolved by the Court. The individualist position is a libertarian one, at times ambiguous about the value of government and at other times, hostile to government. The individualist position is deeply skeptical that government can be communitarian. It seems to view government as something alien to “the people.”

Petitioners and their amici, and the dissenting justices in *Heller*, embrace the communitarian position. Government is of the people and by the people not opposed to the people. The right in the Second Amendment is a collective one, enjoyed by the people through their participation in the militia. There may be an individual right to self-defense and arms of

some type may be necessary to enjoy this right, but this right is to be found in the common law not the Second Amendment.

There is no indication in any of the briefs or in the Court's opinions, however, that there is an argument over "moral authority." The petitioner and the dissenting justices look to the people for authority in matters involving guns. The respondent and the majority look to the Founders and other historical sources of authority. *Heller* does not look like an example of Hunter's culture war. This may be because of the nature of the right at issue. It is not obvious how one would appeal to biblical authority in this matter (though one might use the Bible as a source of the right to self-defense.) Alternatively, it may be that the parties and the amici chose not to make such arguments because this was the first case to seriously tackle the meaning of the Second Amendment. Perhaps such arguments will appear later as the courts grapple with the scope of the right embedded in the Second Amendment.

In fairness to Hunter, it must be recognized that he did not argue that all culture war positions stem from different views as to the source of moral authority, only that cultural traditionalists and cultural modernists are the primary combatants in the culture wars. That claim does not appear to be accurate in the case of gun rights. Amici include a very large and diverse group of combatants. A few can safely be described as moral traditionalists (for example, the Foundation for Moral Law). No doubt many petitioner amici (and even many respondent amici) are moral "modernists." But this distinction seems largely irrelevant in the battle over gun rights. The key battle in *Heller* is not between moral traditionalists and moral modernists. Rather, it is between those who trust government and those who do not.

Finally, as culture war battles go, *Heller* was less than momentous. The majority opinion validated public opinion and reinforced the gun regulation status quo. Following the decision in *Heller* and through the end of 2009, there were 75 cases filed in federal court challenging gun regulations. Not one regulation was found unconstitutional. (Winkler 2009, 1567) *Heller* provides a symbolic victory to gun rights supporters but in terms of changing law or public perceptions, it is a pyrrhic victory. Moreover, for those who hoped that a thoroughly originalist opinion would lay the groundwork for overturning the cultural war precedents of the Warren and Burger courts, the decision in *Heller* is even less than a pyrrhic victory.

Chapter 4: Gay Rights

In 1996, Congress passed the Defense of Marriage Act (DOMA)³⁴ defining marriage as the union of one man and one woman. Last year, in *United States v. Windsor*,³⁵ the Supreme Court declared DOMA unconstitutional, thereby ensuring equal rights under federal law to gay couples wed in states permitting gay marriage. At the same time, the Court also refused on technical grounds to allow a challenge to gay marriage in California. That decision, *Hollingsworth v. Perry*,³⁶ effectively legalized gay marriage in California. More recently, federal courts in Michigan, Utah, Texas and Virginia³⁷ have now declared that state gay marriage bans are unconstitutional and the first of these cases have been heard by Fourth Circuit and Tenth Circuit Court of Appeals.³⁸ The issue of gay marriage seems destined for the Supreme Court.

Accompanying this whirlwind change in the courts has been an equally swift change in public opinion about gay rights and gay marriage. Perhaps no other culture war issue has seen such a rapid evolution of public opinion. A short eight years ago, conservative Republicans were confident enough in their ideological advantage on the issue that they put gay marriage

³⁴ Pub. L. No. 104-199.

³⁵ *United State v. Windsor*, 133 S. Ct. 2675 (2013).

³⁶ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

³⁷ State Supreme Courts in New Mexico and New Jersey have both declared same-sex marriage legal. In all, there are over 30 cases regarding same-sex marriage currently pending. “Gay marriage fight shifts to federal courts, 2014 set to be tipping-point year,” *Washington Post*, December 24, 2013.

³⁸ The Tenth Circuit has overturned bans in Utah and Oklahoma. The Utah case is *Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D. Utah 2013). The Oklahoma case is *Bishop v. Smith*, No. No. 04-CV-848-TCK-TLW (10th Cir. Jan. 14, 2014). The Fourth Circuit overturned Virginia’s ban (*Bostic v. Schaefer*, No. 14-1167 (4th Cir. July 28, 2014). The only court to date to uphold a state constitutional gay marriage ban is the United States District Court for the Eastern District of Louisiana. In *Robicheaux v. Caldwell*, the Court concluded that “the State of Louisiana has a legitimate interest under a rational basis standard of review for addressing the meaning of marriage through the democratic process.” *Robicheaux v. Caldwell*, 2014 WL 4347099 (Sept. 3, 2014).

restrictions on the ballot in numerous states as a means to improve voter turnout. Most of these ballot initiatives defined marriage as a union between a man and woman and codified this definition into a state's constitution. All of these measures passed.³⁹ Now, popular majorities nationally support gay marriage⁴⁰ and the last three ballot provisions attempting to restrict gay marriage all failed.⁴¹ 1986 now seems like a far distant past.

It was in 1986 that the Supreme Court, in *Bowers v. Hardwick*,⁴² concluded that there was no constitutional right to engage in homosexual sodomy. Seventeen years later, in *Lawrence v. Texas*,⁴³ the Court repudiated *Bowers*, overruling it outright. Citing with approval the dissent in *Bowers*, the Court rejected both *Bowers*' analysis and its phrasing of the constitutional issue in question. In soaring language, Justice Kennedy concluded that the Constitution protects "liberty of the person both in its spatial and in its more transcendent dimensions." (*Lawrence* at 562)

In this chapter, I will focus my analysis on *Bowers* and *Lawrence*, because not only do these two cases bookend the battle over the constitutionality of homosexual behavior, they deal specifically with the constitutionality of ordinances criminalizing such behavior. But there are

³⁹ See Egan, Patrick J. and Kenneth Sherril. "Same-Sex Marriage Initiatives and Lesbian, Gay and Bisexual Voters in the 2006 Elections," The National Gay and Lesbian Task Force, (2006), http://www.apsanet.org/imgtest/Egan_Sherrill_06.pdf (accessed September 15, 2014.)

⁴⁰ A September 2014 Pew Research poll It finds a slight drop in support for allowing gays and lesbians to marry, with 49% of Americans in favor and 41% opposed – a 5-point dip in support from a February Pew Research poll, but about the same level as in 2013. (See "Public Sees Religion's Influence Waning Growing Appetite for Religion in Politics," September 22, 2014 at <http://www.pewforum.org/2014/09/22/public-sees-religions-influence-waning-2/>). The article states, "[I]t is too early to know if this modest decline is an anomaly or the beginning of a reversal or leveling off in attitudes toward gay marriage after years of steadily increasing public acceptance. Moreover, when the February poll and the current survey are combined, the 2014 yearly average level of support for same-sex marriage stands at 52%, roughly the same as the 2013 yearly average (50%)."

⁴¹ In 2012, Maine, Maryland, and Washington all approved initiatives legalizing same-sex marriage. See Honan, Edith. "Maryland, Maine, Washington Approve Gay Marriage," Reuters, Nov. 7, 2012 at <http://www.reuters.com/article/2012/11/07/us-usa-campaign-gaymarriage-idUSBRE8A60MG20121107> (accessed September 15, 2014.)

⁴² 478 U.S.186 (1986).

⁴³ 539 U.S. 5558 (2003).

several other cases that are also worthy of note: *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1994); *Romer v. Evans* (1995); *Webster v. Doe* (1995); and *Boy Scouts of America v. Dale* (2000). Technically, however, while each of these four cases deals with issues involving homosexuality, none deals directly with whether the Constitution protects the rights of homosexuals to engage in homosexual conduct.

Hurley is a First Amendment free speech case. It concluded that the State of Massachusetts' decision, pursuant to a state anti-discrimination law, to require the private parade organizers to include the Gay, Lesbian and Bisexual Group of Boston, was inconsistent with the First Amendment.

In *Webster v. Doe*, the respondent was dismissed from the CIA after informing that agency that "he was a homosexual." He challenged his dismissal on various grounds including that the Agency had violated the Administrative Procedures Act and his rights under the Constitution. The Court, however, did not reach his constitutional claims, instead remanding the case to the District Court for further review.

Boy Scouts v. Dale is a freedom of association case. There, a gay scoutmaster challenged his termination by the national association when it learned that he was "an avowed homosexual and gay rights advocate."⁴⁴ In rejecting his claims, the Court held that New Jersey's "public accommodations law" requiring the Boy Scouts to readmit Dale violated the Scouts' First Amendment right of expressive association.

Finally, in *Romer v. Evans*, arguably the most significant of these four cases, the Court struck down a Colorado referendum ("Amendment 2") that amended the State Constitution to preclude all "legislative, executive, or judicial action at any level of state or local government

⁴⁴ 530 U.S. 640 (2000) at 640.

designed to protect the status of person based on their ‘homosexual, lesbian, or bisexual orientation, conduct, practices or relationships.’”⁴⁵ In a 5-4 opinion, Justice Kennedy, writing for the majority, concluded that the Amendment violated the Equal Protection Clause. Citing precedent that a law that “neither burdens a fundamental right nor targets a suspect class, will be upheld as long as it “bears a rational relation to some independent and legitimate legislative end” he concluded that the Amendment, “born of animosity” failed to meet even that low standard. In an (in)famous and scathing dissent, Justice Scalia accuses the majority of taking sides in the “culture war”:

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a ‘bare . . . desire to harm’ homosexuals (cite omitted) but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise these mores through the use of the laws.⁴⁶

Citing *Bowers*, Justice Scalia concludes that “if it is rational to criminalize [homosexual] conduct surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.”⁴⁷

While I will not specifically analyze the briefs and the Court’s decision in *Romer*, we will see this case again. In overruling *Bowers*, Justice Kennedy, for the *Lawrence* majority, relied on reasoning similar to that in *Romer*—not surprising since he wrote both opinions. So in analyzing *Lawrence*, I will necessarily place it in context by reference to both *Bowers* and *Romer*. With this as background, I now turn to a discussion of the briefs and amici in *Bowers*.

⁴⁵ 517 U.S.620 (1996) at 620.

⁴⁶ 517 U.S. 620 (1996) at 636.

⁴⁷ *Id.* at 642.

Bowers v. Hardwick: The Parties' Briefs

In 1982, police officers in Atlanta, Georgia arrested Michael Hardwick in his bedroom while in the act of performing oral sex on another male and charged under a Georgia law making sodomy illegal.⁴⁸ Under the Georgia statute, sodomy was defined as “any sexual act involving the sex organs of one person and the mouth or anus of another.”⁴⁹ As is clear from the language of the statute, it was not directed at homosexual behavior *per se*, but rather applied to all individuals—heterosexual or homosexual, married or single.

The State, however, declined to prosecute Hardwick though he remained subject to prosecution for four years from the date of his arrest. Given the ongoing threat of prosecution, in 1983, Hardwick challenged the Georgia statute, seeking a declaratory judgment that the statute was unconstitutional. He was joined in his challenge by a heterosexual married couple who stated that they had a reasonable fear of being arrested under the challenged statute.

At trial, the State moved to dismiss on the grounds that the plaintiffs had failed to present a cognizable claim. The district court granted the motion, summarily rejecting the constitutional claims. The court also found that the married, heterosexual couple lacked standing to maintain the suit.

⁴⁸ The facts of the case are actually much more interesting than this simple sentence would suggest. Hardwick was initially issued a ticket for public drinking after a police officer saw him throw a beer bottle in a trash can outside of a gay bar. The issuing officer, however, wrote an incorrect court date on the summons and thus Hardwick failed to appear in court on the day of the trial. After the court issued an arrest warrant, the issuing officer headed to Hardwick's home to arrest him. Hardwick was not home but when he arrived later, he learned that the officer had been there. He proceeded to the courthouse and paid the fine. At that point, the court clerk informed Hardwick that the officer could not have served the warrant the previous day because it had not been officially processed. Several weeks later, the officer again appeared at Hardwick's house to serve the warrant (even though the warrant had been recalled since Hardwick had paid the fine). The officer entered the house. (There is some dispute as to whether the door to the house was open or whether a guest gave the officer access.) It was in searching the house that the officer found Hardwick engaged in mutual oral sex. Given that the officer's actions could be viewed as extra-legal and harassing, it is not surprising that the State declined to prosecute the case.

⁴⁹ Official Code of Georgia Annotated Section 16-6-2(1984.)

On appeal, the Eleventh Circuit reversed. It concluded that the statute implicated “fundamental constitutional rights.” The Court noted the private nature of the conduct at issue stating; “The activity [Hardwick] hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation.”⁵⁰ It remanded the case with instructions for the district court to determine if the State had a “compelling interest” in regulating the sexual conduct at issue.

Georgia State Attorney General Michael Bowers then filed a petition for *certiorari*. The Supreme Court granted the petition and in a 5-4 decision, reversed the lower court.

The State’s brief is simple and straightforward, confident that precedent is on its side. The State makes two arguments. First, there is controlling precedent that the lower court improperly ignored. In *Doe v. Commonwealth’s Attorney for the City of Richmond* (425 U.S. 901 (1976)), a federal district court concluded that Virginia’s sodomy statute was constitutional. The Supreme Court later affirmed this judgment without comment. While the trial court relied on this precedent to dismiss Hardwick’s case, the Eleventh Circuit interpreted *Doe* very narrowly, concluding that the Supreme Court decision was not a decision on the merits and thus, that it was not bound by the case with respect to the constitutionality of sodomy bans. The State argues that the Eleventh Circuit misunderstood *Doe* and that *Doe* requires dismissal of Hardwick’s action.

Second, the State argues in the alternative that there is no “fundamental right” to “engage in homosexual sodomy.” (Brief at 18) It is not protected by the constitutional right to privacy or the right to association. Further, the State has a legitimate (and even a compelling) interest in criminalizing sodomy: the protection of public morals. “[M]orality and decency constitute

⁵⁰ 760 F.2d 1202 at 1212.

legitimate and compelling state interests.” (Brief at 34) Moreover, “moral issues should be resolved by the people and not by the federal judiciary.” (Brief at 36, cite omitted) The State then proceeds to delineate several reasons the legislature could have had in passing the statute at issue: sodomy could lead to “other deviate [sexual] practices;” it could threaten public safety given its “possible relationship to crimes of violence;” and it could threaten public health given its relationship to sexually transmitted diseases.” (Brief at 36-37) Most importantly, however, “is that homosexual sodomy is the anathema of the basic units of our society—marriage and the family.” (Brief at 37) Overturning Georgia’s law could “demote[] these sacred institutions” and “the order of society, our way of life, could be changed in a harmful way. . . . [Georgia has a] compelling interest in the protection of the organization of society.” (Brief at 38)

In its reply brief, the State further develops this “slippery slope” argument.

Should the Court recognize a ‘right to engage in sexual intimacy as such’ . . . it is clear that at least all sexual activities which can be called private and consensual would be legalized. This would certainly include polygamy, homosexual marriage, fornication, adultery, and some cases of incest. (Reply Brief at 13)

It is interesting to note that nowhere in its brief does the State support its assertions regarding “possible” reasons for the sodomy statute with reference to actual legislative materials. There are no references to statements by the sponsor, legislative hearings or any other materials relevant to legislative intent. It is also important to note that the State appears to misread its statute. While the statute makes both homosexual and heterosexual sodomy a crime, the State consistently refers to the statute as regulating only homosexual behavior.

In short, according to the State, sodomy is “an activity which for hundreds of years, if not thousands, has been uniformly condemned as immoral” (Brief at 19) It is inconsistent with “the Natural Law referred to by Jefferson in the Declaration of Independence”, proscribed by the laws of the Old Testament and in the writings of St. Paul, a capital crime under Roman law and

condemned by such disparate thinkers as Plato, Aristotle, Kant and St. Thomas Aquinas. (Brief at 20-21)

Not surprisingly, respondent Hardwick defines the right at issue in a very different way. According to Hardwick, the case involves nothing less than the “right to be let alone.” (Brief at 12) The Court’s birth control and abortion cases do not so much protect “the right to buy and use a pharmaceutical product . . . [as they do] the right to engage in sexual intimacy.” (*Id.*) The State must therefore proffer a “compelling interest” in regulating such intimate behavior and protecting “traditional moral values” is not a compelling interest.

Hardwick also rejects the State’s “slippery slope” argument. The case deals with a crime defined “in terms of anatomical parts” not in terms of a relationship. (Brief at 23) Overturning Georgia’s statute will not lead to disorder, or decline in Georgians’ “way of life.” (Hardwick also points out that these are *post hoc* rationalizations for the statute and that such questions would have properly been considered by the trial court on remand.)

Citing *Stanley v. Georgia*, a 1969 Supreme Court case that held that the state could not criminalize the possession of pornography within one’s own home, Hardwick argues: “It would be ironic indeed if government were constitutionally barred . . . from entering a man’s home to stop him from obtaining sexual gratification by viewing an obscene film—but were free . . . to enter the same dwelling to interrupt his sexual acts with a willing partner.” (Brief at 16)

In short, the parties disagree about what right is at issue in the case or perhaps more accurately, they disagree as to the degree of generality or specificity of the right at issue. Is the question whether one has a right to engage in sexual intimacy or whether one has a right to engage in homosexual sodomy? The answer to this question will drive the answer to the doctrinal question—is the right “fundamental”? If yes, then the State must have a compelling

interest to support its statute. If not, then almost any proffered reason will suffice. As we will see, the Court ultimately adopts the State's framing of the constitutional question and likewise, its analysis.

Amici and Their Arguments

Surprisingly, only four briefs were filed by amici on behalf of the petitioner (Table 4-1) and only eight were filed on behalf of respondent Hardwick, though a total of twenty-five amici joined the briefs. (Table 4-2) There are several possible explanations for the small number of briefs filed on behalf of petitioner. First, it may reflect a confidence that the State would prevail and extensive briefing to defend a long-standing sodomy statute was simply not necessary. Second, it might be a product of tactical decisions by the State—they may have not encouraged (or even actively discouraged) amici to file briefs. It may mean that in 1985, the issue of gay rights was not yet a culture war battleground. Finally, it might simply reflect that the rise of the conservative legal movement was still at a preliminary stage. History does not provide a clear answer to this question, but the small number of briefs is curious given the issue in dispute.⁵¹

While the number of respondent amici briefs is also small, the list of respondent amici does reveal a significant number of gay rights advocacy groups. The progressive lawyers supporting Hardwick include the Lambda Legal Defense and Education Fund, the Lesbian Rights Project, Gay and Lesbian Advocates and Defenders, Gay and Lesbian Alliance Against Defamation, National Gay Rights Advocates and gay and lesbian bar associations. The briefs also suggest that these groups were coordinated in their arguments to the Court with amici advancing a variety of constitutional challenges. Not surprisingly, progressive legal groups had

⁵¹ The number of briefs is less surprising when compared with those filed in *Lawrence*. Only 15 briefs were filed on behalf of Lawrence.

been looking for a “test case” with which to challenge laws criminalizing homosexual conduct. With the arrest of Hardwick, they believed that they had found their plaintiff and a statute that could be successfully challenged.

**Table 4-1
Petitioner Amici (4)**

Catholic League for Religious and Civil Rights
Concerned Women For American Education and Legal Defense Foundation
David Robinson
Rutherford Institute

**Table 4-2
Respondent Amici (25)**

American Friends Service Committee	Gay and Lesbian Advocates and Defenders
American Jewish Congress	Lambda Legal Defense and Education Fund
American Psychological Association	Lesbian Rights Project, Women's Legal Defense Fund
American Public Health Association	Los Angeles Lawyers for Human Rights
Attorney General of the State of California	Massachusetts Lesbian and Gay Bar Association
Attorney General of the State of New York	National Gay Rights Advocates
Bar Association for Human Rights of Greater New York	National Women's Law Center
Bar of the City of New York	NOW
Bay Area Lawyers for Individual Freedom	Philadelphia Yearly Meeting of Friends
California Lawyers for Individual Freedom	Presbyterian Church (U.S.A.)
Equal Rights Advocates, Inc.	Unitarian Universalist Association
Gay & Lesbian Alliance Against Defamation	United Church of Christ
	Women's Law Project

The most detailed amici brief filed on behalf of Bowers was that of the Rutherford Institute. In large part, it mirrors the petitioner’s brief. It also argues that constitutional privacy protections are limited to activities relating to marriage, child-bearing and the family, and not to homosexual sodomy. It summarily describes the history of anti-sodomy laws: “Judeo-Christian scripture “unequivocally condemns homosexual sodomy;” Roman law outlawed sodomy (one paragraph discussion); and English common law outlawed homosexual sodomy (one paragraph). It further develops the State’s “slippery slope” argument. In the view of the Rutherford Institute,

not only would a decision overturning Georgia’s statute lead to “polygamy, homosexual marriage, fornication, and some cases of incest” (Petitioner’s Reply Brief at 13), it would also lead to necrophilia, private use and possession of many controlled substances, bestiality, adultery and perhaps prostitution. Indeed, “the very foundations of this society will be shaken.” (Brief at 27.) Like the State, the Rutherford Institute argues that a community through its laws can protect and promote the “moral soundness of its people.” (Brief at 20.)

The Rutherford Institute also addresses an issue not addressed by the State—whether the statute violates the Equal Protection Clause of the Fourteenth Amendment. Rutherford argues that homosexuals are not a suspect class; that the standard of review of the statute is thus “rational basis;” and that State’s legitimate interest in preserving and protecting morality easily passes this standard.

The brief by “Concerned Women” is actually more of a catalogue than a brief. It points out that states have always criminalized sodomy (it makes no distinction between homosexual and heterosexual sodomy instead conflating homosexuality and sodomy), and it then includes the texts of various state sodomy statutes.

The brief for the Catholic League for Religious and Civil Rights is somewhat odd in that while it repeats the State’s arguments regarding precedent and ordered liberty, it also argues that Hardwick does not have standing to bring this action. It points out that Hardwick was not prosecuted and police stated that he would not be prosecuted in the future. While this is accurate and the Court could have overturned the Court of Appeals decision on this procedural point, it is a surprising argument given the confidence that the State and the other amici had in their legal position.

Finally, the oddest brief is that of Professor Robinson who argues that Georgia's statute is defensible on the grounds that it protects the public health. Robinson argues that the statute reduces the spread of AIDS (and other venereal diseases) and there is a long and impassioned discussion of the growing threat of AIDS. The argument is odd in that the Georgia statute was passed long before the first diagnosis of AIDS and there was no evidence in the record that this was the motivation of the Georgia legislature in passing the statute. The brief concludes: "this is not a homophobic brief. It is a labor of love, an effort to help keep homosexuals and the rest of us, alive." (Brief at 7.)

Respondent amici repeat the arguments of respondent Hardwick but also go much further in attacking the statute. Like respondent, respondent amici reject petitioner's framing of the constitutional question as a right to homosexual sodomy, reject petitioner's characterization of the legal, religious and historical condemnation of homosexual sodomy as "unequivocal," reject *Doe* as controlling precedent and reject the "slippery slope" arguments made by petitioner and petitioner amici. But respondent amici also advance several additional arguments:

- Presaging *Romer v. Evans*, amici suggest that the statute is the product of nothing more than unconstitutional animus towards homosexuals (a claim that is problematic given that the statute makes all sodomy not just homosexual sodomy illegal);
- A decision to uphold the statute would undermine the Court's legitimacy and will make it a party to *de jure* discrimination; and
- An "emerging social consensus" or tolerance reinforces the appropriateness of the Court striking down the statute.

The brief of the National Gay Rights Advocates argues that while the State justifies its statute based upon "history and tradition," this history and tradition is nothing more than a record of antipathy towards gays. "The sole purposes to be served are the prevention of moral

indignation, outrage or disgust with which one segment of society regards another. . . . Such use is singularly inappropriate in a secular, pluralistic society such as ours . . .” (Brief at 13.)

The Lesbian Rights Project argues that the Court’s legitimacy will suffer if it “len[ds] the imprimatur of this Court in enacting homophobic laws . . .” and that the “government will suffer a loss of respect” if the Constitution is read to undercut the claim to a right to privacy in sexual matters. (Brief at 3) Moreover, legitimization of criminal laws against gay and lesbian activities “excuses and encourages already pervasive civil discriminations against these groups of persons.” (Brief at 22-23) “[A] determination by this Court that states are free to criminalize gay/lesbian sexual activities per se would reinforce the homophobic element of both anti-gay violence and the anti-gay legal decisions that are proliferating at the present time.” (Brief at 22)⁵²

Finally, the Lesbian Rights Project also argues that there is an “emerging national consensus” of tolerance towards diversity in matters of sexuality. Echoing statements by the Court in Eighth Amendment death penalty cases, where the Court concludes that national consensus has congealed and outlier practices (*e.g.* sentencing juveniles or the mentally retarded to death) must be constitutionally prohibited, the Lesbian Rights Project argues that statutes such as Georgia’s are anachronistic and constitutionally outdated. There is a “new aspiration of our people: to enforce tolerance for diversity in our society.” (Brief at 14)

As Charts 4-1 and 4-2 show, both petitioner and respondent amici relied on a limited number of modalities in making their arguments. Both relied on doctrinal, ethos-cultural, and policy arguments with ethos-cultural being the most popular. Given the ambiguity of the Due

⁵² Ironically, the Lesbian Rights Project was more prophetic than they knew. In *Bowers*, the Court upholds the “anti-gay” Georgia sodomy statute and ten years later, In *Romer v. Evans*, Justice Scalia, relies upon *Bowers* to argue that the anti-gay constitutional amendment at issue should be upheld. (Of course, Justice Scalia disagree strenuously with the majority that the constitutional amendment was “anti-gay.”)

Process Clause, and the Court’s attempt to doctrinally interpret it, the parties necessarily had to address doctrinal questions. It is also unsurprising that the competing parties and amici fight over the cultural context and meaning of the statute. In keeping with the doctrinal concept of “ordered liberty,” petitioner amici made historical arguments. Petitioner amici also made “prudential” arguments, their “slippery slope” arguments about the unintended effects that would result from striking down the Georgia statute. Respondent amici were left to simply rebut these arguments.

CHART 4-1

Petitioner Amici - Modalities

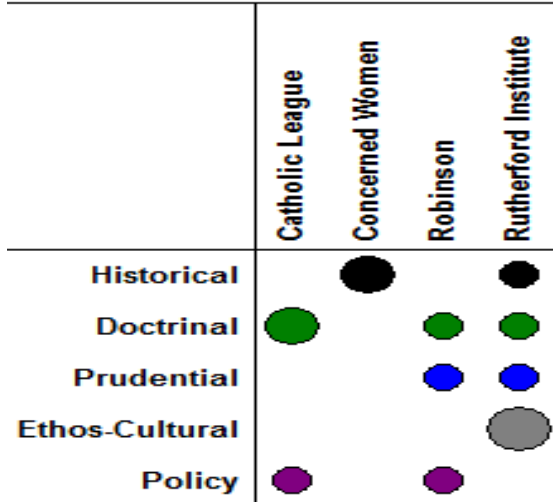
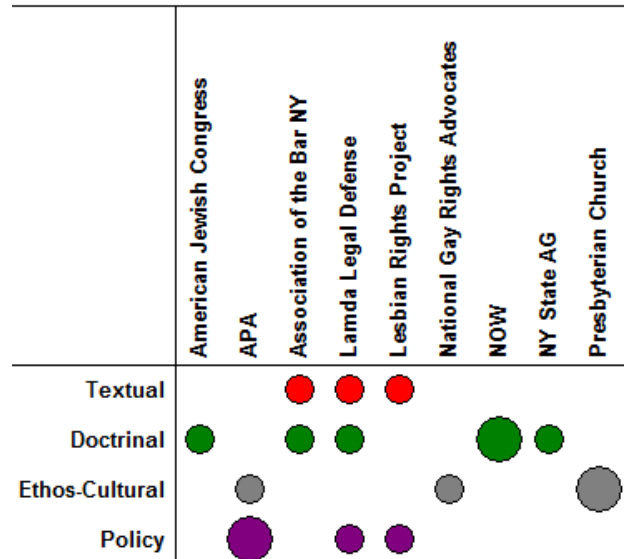


CHART 4-2

Respondent Amici - Modalities



The Court's Decision

The Court's decision in *Bowers v. Hardwick* is brief. The majority opinion runs only 10 pages in the U.S. Reports. It begins by adopting the framing suggested by petitioners: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . . ." *Bowers* at 190. The answer to that question is a foregone conclusion.⁵³ The Court explains that its prior Due Process jurisprudence dealt only with matters of family, marriage or procreation, and not homosexuality, and that none of the rights announced in prior cases "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy. . . ." *Bowers* at 191. The Court rejects directly the claims that there is any kind of Constitutional protection for "private sexual conduct between consenting adults. . . ." *Id.*

Rather perfunctorily, the Court concludes that homosexual conduct is not "implicit in the concept of ordered liberty" citing *Palko v. Connecticut* nor "deeply rooted in the Nation's history and tradition" citing *Moore v. East Cleveland*. In one paragraph, the Court explains that "[s]odomy was a criminal offense at common law, and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights." *Bowers* at 192. The Court then notes that "24 states and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults." *Bowers* at 193. The Court fails to remark on the fact that the statutes outlawed sodomy not specifically homosexual sodomy nor does the Court comment on the fact that a majority of the states (26) did not criminalize sodomy.

The Court concludes by rejecting Hardwick's claim that even if sexual privacy is not a fundamental right, there is no rational basis for the law. The Court notes that law "is constantly

⁵³ History has revealed that the conclusion was not as foregone as it first appeared. According to conference notes later made public, Justice Powell initially voted to affirm the Eleventh Circuit but later changed his mind. He also reportedly said that he had never met a gay person, not knowing that one of his clerks was in fact gay. See Tribe (2004).

based on notions of morality” and that such notions alone are an adequate basis for law. “[I]f all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.” (*Bowers* at 196.)

In dissent, Justice Blackmun begins by challenging the majority’s very framing of the question presented by the case. The case, he makes clear, is not about the right to engage in homosexual sodomy. “Rather, this case is about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’” (*Bowers* at 200.) Moreover, says Blackmun, the Court has ignored the actual statute at issue. Blackmun correctly points out that the “sex or status of the persons who engage in the act is irrelevant as a matter of state law.” (*Id.*) The law does not just deal with homosexual sodomy. It deals with heterosexual sodomy as well. The majority has misread the statute at issue and compounded this error by taking a cramped understanding of due process precedent.

Blackmun argues that “[o]ur cases have long recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.” (*Bowers* at 203.) Interpreting prior decisions to protect only marriage, family and procreation evidences a “willful blindness [to] the fact that sexual intimacy is ‘a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality. . . .’” (*Bowers* at 205 (cite omitted).) For Blackmun, all persons have a fundamental interest “in controlling the nature of their intimate associations with others.” (*Bowers* at 206.)

Blackmun and the dissent also take direct aim at the argument that the Georgia statute is justified based upon majority “notions” of morality. Blackmun recognizes that the “notions” of morality are rooted in “Judeo-Christian values” as petitioner *Bowers* and petitioner amici argue.

But far from supporting the statute, Blackmun suggests that references to the Bible and religious figures undermine petitioner's argument that the statute represents a "legitimate use of secular coercive power." (*Bowers* at 210.) The fact that many religious groups "condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry." (*Id.*) In short, what the majority calls "notions of morality," Blackmun characterizes as "religious intolerance" and religious intolerance is not a legitimate state interest. Blackmun concluded with a wish that *Bowers* might swiftly be overturned.

Bowers Revisited: Lawrence v. Texas

Measured in "constitutional time," Blackmun's wish was quickly granted. In 2003, the Court again confronted the issue of the constitutionality of state regulation of private sexual conduct but this time, the statute at issue (unlike the statute in *Bowers*) was aimed squarely at homosexual sodomy and not sodomy more generally. The Texas statute made it a crime to engage in "deviate sexual intercourse" defined *inter alia* as "any contact between any part of the genitals of one person and the mouth or anus of another person [of the same sex]." (*Lawrence* at 563.) Michael Lawrence was convicted under that statute. In rejecting its very recent precedent, the Court stated definitively: "*Bowers* was not correct when it was decided, and it is not correct today. . . . *Bowers v. Hardwick* should be and now is overruled." (*Lawrence* at 578.)

In the seventeen years that had passed since *Bowers*, much had changed. Homosexuality itself had become much more visible. It was, for the first time, depicted in non-demeaning and non-disparaging ways in prime-time sitcoms, and publicly embraced by numerous celebrities.⁵⁴

⁵⁴ The TV sitcom "Will and Grace" premiered on NBC in September 1998. Ellen DeGeneres revealed that she was a lesbian in an appearance on the Oprah Winfrey show in 1997.

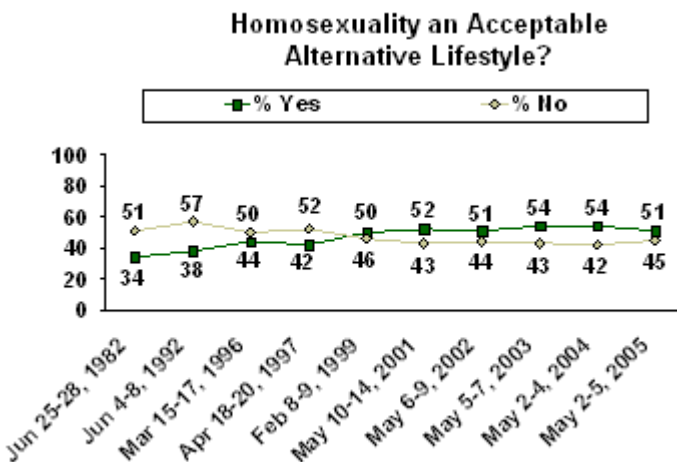
For the first time, elected officials had “come out of the closet.”⁵⁵ With these changes, also came changes to public attitudes. While the public still opposed gay marriage, acceptance of homosexuality had grown significantly since *Bowers*. According to Gallup polling, by the late 1990s public attitudes toward homosexuals had advanced considerably compared with the 1970s, and even with the early 1990s. The percentage saying homosexuals should have equal job opportunities grew from 56% in 1977 to 74% in 1992 and to 88% by 2003. Similarly, the percentage saying homosexuality should be considered an acceptable alternative lifestyle was only 34% in 1982 and 38% in 1992, but expanded to 50% by 1999.⁵⁶

Advocacy both for and against gay rights had also mushroomed. Anti-gay rights groups began to warn in ominous tones about the “homosexual agenda,” and some groups sought to limit the rights of homosexuals by statute. For example, religious rights groups were successful in amending Colorado’s constitution to limit gay rights and to overturn local ordinances that had

⁵⁵ Barney Frank “came out” much earlier, revealing his homosexuality in 1987.

⁵⁶ Saad, Lydia. “Gay Rights Attitudes a Mixed Bag Broad Support for Equal Job Rights, but Not for Gay Marriage.”

Gallup News Service, May 20, 2005, <http://www.gallup.com/poll/16402/Gay-Rights-Attitudes-Mixed-Bag.aspx> (accessed June 2, 2014.)



prohibited discrimination based upon sexual orientation. It was this legislation (Amendment 2) that was struck down by the Court in *Romer v. Evans*. There, echoing Blackmun's dissent in *Bowers*, Justice Kennedy wrote: "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws." (*Romer* at 635.) And it was in *Romer*, that Scalia came to the conclusion that the Court had "now taken sides in the culture war."

In *Bowers*, there were a total of 29 amici. In *Lawrence*, almost 100 amici present arguments to the Court. (As noted earlier, the number of amici briefs is similar in *Bowers* and *Lawrence*, but the number of organizations signing onto to amici briefs increased dramatically in *Lawrence*.) Given *Romer* and the changing cultural and political environment, it is reasonable to suggest that the anti-gay rights forces believed that they were losing the battle and gay rights forces believed that they were gaining ground. It is in this context that the Court took up *Lawrence v. Texas*.

The Parties and their Arguments

On September 17, 1998, John Gaddis Lawrence was arrested by Harris County sheriff's deputies and charged with violating Texas' Homosexual Conduct Law. According to the "standard" account of events, the police were dispatched to Lawrence's apartment after they received a call that someone was "going crazy with a gun." Once there, the sheriff's witnesses Lawrence and Tyron Garner having anal sex. No gun was ever found. The call to the police apparently came from Lawrence's ex- or sometimes lover.

There are ample reasons to question this version of events.⁵⁷ For one, given the sequence of events involved in the sheriffs' search of Lawrence's apartment, it is highly unlikely that the sheriffs could have witnessed Lawrence and Garner in the act of sex. Moreover, as Carpenter (2004) carefully argues, the standard account ignores issues of race and class and the history of law enforcement's selective use of the homosexual conduct statute to harass homosexuals. (Carpenter suggests that the homosexual sodomy statute was never really about sodomy.) Moreover, while there is no evidence that John Lawrence staged the events of that night as a means to challenge Texas' Homosexual Conduct statute, the standard account minimizes or ignores the efforts of gay rights activists to continue the fight for gay rights in the aftermath of *Bowers*.

In granting *certiorari*, the Supreme Court revealed its thinking in taking the case. It specifically invited the parties to address the question—"Should *Bowers* be overturned?" Petitioner Lawrence was not bashful in accepting this invitation and in doing so, he directly confronted the rationale accepted by the *Bowers* majority in upholding state restrictions on homosexual sodomy.

Petitioner makes two arguments: 1) the Texas statute violated his liberty and privacy interests protected by the Fourteenth Amendment's Due Process Clause; and 2) the Texas statute, in singling out homosexuals, violated the Equal Protection Clause. In both cases, there was no legitimate purpose or rational basis for the statute. Echoing *Romer*, Lawrence argues that the sole purpose of the statute was to disadvantage gay persons and "brand them . . . as second-class citizens." (Petitioner's brief at 10, 41).

⁵⁷ For an excellent account and analysis of events, see Carpenter, "The Unknown Past of *Lawrence v. Texas*," *Michigan Law Review*, 102: 1464-1527.

Lawrence argues that the liberty interest protected by the Constitution protects the “right of an adult to make choices about whether and in what manner to engage in private consensual sexual intimacy with another adult, including one of the same sex.” (Petitioner’s brief at 10). Lawrence does not just position his argument regarding homosexual conduct within the framework of marriage or a marriage-like relationship. Rather, Lawrence explains that “well established protections for intimate relationships, bodily integrity, and the privacy of the home converge in this vital freedom” (i.e. sexual autonomy).” (*Id.* at 11.) The Texas statute unconstitutionally burdens this freedom. The Texas legislature, in effect, reserves to itself the right to choose acceptable sexual acts and acceptable sexual partners. Moreover, for some people, the Legislature’s choices as set forth in the statute at issue would mean a life without sexual intimacy. The Act deprives couples of the same gender the right to engage in sexual intimacy, reserving such rights for different gender couples. In addition, enforcement of the Texas law and laws like it require the “grossest forms of intrusion” into the privacy of the home.” (*Id.* at 14) Enforcement of the law, as evidenced by the police behavior in this case, literally requires the state to intrude into a couple’s bedroom.

Similarly, with respect to equal protection claims, the statute fails to comport with the Constitution. Relying, heavily on *Romer*, petitioner argues that the statute singles a “certain class of citizens for disfavored legal status” (*Id.* at 32, cite omitted) and the state has no good reason for doing so. There is no “compelling reason” or even a “rational basis” for the statute. Petitioner points out that the State’s only justification for the statute is that it reflects the desire of a majority of Texans “to espouse prevailing moral principles and values.” (*Id.* at 26) “The State claims no distinct harm or public interest other than a pure statement of moral condemnation.”

(*Id.*) But per *Romer*, moral condemnation or even the more “positive” version of this interest—preserving traditional family mores—is not a legitimate justification of discrimination.

Moreover, because the state’s moral condemnation is expressed through the criminal law, it places a heavy burden on those subject to its reach, a reach that extends even beyond the State of Texas. Under Texas law, petitioners’ criminal convictions disqualify them or restrict them from practicing various professions. But equally consequential, if petitioners were to move to certain other states, they would be required to register as sex offenders. In short, the statute does more than affix a badge of moral condemnation. It makes petitioners criminals.

Obviously, standing in the way of the outcome that petitioners suggest is *Bowers v. Hardwick*. But the Court had tipped its hand in granting certiorari. It specifically asked the parties whether *Bowers* should be overruled. Petitioners’ answer is a full-throated “yes.” They describe *Bowers* (and the law at issue) as anachronistic. “Over the last century, the Nation has firmly broken from its prior legal tradition of criminalizing many adult choices about private sexual intimacy.” (*Id.* at 21) A “strong national consensus” has developed around eliminating criminal sanctions for private, adult consensual sexual behavior.” (*Id.* at 25) In short, “America has repudiated a role for government as enforcer of permitted forms of intimacy.” (*Id.*)

But *Bowers* is more than just anachronistic. According to petitioners, it was wrong when it was decided and had been used to “legitimize widespread discrimination against gay and lesbian Americans.” (*Id.* at 30). Taking direct aim at Justice Scalia, petitioners pointed out that *Bowers* had been used to justify Amendment 2, the anti-gay Colorado ordinance that the Court had struck down in *Romer*. (There was little risk to petitioners in this strategy since they could be virtually certain that Scalia would side with respondents and tactically this move could improve their position with Justice Kennedy, the author of *Romer*.)

In contrast, the respondent's brief defends *Bowers* and leans heavily (even predominantly) on it in defending the statute. According to Texas, *Bowers* was rightly decided and there is no reason to depart from its reasoning. *Bowers* correctly found that there is no constitutional right to engage in the behavior outlawed under the Texas statute and that is appropriately, the end of the constitutional analysis. Texas distinguishes more recently decided cases overturning sodomy laws as not being part of a "strong national consensus" but being specifically limited to states interpreting their own state constitutional privacy provisions. According to Texas, these decisions simply reflect changing state constitutional jurisprudence and give no insights into the meaning of the federal Constitution.

As to the equal protection claims, there is no fundamental right at issue (per the due process analysis above) and there is no "suspect class" thus there can be no equal protection violation. According to Texas, the statute is not directed at homosexuals *per se*. Rather, it is also directed at bisexuals and heterosexuals who might be "tempted" to engage in homosexual conduct. (Respondent's brief at 12) Moreover, per *Bowers*, even if there is a suspect class here, the state needs only a rational basis to legislate and "[i]t does not appear that any Court has ever rejected the proposition that the implementation and protections of public morality may constitute a rational basis for a statute which criminalizes illicit sexual behavior. . . ." (*Id.* at 16.)

Finally, respondent seeks to distinguish *Romer v. Evans*. According to Texas, the Colorado statute was aimed at "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." (*Id.* at 18, cite omitted.) The Texas statute seeks only to limit homosexual conduct. The Colorado statute went beyond this to punish "orientation" and thus was "overbroad." The Texas statute does not suffer from this deficiency. It is "perfectly tailored to

implement the communal belief that the conduct is wrong and should be discouraged.” Finally, notwithstanding *Romer*, *Bowers* is still good law.

Respondents conclude:

Morality is a fluid concept, and public opinion regarding moral issues may change over time, but what has not changed is the understanding that government may require adherence to certain widely-accepted moral standards and sanction deviation from those standards, so long as it does not interfere with constitutionally protected liberties. . . . Perhaps homosexual conduct is not now universally regarded with the same abhorrence it inspired at the time of the adoption of our Federal Constitution, but any lag in legislative response to a mere change in public opinion—if such a lag actually exists—cannot and must not constitute the basis for a finding that the legislature’s original enactment exceeded its constitutional authority. (*Id.* at 20.)

The Respondent’s brief is comparatively short; it runs only 21 pages including the table of citations. (By comparison, the petitioners’ brief is over 50 pages.) It is possible that Texas “saw the writing on the wall” and concluded that a lengthy brief was unnecessary or alternatively, they decided that an aggressive, but concise, defense of *Bowers* was their best strategy. In either case, the respondents rely almost exclusively on two notions: *stare decisis* and deference to the Texas legislature. They defend the authority of the legislature to legislate morality but they spend little time defending the morality being legislated—even conceding that views of morality change over time.

At this point, several comments about the parties’ briefs are in order. First, neither party relies heavily on textual arguments for the simple fact that there is not much text to work with. There are two claims: that the statute implicates liberty interests under the Due Process Clause and privacy interests more broadly and second, that the statute violates the Equal Protection Clause. But these clauses are not plain on their face and have been subject to doctrinal development—Court-developed tests as to how they are to be understood and applied. Accordingly, the parties are left to fight over the meaning of “liberty” and “privacy” and the

scope of their reach. Are these rights to be interpreted narrowly within the context of marriage, family and child-rearing or are they to be understood more broadly to guarantee a right to sexual autonomy? Much of the brief space is taken under trying to put the facts of this case in an analogical framework crafted from previous decisions. The parties obviously disagree as to the nature of that framework and the meaning of prior decisions.

Second, compared to *Bowers*, there is little historical argumentation here. For obvious reasons, the petitioners reject the historical analysis of *Bowers*, but they spend no time on the history of sodomy laws. (This will be left to one of respondent amici.) The respondent brief is similar in that it does not contain any new or insightful history. It simply restates the point that the anti-sodomy statutes are long-standing.

The centerpiece arguments of petitioners are ethos-cultural and prudential. Petitioners' core attack on Texas's statute is that it is not consistent with America's most treasured values, namely the right to make the most important decisions about how one is to live one's own life without interference from the government. Decisions about sexual activity are at the very center of the liberty interest protected by the Constitution. Such ethos-cultural arguments appear only in muted form in the respondent's brief. Respondents defend the rights of the majority to legislate morality and they argue that where democratic majorities take such moral positions, the Court should not disturb this state of affairs. With the exception of this defense of democratic decision-making, they do not, however, advance their own ethos-cultural view of the "meaning of America."

Petitioners also advance strong prudential arguments in defense of their position (arguments that will ultimately be reflected in Kennedy's majority decision). According to petitioners, the problem with criminal statutes like Texas' is that not only does it have harsh

consequences (exclusion from certain professions; possible sexual predator status) for the unlucky few convicted under it, it also supports, reinforces and even promotes discrimination against homosexuals. Homosexuals are made to feel like “second-class citizens” and strangers in their own country. Petitioners yoke *Bowers* to the statute struck down in *Romer* and pointedly argue that Amendment 2 is the logical consequence of statutes such as the Texas statute. In short, petitioners weave ethos-cultural and prudential arguments together to show that statutes like the one at issue fail to live up to America’s highest ideals.

Respondent’s response to such arguments is weak, to say the least. There is no full-throated defense of a moral “anti-gay” America. The brief does not suggest that Texas’ statute promotes America’s highest ideals or makes America better. It does not even attempt to defend the statute on the basis that the behavior that is criminalized is “wrong.” It simply says that the statute is ok because the majority has approved it. More aggressive defense of the statute will come from respondent amici. Accordingly, I now turn to the amici briefs.

Amici and Their Arguments

A total of 31 amici briefs were filed in *Lawrence*, 15 on behalf of petitioners and 16 on behalf of respondents. Eighty-two amici (see Table 4-3) signed on to the 15 petitioner amici briefs and there were 27 amici appearing in the 16 amicus briefs for respondents (see Table 4-4). The number of amici filing briefs in both *Bowers* and *Lawrence* is somewhat small. Only 9 amici appear in both cases (see Table 4-5). (This is less surprising than it seems when one remembers the small number of briefs filed in *Bowers*.)

Table 4-3
Lawrence Petitioner Amici (82)

21 Other Religious Organizations	Lesbian and Gay Law Association of Greater New York
Action Wisconsin	Lesbian and Gay Lawyers Association of LA
Aids Action	Liberty Education Forum
Alliance for Full Acceptance	Log Cabin Republicans
Alliance of Baptists	Louisiana Electorate of Gays & Lesbians
American Bar Association	Massachusetts Lesbian and Gay Bar Association
American Civil Liberties Union	Methodist Federation for Social Action
American Friends Service Committee	Mexican American Legal Defense & Ed Fund
American Orthopsychiatric Association	Minnesota Advocates for Human Right
American Psychiatric Association	Minnesota Lavender Bar Association
American Psychological Association	More Light Presbyterians
American Public Health Association	Nat'l Alliance State and Territorial Aids Directors
Amnesty International U.S.A.	National Association of Social Workers
Anti-Defamation League	National Center for Lesbian Rights
Asian American Legal Defense and Education Fund	National Gay & Lesbian Task Force
Association of Nurses in Aids Care	National Lesbian and Gay Law Association
Bay Area Lawyers for Individual Freedom	National Mental Health Association
Bay Area Transgender Lawyers' Association	National Minority AIDS Council
Cato Institute	North Carolina Gay & Lesbian Attorneys
Cimarron Foundation of Oklahoma	Northwest Women's Law Center
Commission on Social Action of Reform Judaism	NOW
Community Center of Idaho	Oregon Gay and Lesbian Law Association
Constitutional Law Professors	Parents, Families & Friends of Lesbians & Gays
Episcopal Church	People for the American Way Foundation
Equality Alabama	Pride at Work, AFL-CIO
Equality Florida	Professors of History
Equality Mississippi	Promo
Equality Virginia	Puerto Rican Legal Defense & Education Fund
Gay & Lesbian Advocates & Defenders	Republican Unity Coalition
Gay & Lesbian Alliance against Defamation	S.A.V.E.
Gay & Lesbian Community Center of Utah	Society of American Law Teachers
Gay and Lesbian Lawyers Association of South Florida	Soulforce
Gay and Lesbian Lawyers of Philadelphia	South Carolina Gay & Lesbian Pride Movement
Gaylaw	Stonewall Bar Association
Human Rights Campaign	Stonewall Law Association of Greater Houston
Human Rights Watch	Tom Homann Law Association of San Diego
Institute for Justice	Unitarian Universalist Association
Interights	United Church of Christ
Kansas Unity & Pride Alliance	Washington Lesbian and Gay Legal Society
Lawyers Committee for Human Rights	Whitman-Walker Clinic
Lesbian and Gay Bar Association of Chicago	Your Family, Friends & Neighbors

Table 4-4
Lawrence Respondent Amici (27)

Agudath Israel of America
American Center for Law and Justice
Catholic Medical Association
Center for Arizona Policy and Pro-Family Network
Center for Law and Justice International
Center for Marriage Law
Center for the Original Intent of the Constitution
Christian Medical and Dental Associations
Citizens United Foundation
Concerned Women for America
Conservative Legal Defense and Education Fund
Daughters of Liberty Republican Women
Family Research Council
Focus on the Family
Help and Caring Ministries
Liberty Counsel
Lincoln Institute for Research and Education
Pro Family Law Center
Public Advocate of the United States
Spirit of Freedom Republican Women's Club
States of Alabama, South Carolina, and Utah
Texas Eagle Forum
Texas Physicians Resource Council
Texas Legislators
Traditional Values Coalition
Traditional Values Education & Legal Institute
United Families International

Table 4-5
AMICI in both *Bowers* and *Lawrence* (9)

American Friends Service Committee
American Psychological Association
American Public Health Association
Bay Area Lawyers for Individual Freedom
Gay & Lesbian Alliance Against Defamation
Massachusetts Lesbian and Gay Bar Association
NOW
Unitarian Universalist Association
United Church of Christ

The amicus briefs on behalf of the petitioners mirror the main brief but also reveal some degree of division of labor among the amici. The three main arguments of the petitioners are repeated here: the Texas statute violates the Due Process Clause (ABA, Cato Institute, Constitutional Law Professors and Log Cabin Republicans); the Texas statute violates the Equal Protection Clause (ABA, Cato Institute, NOW); and *Bowers* should be overruled (ABA, ACLU, Cato Institute, Log Cabin Republicans).

The American Psychological Association (APA) argued as it also had in its *Bowers* brief, that homosexuality is a “normal” form of sexual expression. The American Public Health Association (APHA) repeated its arguments from *Bowers* that the statute had no public health purpose and pointed out that the State of Texas had never offered such a justification for the statute.

Several briefs pointed out the inconsistency between the Court’s decisions in *Romer* and *Bowers*. The ABA, the Cato Institute, the Human Rights Campaign and the Republican Unity Coalition argued that the Texas statute was motivated by anti-gay animus and that per *Romer*, this is not a legitimate government interest. In all, amici offer five reasons for why *Bowers* should be overruled:

- It is inconsistent with *Romer*. (ABA)
- It improperly narrowed the definition of “family and home.” (ABA, ACLU, Log Cabin Republicans)
- It improperly failed to recognize a fundamental liberty interest in “intimate behavior.” (ABA, ACLU)
- International and foreign law rejects *Bowers*. (Amnesty International)
- Social and culture developments require the Court to overrule *Bowers*. (Log Cabin Republicans, History Professors)

Three briefs are worthy of specific discussion—those by the History Professors, the Cato Institute and Now, respectively. The History Professors brief attacks directly the “history” of sodomy laws in *Bowers* and it is clear that this discussion was highly influential on Justice Kennedy and the majority—not so much because he adopts the historical understanding offered by the history professors, but because he rejects the simplistic historical analysis in *Bowers*. The history professors take direct aim at the majority in *Bowers* and the concurring opinion by Justice Burger. They state unequivocally that the *Bowers*’ history is simply wrong. They are not the legacy of “millennia of moral teaching” but are rather “products of our time.” (History Professors Brief at 9.) They discuss the history of sexual regulation in western civilization with particular focus on Christian writers and theology. They describe the regulation of non-procreative sexual practices in colonial America and note that “[t]he phrase ‘homosexual sodomy’ would have been literally incomprehensible to the Framers of the Constitution.” (*Id.* at 2.) In fact, they note that the very notion of “homosexuality” was “socially created”—“the very concept of homosexuality as a discrete psychological condition and source of personal identity was not available until the late 1800s.” (*Id.*)

The CATO Institute’s brief is interesting for an argument offered but ignored by the Court. The CATO Institute suggests that the Texas statute not only violates the Due Process and Equal Protection clauses, but also violates the Privileges and Immunities Clause. CATO argues that the Framers of the Privileges and Immunities Clause intended to create “national rights” of citizenship and that among these national rights was “natural rights to deploy their bodies and inhabit their properties, without state intrusion, so long as they were not themselves intruding upon the natural rights of third parties.” (CATO Institute Brief at 29.) CATO recognizes that the Court has historically interpreted the Privileges and Immunities Clause narrowly and that adopting CATO’s approach would require the Court to reject dicta from the *Slaughter-House* cases.⁵⁸ But CATO argues that nonetheless, the Court should adopt this approach since it is consistent with the “original meaning” of the Fourteenth Amendment. Justice Scalia and Justice Thomas decline to accept CATO’s invitation to rethink the original meaning of the Privileges and Immunities Clause, nevertheless, it is not only an interesting argument but a clever attempt to appeal to judicial conservatives on the Court in a case where there is little chance that the conservatives will support petitioners’ case.

Finally, the brief by the National Organization of Women (NOW) offers the original argument that the Texas statute impermissibly relies on gender stereotypes. In *United States v. Virginia (VMI)*, decided only seven years earlier, the Court, relying on “intermediate scrutiny” had determined that Virginia’s male-only military school, Virginia Military Institute (VMI) was not constitutionally consistent with the Equal Protection Clause. The Court concluded that

⁵⁸ The *Slaughter-House Cases*, 83 U.S. 36 (1873), involved a challenge to a state-granted monopoly by New Orleans butchers. The Court held that that a citizen's "privileges and immunities," as protected by the Constitution's Fourteenth Amendment against the states, were limited to those spelled out in the Constitution and did not include many rights given by the individual states. Thus, a state may grant business monopolies to some of its citizens but not to others without running afoul of the Constitution.

VMI's decision to exclude women was based upon impermissible gender stereotypes and thus unconstitutional.

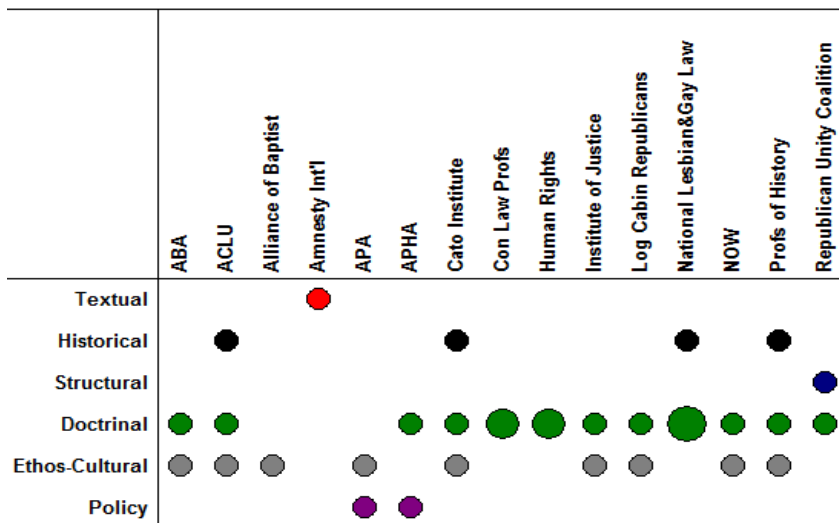
Generously citing *VMI*, NOW argued that likewise the Texas statute sought to “enforce stereotyped norms of gender-appropriated sexual behavior.” (NOW Brief at 3.) NOW points out that the criminality under the statute “turn[s] on the gender of the actors involved in intimate sexual conduct, not on the conduct itself. . . .” (*Id.* at 2.) Citing social science research, NOW notes that “a strong aversion to homosexuality is correlated positively with endorsement of traditional sex-based stereotypes.” (*Id.* at 13.) Same-sex sexual behavior is an “inversion” of “normal” sexual roles. “Effeminate men or masculine women violate[] the prescriptions of gender.” (*Id.*) The Texas statute attempts to punish same-sex couples because of their failure to abide by stereotypical sexual norms. As in the case of *CATO's Privileges and Immunities* argument, the Court declines to adopt this argument. Nonetheless, it is not only creative, it also provides another perspective from which to view the culture wars. If NOW is correct in its assertions, the argument over homosexual practices (and gay marriage) is not just about the “morality” of such practices. It is also about the proper roles of men and women in society.

As the previous discussion suggests, petitioner amici rely primarily on a subset of

argument modalities, most importantly doctrinal and ethos-cultural ones. (See Chart 4-3)

Textual and policy arguments play almost no role. Amnesty International relies on a textual argument but only in the limited sense that it looks to foreign and international sources for insights into how “liberty” and “equal protection” should be understood. The APA and the APHA make policy arguments, but these arguments are made in the context of refuting justifications offered by Texas and its supporters for the Texas law. As discussed earlier, there are important historical arguments made, some of which deal with the history of the Fourteenth Amendment but the majority of which deal with the history of sodomy laws and homosexuality. Twelve of the sixteen amicus briefs address these historical issues and provide significant new information to the Court. The briefs by the Professors of History, the ACLU, the CATO Institute, and the National Lesbian and Gay Lawyers are particularly significant in this regard.

Chart 4-3
Petitioner Amici - Modalities



The overwhelming majority of arguments are doctrinal and ethos-cultural. The popularity of doctrinal arguments is not surprising. The case turns on how the Court is to understand the Equal Protection and Due Process Clauses but these Clauses do not, on their own

terms, provide the answer to the questions posed by *Lawrence* (just as they did not answer in an obvious way, the question posed in *Bowers*). Rather, a significant amount of case law develops the doctrines—“suspect class,” “insular minority,” “ordered liberty”—that the Court uses to apply the Due Process and Equal Protection clauses. The briefs extract these doctrines from prior cases and then seek to apply them to the facts at hand and of course, given the precedential presence of *Bowers*, petitioner amici seek to reinterpret these doctrines. Petitioner amici also had little choice but to do so since, as noted earlier, the Court asked the parties to address the question of whether *Bowers* should be overturned. Addressing that question required revisiting the doctrinal decisions in *Bowers*.

But the briefs also rely heavily on what I have described as ethos-cultural arguments. These are arguments that rely on the “meaning of America” to understand constitutional text. Whereas *Bowers* posed the constitutional question as simply—is there a constitutional right to engage in homosexual sodomy?—petitioner amici argue that the real question is whether Americans are to be protected in their fundamental choices regarding sexual activities and sexual partners. *Bowers* is wrong not only because of uninformed understanding of history, but also because it defined liberty in a way foundationally at odds with a property understanding of the “meaning” of America—a meaning that places tolerance and respect for individual choice in matters of private concern front and center in constitutional argument.

The respondent amici briefs contain the expected counter-arguments to the Due Process and Equal Protection challenges raised by petitioners and petitioner amici, but the respondent amici also advance a type of doctrinal argument that does not appear in the petitioner briefs. Perhaps “seeing the writing on the wall” given that the Court invited the parties to address the question of whether *Bowers* should be overturned, nine of the respondent amici briefs argue that

the Court should dismiss the writ as improvidently granted. The brief by the American Center for Law and Justice (ACLJ) provides a good example of this argument:

The minuscule record in this case establishes virtually nothing beyond the fact that petitioners committed anal same-sex sodomy. For all the record reflects, the sodomy could have been nonconsensual, or public, or paid for, or incestuous, or part of an anonymous ‘one-night stand’ arranged through an online chat room. The record does not even indicate whether either participant could fairly be described as homosexual in orientation. This case is therefore unsuitable for the landmark adjudication that petitioners seek. (ACLJ Brief at 2)

With respect to the Due Process claims, the respondent amici simply restate the arguments that were successful in *Bowers*—ordered liberty does not include the right to engage in homosexual sodomy and the Due Process Clause’s liberty interest protects only marriage, family and child-bearing. Similar arguments in this vein are offered by the American Center for Law and Justice (ACLJ), the Family Research Council, Public Advocate, Texas Legislators, United Families International, and the States.

Arguments with respect to the Equal Protection Clause also follow closely the Court’s doctrinal outline for understanding the clause. The ACLJ, Concerned Women for America and the Family Research Council all argue that there is no fundamental right at stake in *Lawrence*. They also argue, along with Liberty Counsel and the Pro Family Law Center, that homosexuals are not a suspect class, hence there can be no constitutional violation. Here, they make a distinction between conduct and status and argue that homosexual behavior is simply what one does; relying on research showing that sexual preferences can be and sometimes are fluid, they argue that it makes no sense to think of homosexuality as a status. This argument is certainly surprising since many of these same groups refer to the “homosexual agenda”—the point being that homosexuality is a status and those belonging to this class are attempting to advance a political and social agenda. Finally, these groups and still others—Agudeth Israel, Texas Eagle

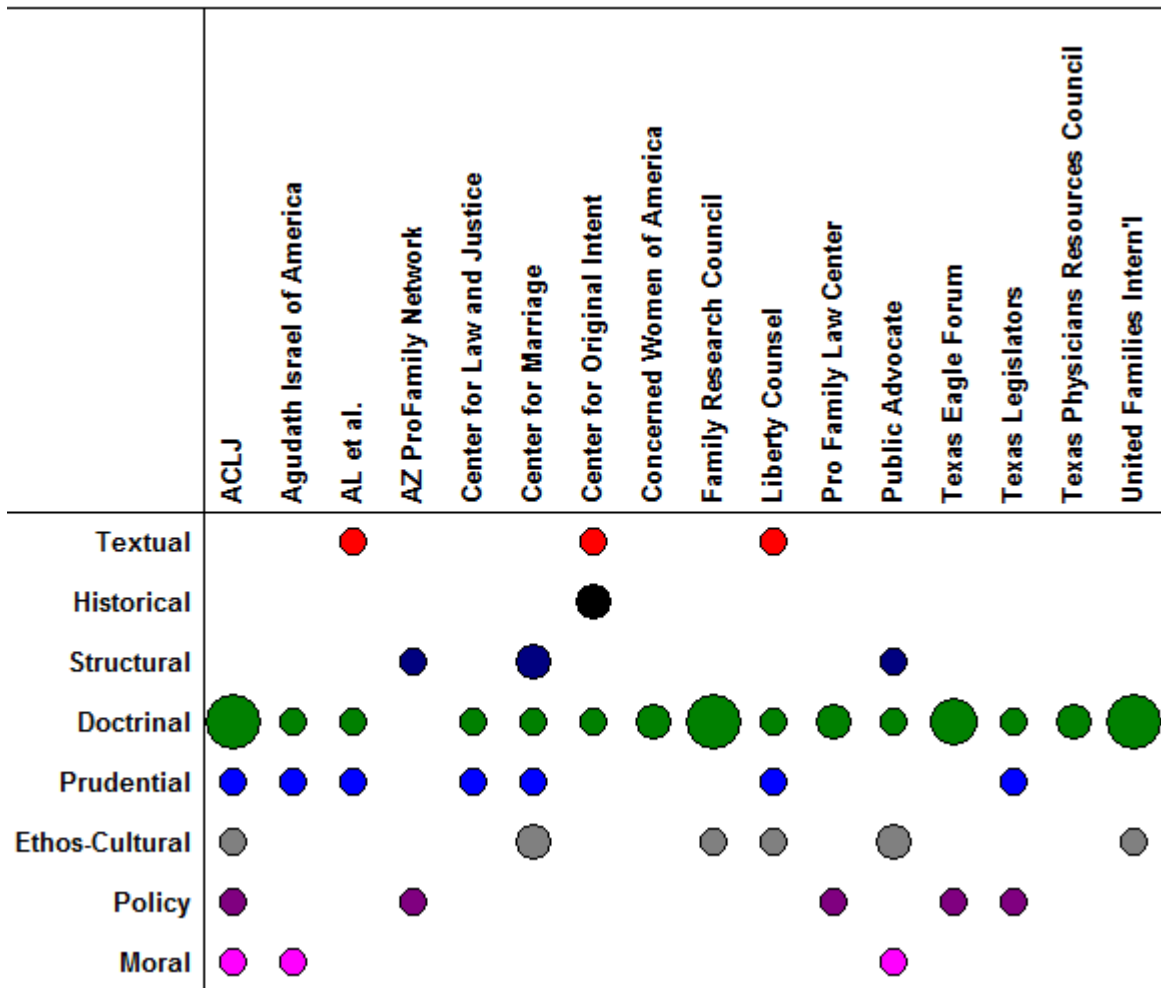
Forum, the Texas Physicians Resource Council—offer four reasons why there is a rational basis for the Texas statute: 1) it furthers morality; 2) it protects public health; 3) it avoids constitutional doubts; and 4) it promotes marriage. By far, the favorite argument is that the law promotes morality and five of the briefs discuss at length the immorality of homosexual behavior.

A number of the briefs are also looking beyond the case at hand to the possible constitutional debate over gay marriage. In making prudential arguments about the impacts of an adverse decision, respondent amici suggest that an adverse decision will damage the legitimacy of the Court (States), enshrine a “dangerously expansive concept of individual freedom” (States’ Brief at 20), remove a contentious issue from the policy debate (Center for Marriage Law (CML); Texas Legislators) and “put same-sex couples on the same legal footing as married couples.” (CML) While not always addressed specifically, the issue of gay marriage hovers below the surface in most of respondent amici briefs. While not always referencing “gay marriage,” almost all of the briefs seek to distinguish homosexual behavior from family and marriage. Respondent amici do not want to concede that homosexual relationships can be “like-straight.” As the passage from the ACLJ brief quoted above points out, there is no reason to believe that Lawrence and Garner had a “relationship” much less anything resembling a family or marriage. It could have simply been a “one-night stand.”

As Chart 4-4 shows, there is more variety in the argument modalities employed by respondent amici. Like petitioners, respondents rely heavily on doctrinal arguments. Given the due process and equal protection challenges raised by petitioners, they had to do so.

CHART 4-4

Respondent Amici - Modalities



Respondent amici also rely on ethos-cultural arguments, though not as frequently as petitioner amici. Obviously, they have a very different perspective, however, on the “meaning of America.” For respondents, liberty is a core American value, but it is not without limits. Moreover, liberty is to be understood within the context of morality. Three of the briefs make explicit moral arguments as to the meaning of liberty. In fact, it is not quite adequate to simply say that the arguments are “moral” given that they rest on a religious foundation. The brief by Public Advocate of the United States provides a good example:

The original substantive concept of liberty, embraced by the Constitution . . . must be understood as having been *established by the Creator*, and thus preexisting according to the created nature of the mankind (sic), not as having been established according to social conventions, constitutional, communitarian, or otherwise. . . . if this Court should affirm petitioners’ claim that the substantive meaning of liberty . . . has evolved to include freedom of choice to engage in homosexual sex . . . it would be rejecting the divine source of rights upon which the nation was founded. (Public Advocate Brief at 23-24, cite omitted, emphasis added)

Of course, while I have described this moral argument as religiously based, Public Advocate would likely counter that the argument is no more religious (or religious in the same manner) as the Declaration of Independence—men are endowed by their Creator with rights. Even so, the Declaration of Independence does not define liberty based upon “the created nature of mankind.”

The Court’s Decision

In declaring the Texas statute unconstitutional, the Court was definitive and dramatic: “*Bowers* was not correct when it was decided, and it is not correct today. . . .*Bowers v. Hardwick* should be and now is overruled.” (*Lawrence* at 578.) Moreover, it is the logic of Justice Stevens’ dissenting decision in *Bowers* that should control. Individual decisions regarding physical intimacies, even when not intended to produce offspring, are a form of “liberty” protected by the Due Process Clause and such an intrusion into liberty cannot be justified on the

basis that a majority has traditionally viewed a practice as immoral. (*Id.* at 560) Beyond this, Justice Kennedy’s analysis is less clear. As Justice Scalia writes in dissent, the majority opinion does not follow the standard conventions of due process analysis. For example, Justice Kennedy does not explain what standard of review the Court is employing in striking down the Texas law, and he is robustly criticized by Justice Scalia for this omission. (Of course, as noted in the previous chapter, Justice Scalia is guilty of the very same offense in *Heller*.)

But arguably, the ambiguity of the analysis in *Lawrence* is also its strength. *Lawrence* can easily be read as the Court’s apology for *Bowers* and in his soaring rhetoric, Justice Kennedy seems not only to be repudiating the logic of *Bowers* but its tone as well. If *Bowers* validated a culture war against gays and lesbians, *Lawrence* ends it and offers moral reparations. *Bowers* was harsh, dismissive and condescending. *Lawrence* is inclusive. The word “dignity” appears three times in the opinion—almost as many times as “privacy.” Justice Kennedy begins his opinion as follows:

Freedom extends beyond special bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and its more transcendent dimensions. (*Id.* at 562.)⁵⁹

Relying heavily on petitioner amici briefs, the majority corrects the history in *Bowers*—“there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.” (*Id.* at 568.) Moreover, there is an “emerging awareness” that liberty “gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” (*Id.* at 572.)

⁵⁹ Justice Kennedy also quotes from his “mystery of life” passage in *Planned Parenthood v. Casey*: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Id.* at 574 (cite omitted).

Kennedy bolsters his decision with a nod to the equal protection analysis in Justice O'Connor's concurring opinion: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." (*Id.* at 575.) But Justice Kennedy is not prepared to rest the opinion only on the disparate treatment of homosexuals occasioned by the language of the Texas statute. To the contrary, he makes clear that the decision rests foundationally on the concept of liberty and that a statute such as the Texas law that invades this important liberty interest is inconsistent with the Constitution, whether or not it targets a group of individuals—or everyone.

Three distinct types of arguments are present in Kennedy's opinion. First, there are the doctrinal arguments. Given that the case turns on the scope and meaning of the Due Process and Equal Protection clauses, this is to be expected. Justice Kennedy is forced to look at the development of these doctrines and place the current case in the appropriate category.

To do so, Justice Kennedy relies heavily on historical arguments. He rejects the history set forth in *Bowers* and utilizing "new" historical arguments offered by petitioner amici, he rewrites the historical understanding of sodomy laws.

More importantly, however, Justice Kennedy relies on ethos-cultural arguments. He defines "liberty" in an expansive manner. His soaring rhetoric about the liberty to define one's own meaning is nowhere echoed in the Constitution. The word "dignity" does not appear in the Constitution. The arguments are based upon the "ethos" that Justice Kennedy and the majority believe underlie the Constitution.

Two final notes are in order with respect to the majority opinion. First, just as *Heller* contained a concluding “limiting” paragraph, so does *Lawrence*. Three paragraphs from the end, Justice Kennedy explains what *Lawrence* is not about:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. *It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.* (*Id.* at 578, emphasis added.)

As in *Heller*, the Court attempts to limit its holding. Most importantly, Justice Kennedy says that the case is not about gay marriage. If there is a culture war, it will be fought in incremental steps.

Second, in her concurring opinion, Justice O’Connor, in discussing the Equal Protection Clause, explicitly states that “moral disapproval” without any other state interest is not a sufficient justification for the discrimination inflicted by the Texas law. (*Id.* at 582.) While Justice Kennedy is not as direct, he also concludes that although “ethical and moral principles” may be “profound” and deeply held, they are insufficient to support criminal sanctions against homosexual behavior. Citing his decision in *Planned Parenthood v. Casey*, he states: “Our obligation is to define the liberty of all, not to mandate our own moral code.” (*Id.* at 571, cite omitted.)

In dissent, Justice Scalia takes the majority to task for the holding and for its analysis—or in his view, lack of analysis. Justice Scalia reprises his argument that the Court has taken sides in the culture war. He describes the decision as the result of a “17-year crusade” to overturn *Bowers*. (*Id.* at 586.) He chastised the Court and the “law-profession culture” for signing onto the “homosexual agenda that seeks to eliminate “the moral opprobrium that has traditionally attached to homosexual conduct.” (*Id.* 602.) According to Scalia, “[i]t is clear . . . that the Court

has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.” (*Id.*)

What seems to vex Justice Scalia most, however, is that the “17-year crusade” to overturn *Bowers* is in *Lawrence* successful and the even longer crusade to overturn *Roe v. Wade* has not been successful. Scalia begins his opinion with this point.

I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine. Today’s opinions in support of reversal do not bother to distinguish—or indeed, even bother to mention—the paean to *stare decisis* coauthored by three Members of today’s majority in *Planned Parenthood v. Casey*. There when *stare decisis* meant preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to reaffirm it. . . . Today, however, the widespread opposition to *Bowers*, a decision resolving an issue as ‘intensely divisive’ as the issue is *Roe*, is offered as a reason in favor of *overruling* it.” (*Id.* at 587.)

Justice Scalia might have more accurately said that the Court has no “theory” or “doctrine” as to when precedent is to be abandoned. A theory that views precedent through the libertarian lens of expanding rights, for example, could reconcile retaining *Roe* and overruling *Bowers*. Absent such a theory, it is not clear what a “consistent” approach to *stare decisis* requires and thus, it is also not clear that the majority here is “manipulative.” But this may all be beside the point. Given Scalia’s accusation that the Court has taken sides in the culture war, his pique may not be so much with the operation of *stare decisis* as it is with the Court’s abortion jurisprudence. Justice Scalia seems to be suggesting that not only has the Court taken sides in this culture war issue (*i.e.* gay rights), it has also taken sides in the cultural warfare over abortion.

But it is not just abortion. Justice Scalia also sees *Lawrence* as opening up more battles in the culture war and in effect, deciding these conflicts in advance. Scalia writes: “State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers*’ validation of laws based on moral choices.” (*Id.* at 590.) In *Lawrence*, the Court has effectively decreed “the end of all

morals legislation.” (*Id.* at 599.) Perhaps “this parade of horrors” is just for rhetorical and dramatic effect, but if he is sincere, he seems to be suggesting that the Court is aiding and abetting cultural destruction.⁶⁰

Finally, Justice Scalia accuses the majority of being duplicitous. In his “limiting paragraph,” Justice Kennedy says that *Lawrence* is not about gay marriage. Justice Scalia says, “don’t believe it.” While gay marriage is only one item among many in the quote in the preceding paragraph, gay marriage is the “star” in Scalia’s “parade of horrors.” Justice Scalia believes that not only has the Court taken the side of cultural liberals in the fight over gay rights, it has also taken the side of cultural liberals on the issue of gay marriage. Deriding Justice Kennedy’s statement that “sexuality finds overt expression in intimate conduct” and that “this is one element of a personal bond that is more enduring,” (*Id.* at 567.) Justice Scalia asks: “what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘[t]he liberty protected by the Constitution?’” (*Id.* at 605, cite omitted.) “This case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.” (*Id.*)

Justice Scalia is almost surely right about this. *Lawrence* is an important beachhead in the culture war, but many of those behind the “17-year crusade” are not content to call a truce after *Lawrence*. *Lawrence* is but one victory in one battle in what is a bigger culture war over gay rights.

⁶⁰ See Sternglantz 2004. “Slippery slope argument may be a Trojan horse for the jurisprudence of hate.” (2004, 25) Writing a year after *Lawrence* was decided, Sternglantz points out that *Lawrence* has not set the Court on “the libertarian slippery slope that so infuriates Justice Scalia” (*Id.*)

***Lawrence* and Cultural Warfare over Gay Rights**

In *Lawrence*, Justice Scalia tells us that there is a culture war, that *Lawrence* is a key battle in that war, that the Court has taken sides in the culture war and that cultural conservatives are losing. Unlike in *Heller*, there are explicit appeals to not just ethos-cultural arguments but also moral arguments. Further, if the majority truly means what it says in *Lawrence*, then *Lawrence*, unlike *Heller*, is momentous for the culture war.

As noted above, the majority states that moral approbation alone is not sufficient to support a statute that criminalizes sexual behavior of a minority group. The Court also seems to suggest that historical antipathy towards a group or behavior, no matter how longstanding, is also not sufficient to support the type of criminal statute at issue in *Lawrence*. If this is true, then Justice Scalia is right to be concerned about the prospects for cultural conservatives in the culture war.

A number of respondent amici argued that bans on homosexual sodomy were historically longstanding and that accordingly, the Court should defer to the democratic majorities that imposed these restrictions. The majority rejects this contention. Justice Kennedy simply proffers that “times change” and that “later generations can see that laws once thought necessary and proper in fact serve only to oppress.” (*Id.* at 579.)

As noted earlier, several respondent amici also offer moral justifications for the statute and one, The Public Advocate of the United States, framed the moral justification as deriving from “an external, definable and transcendent authority.” (Hunter 1991, 43.) The majority rejects this view. Moral and ethical views even if profound and deeply held and presumably even if believed to be divinely ordained, are an insufficient justification for criminal sodomy statutes (and presumably many other types of statutes as well).

Here is the type of culture war that Hunter has in mind. The majority requires that “secular reasons” be given for this type of statute. Historical moral and religious reasons are not adequate. Justice Kennedy and the majority seem to be employing Hunter’s “moral modernism,” in the process rejecting moral traditionalism. The majority could have accepted that there are certain non-changing moral “laws” but that democratic majorities cannot enforce these with the criminal law. Rather than this position, however, the majority suggests that there are no such eternal, grounded “truths.” Times change. Views about homosexual behavior and sexual behavior change. More “enlightened” people can and do reject earlier less enlightened moral views and the Court cannot allow democratic majorities to discriminate based upon such views.

For his part, Justice Scalia does not attempt to defend “transcendent moral truth” so in the first instance, he is not fighting Hunter’s culture war. Neither do most of the respondent amici. Arguments are couched in terms of deference to elected democratic majorities. In suggesting that the Court has taken sides in the culture war, Justice Scalia is also suggesting that he has not taken sides. He seems to suggest that he stands above the fray, simply letting the contending armies battle it out. He even reassures us of this fact: “Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. . . . I would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than I would *forbid* it to do so.” (*Id.* at 603.)

Superficially, this is reassuring. There is no moral condemnation here; no appeal to transcendent moral truth. Scalia is not fighting a culture war or helping any party that does. Upon closer inspection, however, and with *Romer* in mind, there is reason to be skeptical of Scalia’s assurances. In *Romer*, Scalia was dismissive even critical of homosexuals who had

attained political power and their use of such power in the democratic process.⁶¹ While he assures us that he “is not critical of [homosexuals’] legislative successes,” his tone and discussion belies this assurance. (*Romer* at 646.)

Beyond this, there is something strange in the wording of his assurance: “I have nothing against homosexuals. . .” Of course, the statement does not end there, but it is an odd way to begin. Justice Scalia is a careful wordsmith and he could have written—“I have nothing against any group promoting their agenda though normal democratic means. This includes groups that define themselves based upon their sexual orientation.” But he does not say this. Justice Scalia’s attack on the “homosexual agenda” suggests that he is not willing to simply let the cultural combatants battle it out. Notwithstanding his protestations, there is the strong impression that Justice Scalia believes that the wrong side is winning the culture war.

But while Justice Scalia believes that the cultural liberals prevailed in *Lawrence*, this judgment is not as obvious as it seems. *Lawrence* is celebrated by its admirers as being the *Brown* of gay and lesbian rights. (Tribe 2004, 1955) “What is truly ‘fundamental’ in substantive due process, *Lawrence* tells us, is not the *set of specific acts* that have been found to merit constitutional protection, but rather the relationships and self-governing commitments out of which those acts arise—the network of human connection over time that makes genuine freedom possible.” (*Id.*, emphasis in original) Understood this way, *Lawrence* is actually a victory of conservative values. *Lawrence* could have found a right of “sexual autonomy” allowing

⁶¹ In *Romer*, Justice Scalia writes: “The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities . . . have high disposable income . . . and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide.” (*Romer* at 646.) It is not clear how Justice Scalia reaches this empirical conclusion. But more importantly, the statement is also true of other groups. Cultural conservatives are disproportionately represented in Colorado Springs, home to Focus on the Family and other conservative groups. Is this a democratic problem? A problem for those there that wish to end the social disapprobation of homosexuality?

individuals to determine which “specific acts” they deemed appropriate and desirable. Instead, *Lawrence* protected gay and lesbian relationships.⁶² Gay and lesbian relationships are protected because they are like straight relationships. These like-straight relationships involve the same intimacy, commitment and love as actual straight relationships. The Court never directly addresses the factual question as to whether Messrs. Lawrence and Garner had a “like-straight” relationship; it simply assumes they did and proceeds to discuss such relationships. But as some critics have pointed out, this “domesticates” gay and lesbian sex. It forces gays and lesbians to abide by heteronormativity. (Rosenbury 2010)⁶³ As Franke (2004) puts it: “*Lawrence* is a slam-dunk victory for a politics that is exclusively devoted to creating a safe zone for homo- and hetero-sex intimacy, which at the same time rendering all other zones more dangerous for nonnormative sex.” (Franke 2004, 117)⁶⁴

It is understandable why the parties in *Lawrence* would have offered the “like-straight” rationale,⁶⁵ and it is also obvious that many gay and lesbian couples endorse, desire and adopt the “like-straight” model of sexuality. What is not obvious is that *Lawrence* represents the victory of cultural liberals over their conservative counterparts. As Rosenbury (2010) argues, “*Lawrence* is not a revolution for sex.” (2010, 827) “The sex-negative legal regime remains largely in place

⁶² See Ruskola 2005. Kennedy’s rhetoric “leaves little or no justification for protecting less-than-transcendental sex that is not part of an ongoing relationship.” (239)

⁶³ Mackinnon (2004) goes so far as to say that “[t]he law norm and discourse of privacy guards the inviolability of heterosexuality’s closet, a closet that *Lawrence* not only guarded but strengthened and expanded. . . . *Lawrence* grants an ominous form of assimilation with dominance.” (1088-1089) Rosenbury 2010 suggests that *Lawrence* is based on gender hierarchy and stereotyping: “the vision of sexuality adopted in *Lawrence* is gendered, viewing sex as the primary avenue through which men can become emotionally intimate.” (812)

⁶⁴ See also Harcourt 2004. As early as 1980, Grey predicted this “domestication” of gay and lesbian sex. “Perhaps something like marriage will have to be recognized for homosexual couples, not because they need it for their happiness (though they may), but because SOCIETY needs it to avoid the insecurity and instability generated by the existence in its midst of a permanent and influential subculture outside the law.” (Grey 1980, 97)

⁶⁵ The petitioner amici briefs go out of their way to praise heterosexuality. The brief by the law professors provides a good example. The “like-straight” logic is also manifest in Justice Stevens’ dissent in *Bowers*.

today.” (*Id.* at 815) If *Lawrence* is a victory for cultural liberals, the victors are not the “free love/just do it” type of cultural liberals.

Post-*Lawrence* cases in the lower courts support this conclusion. The impact of *Lawrence* has been limited. It turns out that there are lots of exceptions to the “zone of dignity” and lower courts have been quite willing to quote Justice Kennedy’s “what *Lawrence* isn’t” passage in upholding restrictive laws on sexual practices. (Gong 2012; Perkinson 2007)⁶⁶

Finally, the culture war being waged in *Lawrence* is not as simple as Hunter suggests. It is not a dichotomous struggle between moral modernists and moral traditionalists. There are various culture “wars” being fought in *Lawrence*. It is true that moral modernists, represented both in the majority and in petitioner amici, reject “moral” reasons as being sufficient to justify the Texas statute. Secular reasons are necessary. By contrast, there are moral traditionalists that argue that the “natural moral order” justifies the Texas law. (But no one on the Court, not even Scalia adopts this reasoning.)

At the same time, moral traditionalists and moral modernists are splintered in their thinking. There is not one “modernist” project here and there is not one “traditionalist” project here. Some moral modernists argue for a right of “sexual autonomy,” a right broader and more

⁶⁶ See Siebeneck 2008.

In *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007), a suit was filed by the American Civil Liberties Union (“ACLU”) on behalf of individual users and vendors of sexual devices to enjoin enforcement of section of an Alabama statute prohibiting the distribution of “any device designed or marketed as useful primarily for the stimulation of human genital organs.” The court specifically stated, “. . . while the statute at issue in *Lawrence* criminalized private sexual conduct, the statute at issue in this case forbids public, commercial activity. To the extent *Lawrence* rejects public morality as a legitimate government interest, it invalidates only those laws that target conduct that is both private and non-commercial.”

See also *United States v. Extreme Associates, Inc.*, 431 F. 3d 150 (3d Cir.. 2005), in which the court concluded, “[W]e are satisfied that the Supreme Court has decided that the federal statutes regulating the distribution of obscenity do not violate any constitutional right to privacy. For district and appellate courts in our judicial system, such a determination dictates the result in analogous cases unless and until the Supreme Court expressly overrules the substance of its decision. *Lawrence v. Texas* represents no such definitive step by the Court.”

expansive than anything the Court vindicates in *Lawrence*. They fear the “domestication” of gay sex and argue for constitutional protection of all “nonnormative sex.” Other modernists seek only vindication of “like-straight sex.” The Constitution need only protect sex within a relationship—any relationship.

Defenders of the Texas law and the constitutional sexual status quo are divided in their thinking as well. Some argue that the Founders enshrined in the Constitution a “traditional” view of sexual morality. Others simply argue that, in the absence of specific directives in the Constitution, majority views should and must prevail.

This splintering of the moral modernists and the moral traditionalists on the issue of sexual autonomy makes arguments over gay marriage even more interesting to watch. So far, five district courts have found that state constitutional bans on gay marriage violate the federal Constitution. The Fourth and Tenth Circuits will shortly issues their opinions, and most court watchers expect at least one of these Courts of Appeals to agree that bans on gay marriage are unconstitutional. The battle will then (almost certainly) move to the Supreme Court.

There logic of *Lawrence* may very likely be extended to its logical conclusion. There will be no arguments over sexual autonomy. Rather, the battle over gay marriage will pit two different types of conservative arguments. Sexual traditionalists will argue that history and morality teach that marriage can only exist between a man and a woman, a conservative argument based upon moral “truth.” On the other side, advocates of gay marriage will also make a conservative argument—that gay marriage is “like-straight” marriage and must be “equally protected.” If the Court agrees, the domestication of gay sexuality will be complete.

But given the growing number of states allowing gay marriage⁶⁷ and the fact that a majority of Americans now favor gay marriage, the cultural battle over gay marriage in the courts may be nothing more than a whimper. Not so with respect to the battle over abortion, the issue to which I now turn.

⁶⁷ According the Williams Institute at the UCLA School of Law, more than 70 percent of Americans live in the 36 states and the District of Columbia where gay marriage is now permitted. See Williams Institute @ www.williamsinstitute.law.ucla.edu (accessed January 9, 2015).

Chapter 5: The Battle Over Abortion

The battle over abortion did not start the culture wars, but abortion, like no other issue, has fueled them. Arguably, the issue of abortion is the culture war issue of all culture war issues. It is the issue that has defined and animated cultural warfare for the last forty years.

What is now hard to remember is that forty years ago *Roe v. Wade* was not all that controversial. It was a “consensus” opinion with neither side getting everything that it wanted. It did not splinter the Court—the vote was 7-2—with Republican appointees joining Democratic ones to forge the majority opinion. It also represented elite opinion at the time. Newspapers for example, generally approved of the opinion, even many in the Deep (and deeply religious) South.⁶⁸ It was consistent with a developing trend of liberalization of abortion laws⁶⁹ and with public positions taken by the American Medical Association and other mainstream groups. Public reaction was also muted. At the time of the decision, 64% of Americans thought that a decision regarding abortion should be made solely by a woman or by a woman in consultation with her doctor. (Greenhouse and Siegel 2011, 2043.) *Roe* did not result in the type of immediate condemnation that accompanied the Court’s earlier decisions regarding racial desegregation or religion in schools. Even three years later, *Roe* remained uncontroversial. At his confirmation hearing, Justice Stevens was not asked a single question regarding *Roe* or abortion.

⁶⁸ See “*Misconceptions*,” by Linda Greenhouse in the *New York Times Opinion Pages*, January 23, 2013. “A Gallup poll in the summer of 1972 found 64 percent of Americans agreeing with the statement that “The decision to have an abortion should be made solely by a woman and her physician.” A majority of all identified groups, including Catholics, agreed with that statement. There was almost no difference between men and women. The group expressing the strongest agreement – 68 percent – was made up of Republicans.”

⁶⁹ It is important not to overstate this point, however. While there was some liberalization of abortion laws, the trend was a slow-developing one. For example, in 1971 and 1972, “pro-choices forces won no political victories.” “In the two states that held 1972 popular vote referenda on abortion, pro-choice measures went down to heavy defeat” (Garrow, 1999, 841)

Of course, elite consensus on the matter of reproductive rights masked a deeper political and cultural conflict that was already ongoing. Before the most recent formulation of the culture war, there was an earlier one—“amnesty, abortion and acid.”⁷⁰ Richard Nixon used this formulation to trounce George McGovern in the 1972 presidential election. Abortion was linked to a conservative cultural critique of the 1960s, a critique that characterized the decade as a hedonistic, “if it feels good, do it” decade. Abortion was portrayed as the logical and unwelcome consequence of such hedonism. This became part of the larger critique—that a disruptive few (as opposed to the silent majority) had abandoned personal responsibility. Men were unwilling to fight for their country. Women were willing to abort their babies to avoid motherhood. The young were stoned or “tripping” instead of working, but most importantly, these cultural changes were undermining core American values.

As Greenhouse and Siegel (2011) point out, these cultural clashes also fit nicely with the Republicans’ political agenda at the time. Republicans, for obvious reasons, sought to splinter the New Deal Coalition that had existed since FDR. Conservative cultural issues appealed to many middle-Americans who would otherwise be inclined to vote Democratic. Painting Democrats as out of touch social and cultural elites was seen as (and was) a winning political strategy. The abortion issue was also a potentially valuable “wedge” issue in that Republican strategists saw an opportunity to pry Catholics from the New Deal Coalition and energize Southern evangelicals.

⁷⁰ In an April 27, 1972 column in *Inside Report* (*Chicago Sun-Times*), Robert Novak quoted an unnamed source as saying that George McGovern was the candidate of amnesty, abortion and the legalization of pot. This characterization was later alliteratively changed to “amnesty, abortion and acid.” Later, it was disclosed that the quotation came from Senator Thomas Eagleton who ironically became George McGovern’s running mate until it was disclosed that he had undergone shock therapy treatment.

It is ironic that the current formulation of the culture wars—God, guns and gays—makes no mention of abortion. But the failure of abortion to appear in the culture war shorthand is not indicative of the degree to which cultural warfare continues to be waged over abortion. As will become apparent, even as *Roe* declared the Constitution protected a woman’s right to have an abortion, the opinion created plenty of room for government regulation of the procedure. Contrary to many characterizations, especially by anti-abortion opponents, it did not constitutionally protect abortion “on demand.” Rather, as the decision itself makes clear, the state can intervene significantly to limit abortion in the later stages of pregnancy. The second case discussed in this chapter, *Planned Parenthood v. Casey*, created even more constitutional space for abortion regulation.

There are six abortion cases deemed significant by Congressional Quarterly. (See Table 5-1.) *Roe* is obviously the earliest. The most recent cases, *Stenberg* and *Gonzales*, dealt with state and federal restrictions on a specific late-term abortion procedure (labeled partial-birth abortion by opponents). While these cases are interesting, especially when comparing the Court’s analysis regarding a state ban on the procedure with its analysis regarding the federal ban, in the end, the decisions are limited and shed little light on the bigger battles going on regarding abortion.

Table 5-1
CQ ABORTION CASES

Roe v. Wade (1972)

Planned Parenthood v. Danforth (1976)

Hodgson v. Minnesota (1990)

Planned Parenthood v. Casey (1992)

Stenberg v. Carhart (2000)

Gonzales v. Carhart (2007)

After *Roe* and before *Stenberg*, there are three cases on the CQ list. In each, the Court grappled with the boundaries of its *Roe* jurisprudence. If a state could regulate abortion but only consistent with a woman's constitutional right to privacy, what were the limits to constitutional regulation? In *Planned Parenthood v. Casey*, the Court faced a number of discrete regulations aimed at women seeking abortions. While the Court sustained all but one of the regulations, the Court went beyond just consideration of these restrictions. Rather, to the dismay of *Roe* supporters, it revisited *Roe* itself and while it did not explicitly overrule *Roe* (to the dismay of *Roe* opponents), it doctrinally replaced *Roe*'s analytic framework. To critics of *Casey*, it overruled *Roe* in substance if not in fact.

Besides *Roe* (and perhaps even including *Roe*), *Casey* is the most important abortion decision handed down by the Court. Its impact can be felt today, as opponents of abortion seek to use *Casey* to further restrict access to abortion. Last year alone, 39 state legislatures passed

over 140 bills restricting or regulating abortion.⁷¹ The latest legislative strategy of anti-abortion advocates involves passing new restrictions on abortion providers (as opposed to restrictions directed at women seeking abortions). These laws target regulation of abortion providers and are thus known as “TRAP” laws.⁷² Such laws stem directly from the Court’s analysis in *Casey*.

But *Casey* is important for another reason. In *Casey*, the Court arguably overruled *Roe* without explicitly doing so. *Webster v. Reproductive Health Services*, a case that is curiously not on the CQ list, presented the first real opportunity for opponents of abortion to overturn *Roe*.

⁷¹ See Guttmacher Institute’s “*Laws Affecting Reproductive Health and Rights: 2013 State Policy Review*.”

⁷² At last count, 26 states had passed some version of TRAP laws. According to the article, “*The Abortion Trap*,” “[t]his year, Louisiana joined 12 other states in passing a TRAP law, bringing the national total up to 26 states, which according to the Guttmacher report, will impact 59 percent of American women who are of ‘reproductive age.’”

Two of the most restrictive states are Texas and Mississippi. In Texas, the Fifth Circuit Court of Appeals ruled on March 27, 2014 that two previously challenged restrictions of Texas’ omnibus anti-abortion law (House Bill 2) were constitutional. The opinion, authored by Judge Edith Jones, noted that when analyzing the constitutionality of an abortion restriction, courts must presume the law in question is valid and vote to uphold that law so long as “any conceivable rationale” exists for the law’s enactment. The Judge went on to state, “[b]ecause the determination does not lend itself to an evidentiary inquiry in court, the state is not required to ‘prove’ that the objective of the law would be fulfilled, . . . a law based on rational speculation unsupported by evidence or empirical data satisfies this standard of review.” *Planned Parenthood of Greater Texas Surgical Health Services, etc., v. Abbott*, Docket No. 13-51008, March 27, 2014.

Legal analyst, Jessica Pieklo at [RH Reality Check](#) speculates that Planned Parenthood might ask the U.S. Supreme Court to hear the case. But, she cautions that while at least four justices have indicated their concerns with the Texas law’s requirements, a fifth and crucial vote, Justice Anthony Kennedy, has never voted to strike an abortion restriction in his entire time on the court. “That means there’s probably more Supreme Court justice votes to uphold the Fifth Circuit decision than to overrule it.” See the March 31, 2014 “*Last Week’s HB 2 Decision Sets Dangerous Path for Challenging Anti-Abortion Laws*,” at [RH Reality Check](#), Reproductive & Sexual Health and Justice.

In Mississippi, on April 28, 2014, the Fifth Circuit Court of Appeals also heard arguments regarding a TRAP Law that would close Mississippi’s one remaining abortion clinic. See “*Fifth Circuit Hears Arguments In Challenge To TRAP Law That Would Close Mississippi’s Last Abortion Clinic*,” at the [Reproductive Rights Prof Blog from CUNY School of Law](#).

It should also be noted that notwithstanding *Roe* and *Casey*, abortion opponents have not given up on “personhood” arguments. Though both cases decided that personhood begins at the point of live birth, abortion opponents continue to argue that fetuses should be treated as persons or should enjoy constitutional rights even if they are not persons. They contend that a fetus can feel pain and they promote statutes that would be abortion illegal at the earliest possible point that a fetus could experience pain. Needless to say, there is serious debate about when or even if, a fetus feels pain. See Jost and Stoltzfus (2002). “Rights of Embryo and Foetus in Private Law,” 50 *Am. J. Comp. L.* 633.

The Court had become more conservative. Opponents believed that they had four sure votes to overrule *Roe* and that a fifth vote was possible. But a splintered Court refused to overrule *Roe*, instead endorsing *Roe*'s central holding. *Webster* did, however, provide clues as to how abortion opponents could restrict the reach of *Roe*. In *Casey*, opponents pressed these arguments and the Court, without overruling *Roe*, discards its analytic structure. *Casey* thus provides an opportunity to understand how opponents of abortion structured their attack on *Roe* and how the battle over abortion evolved from 1972 to 1992. In addition, the fact that both supporters and opponents of abortion were disappointed in the decision in *Casey* is also likely to lead to insights into the nature of cultural warfare over abortion.

Roe and *Casey* can rightly be seen as the two most important cases in the Court's abortion jurisprudence. For this reason, I will concentrate my analysis on these cases although not to the exclusion of others in the CQ list. (Some analysis of the interim cases between *Roe* and *Casey* is necessary in order to put *Casey* in historical and jurisprudential context.) Analysis of these cases should lend substantial insights into how culture warriors first fought the legal battles over abortion and how they honed and developed their legal arguments in the twenty years after *Roe* was decided. With this as background, I now turn to the parties' briefs in *Roe*.

***Roe v. Wade*: The Parties' Briefs**

The first thing to note about *Roe v. Wade* is its procedural peculiarity. In *Roe*, a three-judge panel of the district court found that the Texas abortion statute was void but it refused to grant *Roe*'s requested injunctive relief. Under federal law, a decision of a three judge district court panel may be appealed directly to the Supreme Court and both parties did so. Both parties also

filed appeals with the Court of Appeals for the Fourth Circuit, but these became moot when the Supreme Court determined that the direct appeal was appropriate.⁷³

The Texas statute at issue in the case made all abortions illegal except for those necessary to save the life of the mother. Jane Roe, a single and at the time of her suit, pregnant woman challenged the constitutionality of the statute. John and Mary Doe, a childless married couple challenged the statute on behalf of all married couples. Dr. James Hallford, M.D. sought to intervene as a party-plaintiff. Dr. Hallford performed abortions in Texas and at the time, was being prosecuted under the Texas statute. The parties sought a declaratory judgment that the statute was unconstitutional and a permanent injunction to prevent enforcement of the statute.

The District Court first took up the issue of standing to challenge the statute. It determined that Jane Roe and Dr. Hallford had standing but dismissed the complaint by the Does. The Court then determined that the Texas statute violated the Ninth Amendment in that it denied single women and married couples the right to determine whether to have children. The District Court further found that the statute was overbroad, not narrowly drawn to serve a compelling state interest and unconstitutionally vague. (*Roe v. Wade*, 314 F. Supp. 1217 (1970), at 1225.) The Court, however, declined to provide injunctive relief, noting that no criminal prosecutions were pending against Roe and that Dr. Hallford had failed to request such relief.

Thus, the case arrived at the United State Supreme Court as a direct appeal (hence the parties are appellants and appellees and not petitioners and respondents) from the district court's

⁷³ 28 U.S.C § 1253 provided for direct appeals of decisions of three-judge district court panels. Such panels are authorized in limited circumstances under federal law. Both parties sought direct review by the Supreme Court. Both parties also filed appeals in the appropriate Court of Appeals. It appears from the Court's discussion that the Appeals Court ruled on the challenge to the lower court's decision regarding declaratory relief but did not rule about the appropriateness of the failure to provide injunctive relief. In light of this, the Court determines that it can and should take jurisdiction of the case.

decision and not based upon a request for a writ of certiorari. Thus, procedurally, *Roe* arrived at the Supreme Court in a complicated form and by a fairly unique path. *Roe* and Hallford appealed the District Court's denial of injunctive relief. The Does appealed the District Court's denial of standing. For its part, Texas challenged the District's Court's finding that the statute was unconstitutional.

This procedural background is important because it not only gives context to the arguments of the parties but also to complaints about the “activist” nature of the Supreme Court's decision. The Court could have avoided a substantive decision in the case—at least in the short term. It could have found that federal law did not apply to the denial of injunctive relief in these circumstances or it could have stayed the action pending a decision of the Appeals Court (the Appeals Court could have decided that the District Court erred in denying injunctive relief and remanded the case in which event, the Supreme Court would not have had to address this issue), or it could have simply decided that the District Court erred with respect to injunctive relief and remanded the case itself. But the Court took none of these “outs” and this may in part be because the parties briefed and argued the merits of the District Court's constitutional determination.

The brief by appellants is anything but brief. It runs 145 pages, not including the appendices. Given the procedural nature of the case, this is not surprising. Fifty pages of the brief address questions of standing, ripeness, the “case or controversy” doctrine, and standards for injunctive relief. But these procedural issues are not of interest here, so I will turn immediately to the constitutional arguments made by the appellants.

Echoing the Court’s decision in *Griswold v. Connecticut* which concluded that there is a “marital right to privacy” embedded in the “penumbras” of the Constitution,⁷⁴ appellants argue that the Texas abortion statute “Abridge Fundamental Personal Rights of Appellants Secured by the First, Fourth, Ninth, and Fourteenth Amendment, and Do Not Advance a Narrowly Drawn, Compelling State Interest.” (Appellants’ Brief at 91.) Appellants’ argument can be encapsulated in four key assertions:

1. The Constitution protects certain “fundamental” rights, even if these are not specifically listed in the text itself.
2. Among these fundamental rights are: “the right to seek and receive medical care for the protection of health and well-being;” the right to marital privacy; the right to personal privacy; and the right to “physical integrity.” These rights to privacy include the right to abortion. In addition, physicians have a fundamental right “to administer health care without arbitrary state interference.”
3. These rights are not absolute but a state may not abridge them without a “compelling” interest and by the “least restrictive means.”
4. The Texas statute is not justified by a compelling state interest, is not narrowly drawn and is unconstitutionally vague. Texas’ proffered justifications—protecting public health,

⁷⁴ In *Griswold v. Connecticut*, (381 U.S. 479 (1965)), the Court acknowledged that there are no fundamental rights in the Constitution or the Bill of Rights specifically allowing “association of people,” the right to “educate a child in a school of the parents’ choice -- whether public or private or parochial,” or the right to “study any particular subject or any foreign language.” The Court noted, however, that the First Amendment has been construed to include those rights.

With this background, the Court noted that “[t]he First Amendment has a penumbra where privacy is protected from governmental intrusion.” It went on to find that *Griswold* involved “a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives, rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship.” Citing *NAACP v. Alabama* (377 U.S. 288 (1964)), the Court noted that [s]uch a law cannot stand in light of the familiar principle, so often applied by this Court, that a ‘governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.’ . . . Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.” (Pp. 482 – 86.) Given this reasoning, the Court held that forbidding the use of contraceptives violated the right of marital privacy within the penumbra of specific guarantees of the Bill of Rights.

regulating inappropriate sexual conduct, and protecting human life—are not promoted by the statute.

While the first claim has since become quite controversial—originalists suggest that the hallmark of an activist Court is to find constitutional rights that nowhere appear in the Constitution—at the time of *Roe*, precedent seemed to concede that such rights existed. “That . . . a right is not enumerated in the Constitution is no impediment to the existence of the right.” (Appellants brief at 92.) Indeed, just such an unenumerated fundamental right was identified by the Court in *Griswold*.

The second proposition flows directly from the first. Of course, it is not without controversy as we saw in the discussion of gay rights. The fact there are unenumerated fundamental rights doesn’t mean that the exact nature and scope of such rights is obvious. But again, the appellants in *Roe* had precedent accumulated over forty years to support their argument. “[R]ights not specifically enumerated have been recognized as fundamental rights entitled to constitutional protection including the right to marry, the right to have offspring, the right to use contraceptives to avoid having offspring, the right to direct the upbringing and education of one’s children as well as the right to travel.” (*Id.*, cites omitted). Each of these rights had been deemed fundamental by the Court and worthy of constitutional protection. Obviously, the most important of these rights sanctioned by the Court was the right to access to contraception recognized by the Court in *Griswold*. Given the Court’s logic in *Griswold* that couples enjoy the right to decide “whether or not to have children” and that this protected access to contraceptives, the logical implication is that it must also protect access to abortion. Indeed, appellants write:

This Court has previously upheld the right to use contraceptives to avoid unwanted pregnancy. ‘ [I]t would seem that if there is a right to use contraception, this right must also take account of the fact that most techniques are not 100 percent protective. If the contraceptive method fails and the *Griswold* right of choice is preserved, it is a strong

argument toward recognized the right to an abortion.’ (Appellants’ Brief at 103, cite omitted.)

Of course, the preceding argument goes only to the constitutional rights of married couples to have access to abortion. It does not address the claims of Jane Roe. At the time of Jane Roe’s appeal, the Court had not yet decided *Eisenstadt v. Baird*, which extended the logic of *Griswold* to unmarried women (though it had noted probable jurisdiction). Thus, appellants could not rely entirely on *Griswold* to support Roe’s constitutional claim. Accordingly, they argued that the right to an abortion was embedded in a personal right to privacy and not dependent upon marital status.⁷⁵

Having argued that there is a constitutional right to an abortion, appellants next turn to the state interests in regulating the procedure. Conceding that regulation is legitimate if it advances a compelling government interest, appellants argue that the Texas statute fails to do so. The State had proffered three justifications for its statute: it protects public health; it deters “illegal” sexual conduct; and “it protects the life of the unborn child.” (*Id.* at 118.) Appellants argue that the statute neither promotes nor achieves any of these goals. First, since abortion when performed during the early stages of pregnancy is “safer than childbirth” (*Id.* at 115), “[t]his fact alone vitiates any contention that the statute here serves a public health interest.” (*Id.*) In fact, according to appellants, the statute actually “creates a public health problem of pandemic proportions’ by denying women the opportunity to seek safe medical treatment.” (*Id.*) In short, denying women legal abortions results in an increase in “back-alley” abortions to the detriment of women’s health.

⁷⁵ In addition, appellants argue that the privacy right protects “the right of every citizen to follow any lawful calling, business, or profession he may choose.” (*Id.* at 110.) This right includes the right of physicians to make their own medical judgments about the appropriateness of abortion.

Similarly, the statute is not tailored to discourage “illegal” sex—pre-marital or extra-marital sex. It prohibits abortion in all cases except to save the life of the mother. It does not distinguish between pregnancies resulting from illegal sex and those resulting from legal sex. Moreover, no evidence suggests that limited access to abortion curtails promiscuity and additionally, “[t]o view the abortion law as protecting public morals by making pregnancy the penalty for forbidden conduct would ascribe a monstrous intention to the Texas legislature.” (*Id.* at 117.)

Finally, appellants turn to the issue of “protecting unborn children.” They note that the State has conceded that this is its one and only interest in prohibiting abortion. But appellants argue, the State evidences little interest in the fetus except in its criminalization of abortion. First, the state does not make a pregnant woman who seeks an abortion guilty of a crime. It criminalizes only the actions of the person performing the abortion. Similarly, it doesn’t criminalize traveling to another state to procure an abortion. If the state was really concerned with protecting unborn children it would make abortion illegal period. It does not require women with a history of spontaneous abortion to “go into seclusion” or seek pre-natal medical care. Property law and tort law do not apply to fetuses. Rather, the State’s argument boils down to the assertion that the fetus “is a potential human being and therefore of value.” Conceding this point, appellants argue that the question is not one of the destruction of human life, but who makes this decision.

The question of the life of the fetus versus the woman’s right to choose whether she will be the host for that life is incapable of answer through the legislative fact-finding process. Whether one considers the fetus a human being is a problem of definition rather than fact. Given a decision which cannot be reached on the basis of fact, the State must give way to the individual for it can never bear its burden demonstrating that facts exists which set up a compelling state interest for denying individual rights. (*Id.* at 124.)

Three things can be said about the arguments raised by appellants. First, in light of *Griswold* and immediately following upon that case, the arguments raised by appellants seem rather unremarkable. It does not appear so now given 40 years of debate over abortion, but as appellants note, their argument is a logical extension of the constitutional principle articulated in *Griswold*.

Second, since they argue that we cannot know when “personhood” attaches to a fetus, they do not need to, nor do they, engage in any kind of “balancing” analysis. In their structuring of the constitutional argument, there is no countervailing right of the fetus to weigh against the privacy right of women.

Third, and perhaps most significantly, in discussing abortion, they do not describe the procedure or more accurately, procedures in any detail. They do not distinguish between abortion in the early stages of pregnancy from late-term abortion. They seem to argue that a right to privacy includes a right to have an abortion at any stage of pregnancy. At the same time, they seem to implicitly concede that there is a difference in the nature of the procedure (though not perhaps in its constitutional status) depending upon when it is performed. In discussing the safety of the procedure, they refer to the “early stages of pregnancy.” (*Id.* at 115.) They do not address questions related to late-term abortions, a silence or omission that will become significant. In short, they do not set forth a defense of abortion, rather their entire focus is on the right to choose.

Finally, the picture painted of pregnancy (and motherhood) is one of toil and trouble. At one point, appellants argue that prohibiting abortion destroys the “potential life” of the pregnant woman. (*Id.* at 123.) While there is no explanation of this statement, read in context, it seems to suggest that a woman is “reduced” to motherhood sacrificing all the potential life choices that

she could otherwise make. An unwanted pregnancy can be “economically disastrous” or “ruinous.” (*Id.* at 102.) For some marriages, it can be “the last straw.” (*Id.*) Suffice it to say that pregnancy (at least an unwanted one) is not presented as a blessing or an opportunity for a woman to reach her “highest calling,” rather, it is presented as a burden, a potentially life-changing one. We will see this ethos reflected in the Court’s opinion.

In comparison to the appellant’s brief, the appellee’s brief is relatively short. It runs 58 pages, almost half of which is taken up with procedural arguments. Not surprisingly, it argues that none of the parties have standing to bring the suit and further, that since Mary Roe is no longer pregnant, the case is moot.

After advancing the procedural arguments, it turns to the constitutional question and its position is clear and straightforward—“The Constitution of the United States does not guarantee a woman the right to abort an unborn fetus.” (Appellee’s Brief at 25.) Appellee begins by distinguishing *Griswold v. Connecticut*. In its reading of *Griswold*, *Griswold* stands only for the proposition that it is unconstitutional for a state to make it “criminal for a couple to engage in sexual intercourse when using contraceptives.” (*Id.* at 26.) In this reading, *Griswold* did not create any general privacy right. Moreover, *Griswold* hinged on the fact that the statute required unconstitutional “invasions of the conjugal bedroom.” (*Id.*) It was potential invasion of the privacy of the home (to enforce the contraceptive statute) and not a general right of privacy that lay at the core of *Griswold*. By comparison, “[p]revention of abortion does not entail, therefore, state interference with the right of marital intercourse, nor does enforcement of the statute requiring (*sic*) invasions of the conjugal bedroom.” (*Id.*) In short, precedent does not support a constitutional claim to a right to abortion.⁷⁶

⁷⁶ Appellee’s brief makes no reference to any of the other privacy cases cited by appellant. It appears to have decided that as a tactical matter, *Griswold* was the only relevant precedent.

After dealing with precedent, appellees turn to what they describe as the “crux” of the matter: the human-ness of the fetus. “The crux of the moral and legal debate over abortion is, in essence, the right of the woman to determine whether or not she should bear a particular child versus the right of the child to life.” Unlike appellants who described “the fetus as a ‘blob of protoplasm,’” appellees argue that “the fetus is human from the time of conception.”

It [the zygote] is alive because it has the ability to reproduce dying cells. It is human because it can be distinguished from other non-human species, and once implanted in the uterine wall it requires only nutrition and time to develop into one of us. (*Id.* at 30.)⁷⁷

Over the next 24 pages, appellees describe in detail the development of a human fetus.

Appellees conclude that not only can a state prevent “the arbitrary and unjustified destruction of an unborn child,” it can be said to have a “duty” to do so. (*Id.* at 31) Because birth is “but a convenient landmark in a continuing process—a bridge between two stages of life” (*id.* at 54), the “unborn child” enjoys a “right to life” under the Due Process Clause of the Fifth Amendment and “it would be a denial of due process of law not accord protection of the life of a person who had not yet been born” (*Id.* at 56.)

Thus, unlike the appellant’s brief that sets up the constitutional question as one between the privacy rights of women and the police powers of the state, appellees pose the question as a choice between competing rights—a woman’s right to privacy and the fetus’ right to life. The state interest is therefore not some generic interest in promoting life but rather a significant and compelling interest in protecting the right of life of unborn fetuses.

Appellants and appellees frame the case in starkly different terms and it is fair to say that their arguments lie more in the category of moral arguments as opposed to legal arguments. For

⁷⁷ Appellees never use the term “zygote” in their brief. They always use the term “fetus” to describe an embryo throughout the development process. Technically this is not correct. The term fetus is generally used to describe an embryo at the ninth week after fertilization.

example, while appellees describe in great detail the development of the embryo/fetus, they cite no cases in which the pre-born have been characterized as persons and no case law for why the Court should decide to grant fetuses personhood. Their arguments—though not insubstantial—boil down to: fetuses are like babies and abortion is like infanticide.

One final point about the appellee’s brief. The appellant’s brief characterized unwanted pregnancy as a “burden.” Rather than responding or objecting to this argument, appellee simply ignores it. Appellees do not fetishize motherhood nor do they minimize the impact of pregnancy on a woman. Rather, they simply fail to engage this issue concentrating their almost full attention on the “unborn child.” Amici, however, will address this issue and add new arguments nowhere found in the parties’ briefs.

Amici and their Arguments

Nine briefs were filed by amici in *Roe* on behalf of appellants.⁷⁸ A total of 31 amici appeared on these briefs. (See Table 5-2.) A total of six briefs were filed by amici on behalf of appellee. Each of these amici briefs represents a single entity. (See Table 5-3.)

For appellants, the obvious organizations are represented: NOW, Planned Parenthood, and the National Abortion Action Coalition. They are joined by various secular organizations representing lawyers, physicians and advocates for the poor, but they are also joined by representatives of religious organizations. No religious organizations filed or signed onto an amicus brief for appellee. Granted, all of the religious organizations supporting appellant are “mainline” religious bodies—Methodists, Episcopalians, Quakers—and not conservative or evangelical denominations (and the rapid growth of evangelical groups was years away) but it is

⁷⁸ The case was argued in 1971 and reargued in 1972. Two amici filed an additional brief before re-argument. I have not included these in the count of briefs but I have included them in my analysis.

interesting that to the extent that organized religion involved itself in *Roe*, it supported the right to abortion. It is also interesting that the Catholic Church, which had been a vocal opponent of the liberalization of abortion laws, chose not to participate in the judicial debate.

Table 5-2
Appellant Amici

American Association of Planned Parenthood Physicians
American Association of University Women
American College of Obstetricians and Gynecologists
American Ethical Union
American Friends Service Committee
American Humanist Association
American Jewish Congress
American Medical Women's Association
American Psychiatric Association
American Public Health Association
Board of Christian Social Concerns of the United Methodist Church
California Committee to Legalize Abortion
Community Action for Legal Services
Episcopal Diocese of New York
Medical School Deans and Professors
National Abortion Action Coalition
National Board of the Young Women's Christian Association of the United States
National Legal Program on Health Problems of the Poor
National Organization for Women
National Welfare Rights Organization
New Women Lawyers
New York Academy of Medicine
New York State Council of Churches
Planned Parenthood Federation of America
South Bay Chapter of the National Organization for Women
State Communities Aid Association
Union of American Hebrew Congregations
Unitarian Universalist Association
United Church of Christ
Women's Health and Abortion Project
Zero Population Growth

Table 5-3
Appellee Amici

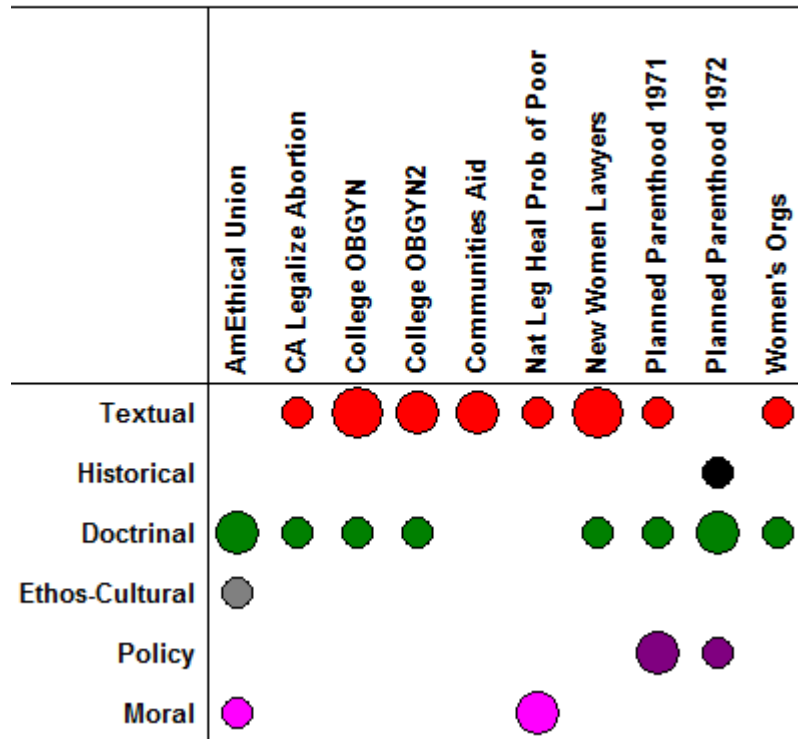
Americans United for Life
Certain Physicians of the American College of Obstetricians and Gynecologists
Ferdinand Buckley (who was initially appointed as Guardian ad litem of the Georgia fetus)
LIFE
National Right to Life Committee
Women for the Unborn

Charts 5.1 and 5.2 compare the modalities of arguments of appellant and appellee amici. As the charts indicate, appellant amici rely primarily on textual and doctrinal arguments and in only two cases make moral arguments. Appellee amici rely primarily on moral arguments. The reason for this lies in both the procedural posture of the case and the substantive positions of the parties and their amici.

Appellants had prevailed on their constitutional arguments at the lower court. Relying on *Griswold*, they had convinced the district court that the Constitution contains a privacy right that encompasses the right to abortion. Thus, while they were the appellants (because of the failure of the district court to grant injunctive relief), they were actually defending the substantive decision of the lower court. Thus, they had the rather easier task of defending the lower court's textual interpretation of the 9th Amendment and supporting its doctrinal approach to the issue of privacy. Appellants had no need to make moral arguments, in fact, they had every incentive not to make the case about the morality of abortion. As Chart 5.1 shows, they concentrated on the text of the Constitution arguing that the 9th and the 14th Amendments protected a woman's right to have an abortion. Given the vagueness of the 9th and 14th Amendments, they also logically argued doctrinally—focusing on the Court's approach to the issue of privacy. Moral arguments make only two appearances in appellant amici briefs but even this is somewhat misleading.

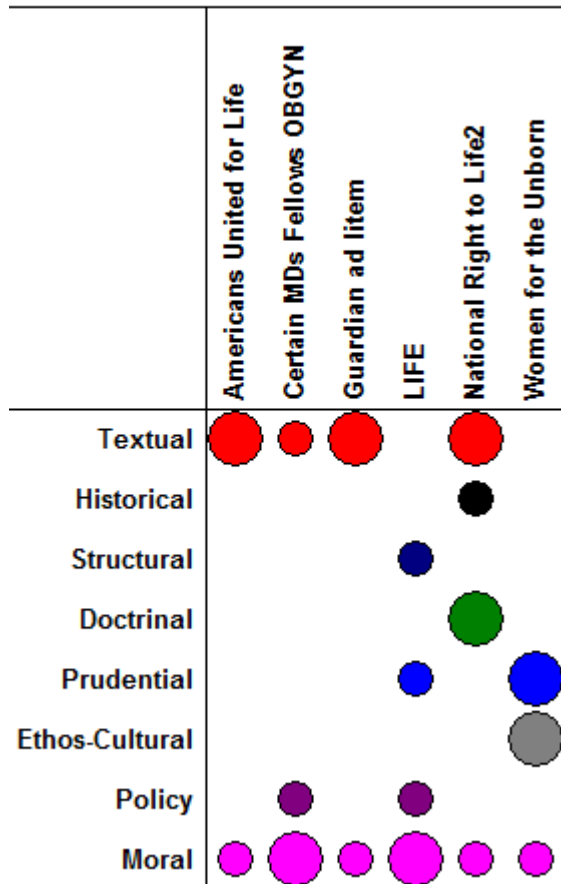
Rather than advancing moral arguments of their own, they simply counter those advanced by appellee amici.

**Chart 5.1
Appellant Amici - Modalities**



By contrast, appellee amici rely heavily on moral arguments. (See Chart 5.2.) Of course, they make textual arguments. They must. Given the lower court’s constitutional interpretation, appellee and their amici must rebut the lower court’s textual and doctrinal analysis. But the majority of their time is spent arguing that abortion is immoral. It flows from this that the Constitution should not protect such immoral acts in the name of privacy. Moreover, they pose the question as a constitutional choice between competing rights—the right to privacy of women and the right to life of fetuses—and argue on moral grounds that the latter must take precedent.

**Chart 5.2
Appellee Amici - Modalities**



A Clash of Moral Worldviews

Unlike the argument over the Second Amendment and to a greater extent than the debate over gay rights, the arguments developed in the competing briefs in *Roe* show a clear and distinct clash of moral worldviews. It is not clear that this clash is the result of a difference in opinion as to the source of moral authority, as Hunter suggests, but it is clear that when it comes to the issue of abortion, appellants and appellees and their amici have very distinct moral worldviews.

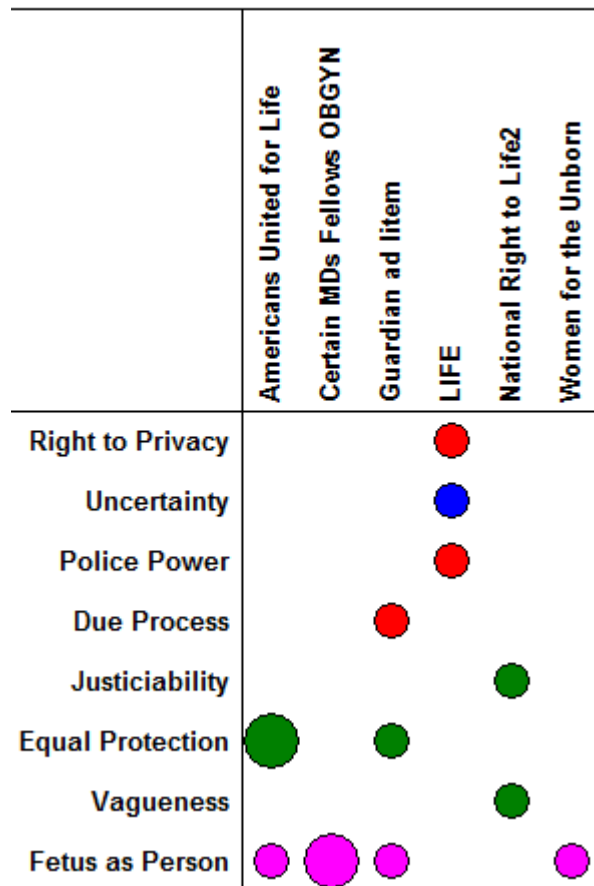
**Chart 5.3
Appellant Amici - Arguments**

	AmEthical Union	CA Legalize Abortion	College OBGYN	College OBGYN2	Communities Aid	Nat Leg Heal Prob of Poor	New Women Lawyers	Planned Parenthood 1971	Planned Parenthood 1972	Women's Orgs
Right to Privacy	●			●		●				●
Standing			●							
Stare Decisis							●		●	
Public Health	●									
Compelling Interest		●	●			●	●	●	●	●
Police Power	●									
Involuntary Servitude		●								
Due Process		●	●	●			●			
Ripeness			●							
Equal Protection			●		●		●			
Privileges and Immunities			●							
Vagueness				●						
Cruel-Unusual Punishment							●			

As Charts 5.3 and 5.4 show, amici raise the procedural and jurisdictional issues—appellant amici more so than appellee. As we saw, with the parties’ briefs, this is consistent with the procedural posture of the case. Appellants had both to defend the lower court’s grant of standing to Roe and argue that it should not have dismissed the married couple from the case. Only one appellee amici even raised the issue of justiciability and for obvious reasons. They are

focused on overturning the declaratory judgment below. They are eager to take on the substantive issues and the majority of appellee amici want to and do advance the argument that the fetus is a person. They are not content to solely rely on the argument that the State has a compelling interest in regulating abortion. Rather, they argue life should be constitutionally protected from the moment of conception, thus allowing the complete criminalization of abortion. Their arguments are often impassioned. Women for the Unborn begins its brief by stating: “It is to plead on behalf of life that we have prepared this brief.” (Brief of Women for the Unborn at 9.)

**Chart 5.4
Appellee Amici - Arguments**



For appellee then, abortion is not simply a question of the scope of the police power of the State. Rather, it is a clash of rights between the mother and the unborn child. There are two steps in their argument. First, the fertilized egg is a person with a right to life. The National Right to Life Committee states: “The leading doctors and scientists in the field now agree that life begins at conception.” (Brief of National Right to Life at 3.) From the point of conception, “the fetus has a living existence, including a heart and a brain, separate and independent from the mother.” (*Id.* at 42.) The physicians’ brief states that an unborn is an “autonomous human being” and receives “separate medical treatment.” (Brief of Certain Physicians of the American College of Obstetricians and Gynecologists at 5.) Ferdinand Buckley, initially appointed as guardian ad litem of the fetus quotes the Declaration of Independence in asserting the rights of a zygote: “Logically, if men are created equal and are endowed with unalienable rights by their creator, it would seem to follow that they are endowed with those rights at the time of their initial creation.” (Brief of Ferdinand Buckley at 4.) There is no discussion, however, as to how Jefferson, as primary author of the Declaration, or other Founders viewed the question of rights of the unborn.

Appellee amici conclude this argument by asserting that “the artificial distinction between the born and unborn has vanished.”

The second step in appellee’s argument is to assert that the constitutional rights of the zygote/fetus trump the constitutional rights of the woman carrying it. As the National Right to Life Committee states: “The choice here is between a nebulous and undefined right to privacy on the part of the woman with respect to the use of her body and the personal right to life of an unborn child . . .” (Brief at 6.) In this formulation, the right to life of the unborn is absolute. There is no suggestion that such a right must yield even if the health or life of the mother were at

issue. LIFE argues that rape and incest are insufficient grounds to justify abortion. “[I]sn’t it a twisted logic that would kill an innocent unborn baby for the crime of his father!” (Brief of LIFE at 48.) Others are less absolute: “The child’s right to continue living ought not to be considered inferior to any asserted right of the mother in this case, where her own life is not in danger.” (Brief of Americans United for Life at 10.) But in all of these briefs, there is the suggestion that in most (or all) circumstances the constitutional rights of a woman must yield to her fetus.

It is also worth noting the gender characterizations in these briefs. The brief of LIFE attaches moral culpability to a woman who has or wants an abortion:

In the case of abortion, the mother not only has the power to prevent the pregnancy, she had to actively participate in a sexual act before the conception could occur. In addition, after participating she had to refrain from taking steps, such as a morning-after pill or D&C, to prevent implantation. (Brief of LIFE at 6-7.)

There is the clear impression that an unwanted pregnancy is the “fault” of a woman. (It is also interesting to note here that LIFE seems to condone what some consider abortifacients⁷⁹ since for example, the morning-after pill may prevent implantation of a fertilized egg.)

Women for the Unborn argues that any “right-thinking” woman will not want an abortion. “Women have traditionally been the guardians of life.” (Brief of Women for the Unborn at 9.) Women abandon this “traditional” role only because of stress. “[A] pregnant woman often feels like a person with claustrophobia. . . . Just as a man with claustrophobia may try to leave a moving train, although he will later be glad someone restrained him, so a woman may seek an abortion but afterwards rejoice that she has been allowed to give birth.” (*Id.* at 14.) The clear implication is that no woman “really” wants to have an abortion. Abortions occur

⁷⁹ An abortifacient is a substance that induces abortion. A common abortifacient is mifepristone (a synthetic steroid compound) used in conjunction with another drug, misoprostol.

solely out of fear.⁸⁰ The structure of the analogy is also worth noting. A man is “restrained” from leaving the moving train, but a woman is “allowed to give birth.” Because no woman can really want to have an abortion, anti-abortion laws do not serve as restraints. Rather, they “allow” a woman to make the choice she “actually” wants to make.

In contradistinction to appellee amici, appellant amici talk little of the “unborn child,” the fetus, or the fertilized egg. The central argument of the appellant amici (like the appellant) is that women have a constitutional right to privacy and that in the case of abortion, the State does not have a compelling interest in overriding this right. As Chart 5.3 shows, all but three of appellant amici address the “compelling state interest” issue. Appellee and their amici had suggested a number of state interests in restricting abortion. Among these were: protecting the public health; reducing “immoral” behavior; increasing the population; and “protecting unborn life.” According to appellant amici:

- Abortion restrictions do not protect the public health, in fact, they lessen it by forcing women to seek “back-alley” abortions. Moreover, abortion is an extremely safe procedure--in most cases, safer than delivery.
- There is no valid interest in “legislating morality.” In addition, abortion restrictions do not reduce pre-marital or extra-marital sexual relations.
- The State has no interest in increasing population. Overpopulation is in fact the real policy issue.
- There is no state interest in requiring that all embryos be born.

⁸⁰ The brief also suggests that there are “socio-economic abortions” (i.e. abortions that occur because of the financial situation of woman. Women for the Unborn suggest that the appropriate response is not to allow abortion but to ensure a “more equitable distribution of society’s resources.” (Brief at 16.)

None of these arguments concede that a zygote/embryo/fetus is a person with rights. They focus on the police powers of the state. Appellant amici dismiss the argument that the “unborn” are persons with constitutional rights. Only the State has interests not a fetus.

First, contrary to appellee’s assertions, appellant amici argue that there is no consensus that life begins at conception. “At what point a fetus become a ‘human being’ is a subject more fitting for philosophical debate than for scientific judgment. . . . any choice of a starting point for an individual human being is largely arbitrary.” (Brief of National Legal Program on Health Problems of the Poor, p. 19.) Planned Parenthood argues: “whether a fetus is a person is . . . ‘not a matter of fact; the answer derives from matters of “religious philosophy and religious principle.” (Brief of Planned Parenthood at 29, cite omitted.)

But assuming *arguendo* that a fetus is a person, appellant amici agree that the rights of a fetus cannot trump the rights of a woman. Characterizing the arguments of appellee, the National Legal Program on Health Problems of the Poor (NLP) states: “It is remarkable that the existence of a one-day old fetus is to be equaled with the life of a grown woman.” (Brief at 40.) It is interesting to note here that NLP does not address the question of a late-term fetus or even a fetus past the point of viability and whether such a fetus has a right to life. Presumably given the character of the argument, birth is a bright dividing line between a fetus with no rights and a baby with rights.

While appellee amici are incredulous that a woman could not want to have a baby, appellant amici are incredulous that the State could require a woman to be “a baby factory.” (Brief of ACOG at 16.) As the California Committee to Legalize Abortion (CCLA) argues: “In no other instance does the law compel one individual to donate his/her bodily force to another individual.” (Brief of CCLA at 21.) Rather than a blessing, “[f]or most women, bearing and

raising an unwanted child . . . is life-term imprisonment.” (Brief of New Women Lawyers (NLW) at 38-39.) NWL sees sexual stereotyping puritanical morality at work in the anti-abortion arguments.

Forcing a woman to bear a child against her will is indeed a form of punishment, a result of society’s ambivalent attitude towards female sexuality.” The sexual double standard requires that when a woman becomes pregnant accidentally, she must be ‘punished’ for her transgression, particularly if she is single. (Brief of NWL at 34-35.)

Suffice it to say, appellee amici and appellant amici have diametrically opposed viewpoints about pregnancy and motherhood (and probably about female sexuality as well).

Finally, it is worth noting two of the unique arguments raised by appellant amici. First, The State Communities Aid Association (SCAA) argues that the Texas statute violated the Equal Protection Clause by denying rights enjoyed by women of means to poor women. Post-*Roe* (indeed post-*Casey*) some have argued that this is sufficient reason to strike down restrictive abortion statutes. (See Graber, 1999.) Others, in offering alternatives as to what *Roe* “should have said,” have suggested even more expansive equal protection arguments. (See e.g. Ginsberg, 1985.)

A second (and very unconventional) argument is offered by the California Committee to Legalize Abortion. They suggest that abortion restrictions violate the 13th Amendment by imposing “involuntary servitude” on a pregnant woman. The Texas law violates the 13th Amendment since it requires women who want an abortion but cannot get one to “involuntarily serve” the fetus. This is certainly a creative reading of the 13th Amendment and it must be noted, not supported by any case law in CCLA’s brief. In a similar vein, the New Women Lawyers argue that abortion restrictions violate the Eighth Amendment’s Prohibition on Cruel and Unusual Punishment. Prohibiting abortion unconstitutionally “punishes” women who want to

have an abortion. Again a very creative reading of the Constitution. It is probably not necessary to note that the Court in its decision did not adopt either of these arguments. At the same time, the decision in *Roe* reflects arguments of both appellant and appellee amici.

Roe v. Wade: The Decision

The decision in *Roe* is anchored on four basic principles:

- 1) The 14th Amendment protects “fundamental” rights/interests that cannot be limited by the state without a very good (perhaps even compelling) reason.
- 2) These fundamental rights/interests are not limited to those explicitly mentioned in the Bill of Rights.
- 3) The Court has recognized as fundamental, the right to privacy. This right is not limited to protection against unreasonable search and seizure under the Fourth Amendment but extends to include other rights of individual choice including marriage, procreation, and child rearing.
- 4) The right to terminate a pregnancy falls within this “right to privacy” and so any limitation on this right by the state must be justified by very good/compelling reason.⁸¹

First, it is important to note what the Court did not do in *Roe*. Most significantly, it did not conclude that a fetus at any point in its development is a “person.” Contrary to the arguments by appellee amici that personhood begins at conception, the Court states clearly that constitutional “personhood” begins at birth. Birth is a “bright line” separating a fetus with no constitutional rights from a person with constitutional rights. At the same time, it rejected the argument that the rights of a pregnant woman always prevail against any regulation of abortion. The fetus has no constitutional rights to assert, but the State can protect unborn life. Thus, it is fair to say that in *Roe*, each side got something.

⁸¹ See discussion in Heymann and Barzelay (1973).

After disposing of the procedural issues—Jane Roe has standing; Dr. Hallford does not; the Does do not; and the case is not moot⁸²—Justice Blackmun turns to a history of abortion. In approximately eight pages, he runs through “ancient attitudes” about abortion up to and including current views of the American Medical Association (AMA) and the American Bar Association (ABA) on the issue. He concludes that it impossible to determine precisely what ancient attitudes towards abortion were, though he notes that ancient religion did not bar abortion. In surveying the common law, he states that “it appears doubtful that abortion was every firmly established as a common law crime even with respect to the destruction of a quick fetus.” (*Roe* at 136.) He also notes that “at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect.” (*Id.* at 140.) Finally, he also notes that neither major organizations of doctors or lawyers condemn abortion in all instances.

In many ways, the analysis here is similar to the type of historical analysis that the Court will undertake in *Bowers v. Hardwick* and *District of Columbia v. Heller*. In all three cases, the Court prefaces its legal and constitutional analysis with historical analysis. However, unlike *Bowers*, the Court in *Roe* is much more circumspect about its historical conclusions. Where the Court in *Bowers* concludes that the historical record is clear and that homosexuality has been universally condemned, the *Roe* Court concludes tentatively that the historical record points in one direction but is nonetheless murky. In comparison to *Heller*, the historical analysis here is sophomoric. Where both the majority and dissenting opinions in *Heller* allocated more than 40 pages to historical analysis (ultimately leading to conflicting conclusions), here the historical

⁸² The Court decides that “[p]regnancy provides a class justification for a conclusion of nonmootness. (*Roe* at 125.) In essence, the Court decides that since pregnancy last for a period of at most nine months and the judicial process cannot resolve constitutional issues within such a time frame, then non-pregnancy will not moot a constitutional challenge to anti-abortion laws.

analysis is more superficial and thus arguably, less important to the legal and constitutional conclusions.⁸³

Getting down to the core constitutional question—is there a constitutional right to terminate the pregnancy?—Blackmun is clear if not specific: there is a right to privacy and whether it is found in the Ninth Amendment or the Fourteenth Amendment, it is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.

Further, restrictions on abortion impose on this right and do so in a significant and unconstitutional way. Writing for the Court, Blackmun argues that statutes that criminalize all abortions impose real hardships on women. First, medical harm and even death may result from a woman’s inability to obtain an abortion. Second, echoing appellant amici, Blackmun writes that maternity or more offspring “may force upon [a] woman a distressful life and future.” (*Id.* at 153.) Third, psychological harm may be “imminent” where a woman is unable to obtain an abortion. (*Id.*) And fourth, the mental and physical health of a woman may be taxed by the caring for an unwanted child. In short, the picture painted by Justice Blackmun is closer to that of maternity as “involuntary servitude” than “blessing.”

Justice Blackmun also directly rejects two possible justifications for criminalizing abortion. First, he notes that abortion prohibitions are the product of “Victorian social concern to discourage illicit sexual behavior” but he also notes that neither appellee nor related amici advanced this argument and so he rejects it out of hand. With respect to the argument offered by appellee that abortion bans are designed to protect the health and safety of the mother, he sides

⁸³ The analysis has also been subject to significant criticism. (*See e.g.* Witherspoon (1985) at 70: “[T]he Supreme Court’s analysis in *Roe v. Wade* of the development, purposes, and the understandings underlying nineteenth-century antiabortion statutes, was fundamentally erroneous.”)

with appellant amici in concluding that “the mortality rate [for abortion] is as low or lower than normal childbirth.” (*Id.*)

But notwithstanding this analysis, Justice Blackmun and the Court do not conclude that the right to abortion is absolute. The Court concludes that the State does have certain interests in regulating abortion and that at some point, these become compelling and outweigh a woman’s right to privacy. Specifically, the Court concludes that there are three legitimate interests: 1) maintaining medical standards; 2) protecting maternal health; and 3) protecting potential life. With respect to the first interest, the Court seems to suggest that the first interest exists throughout the term of a pregnancy, but the Court says little about this and there is no analysis. (As we will see, this “interest” becomes very important in *Casey* and now is at the center of TRAP legislation.) With respect to maternal health, the “compelling point” is at the end of the first trimester. Again, the Court says little about this State interest. Finally and most importantly, the Court says that states have a right to protect “prenatal life” and that the “compelling point” for this interest is at viability. At the point of viability, a state may outlaw abortion except when it is necessary to preserve the life or health of the mother.

It is interesting (and perhaps troubling) that the Court never explains why the State has a constitutionally sufficient reason for “protecting prenatal life.” The Court rejects the argument that a fetus is a person at any point prior to delivery so it cannot assert that the State has an interest in protecting the constitutional rights of a vulnerable “person” that cannot otherwise protect its rights. Rather, the assertion is that the State can protect prenatal life even if that life is not a prenatal person. Why is the “prenatal life” deserving of protection? It is certainly true as several appellee amici asserted that the prenatal life will become a person—assuming that the pregnancy takes its normal course, but why does that give the state the right to limit a woman’s

privacy right? Moreover, if it does, why does not the State have the right to force any woman whose behavior threatens the health and safety of a fetus post-viability to undergo a mandatory delivery or at a minimum, assent to mandatory convalescence to protect the fetus? The Court simply agrees with appellee without ever explaining its thinking.

One final point of note—Justice Blackmun states that “we need not decide when life begins.” He and the Court have been roundly criticized for this position. Critics of *Roe* contend that notwithstanding this disclaimer, the Court did decide when life begins and that it is at the point of viability. But this is wrong and misses the point of Blackmun’s analysis. Blackmun says that the Court need not decide when life begins only when personhood begins. Personhood begins at birth and that is when the right to life begins. In protecting post-viable prenatal life, the Court leaves the impression that it has decided when life begins. It didn’t. It decided only when a State’s interest in protecting prenatal life begins. The problem, as noted above, is that it did not explain what this state interest is.

In *Roe*, the Court was called on by the appellee and even more so by certain appellee amici, to make a moral decision. It tried mightily to duck the moral question.⁸⁴ It attempted to pose the

⁸⁴ Critics of *Roe* regularly complain that the Court went “too far, too fast.” Even Justice Ginsberg, writing before she joined the Court, took this position:

“*Roe*, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court. The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved conflict.” (Ginsberg, 1985, 385)

Two comments are relevant. First, it is not clear what a “decision that not gone beyond a ruling on the extreme statute” would have looked like. The State of Texas and anti-abortion advocates argued that the statute was constitutional because fetuses had rights that could be and should be protected by such statutes. Perhaps the Court could have ducked this question and not decided that personhood rights begin at the point of a live birth, but to write a narrow opinion, it would also have needed to duck the question of whether a woman has a constitutional right to an abortion and if it had done so, it is not clear on what grounds it would have struck down the statute. Second, it is interesting that such complaints are regularly leveled at *Roe* but not at *Griswold*. In the case of contraception, the majoritarian process had responded very quickly to demands for the legalization of contraceptives. Perhaps, the explanation lies in the fact that Connecticut was an “outlier” state in banning the sale contraceptives. But this explanation is unsatisfactory, because the abortion statutes in Texas and Georgia also fit the description of “outlier” statutes.

issue of abortion as a legal and constitutional balancing of the rights of women and the interests of a state. The Court is actually more successful than is usually recognized—there is nothing illogical or inappropriate in deciding the legal question of personhood in such a way as to make the moral question of the nature of the fetus a moot question. But, in the end, the moral question will simply not go away. It is a more powerful moral conundrum than the right to self-defense (*i.e.* guns) or even the question of homosexual behavior. It was a moral and constitutional conundrum that the Court was destined to revisit—often.

Rethinking *Roe*

When *Planned Parenthood v. Casey* arrived at the Court in 1992, nineteen years had passed since *Roe* and the Court and the country had undergone significant changes. Only three members of the *Roe* Court remained—Justice Blackmun, the author of *Roe* and Justices Rehnquist (now Chief Justice) and Justice White, both of whom had dissented in *Roe*. All six new members of the Court—Justices Stevens, O’Connor, Scalia, Kennedy, Souter and Thomas—were appointed by Republican presidents. While the Republican Party platform in the 1970s, even after *Roe*, had included language noting a right to abortion, now the Republican Party became decidedly anti-abortion. Even under President Reagan, the legal status of abortion did not change. A constitutional amendment to protect unborn children, failed to clear the Senate, but President Reagan and other prominent Republicans did take a more forceful and public stand against abortion. For example, President Reagan issued a Presidential Proclamation in 1988, proclaiming a “National Sanctity of Life” Day.⁸⁵

⁸⁵ Proclamation 5761 issued January 14, 1988. The Proclamation states that “since the Supreme Court’s decision in *Roe v. Wade* . . . America’s unborn have been denied their right to life” and has resulted in the “loss of life of 22 million infants before birth . . .” The Proclamation concludes: “I, Ronald Reagan, Present of the United States of

In the nineteen years subsequent to *Roe*, the Court had heard and decided 23 cases involving abortion. Seven of these cases are included on CQ’s list of significant cases. While it is not necessary to discuss each of these cases in detail, some discussion is necessary in order to place *Casey* in context. A case immediately following *Roe*—*Planned Parenthood v. Danforth* shows the Court attempting to work out the implications of its decision that there is both a privacy right protecting abortion and a governmental interest in regulating it. A 1983 case, *Akron v. Akron Center* is important because it reveals a new jurisprudential approach to abortion, one that would eventually radically revise the *Roe* approach to analysis of abortion regulation. And finally, *Thornburgh v. American College of Obstetricians and Gynecologists* and *Webster v. Reproductive Health Services*—are important precedents to *Casey*. In *Webster*, the Court splinters badly but more importantly the cultural battle over abortion erupts into full public view. But first, a brief description of the litigation aftermath of *Roe* is in order.

Not surprisingly, following *Roe*, the Court was immediately faced with a variety of state restrictions on abortion. As the Court itself notes in subsequent decisions, it not only expected challenges to a number of these restrictions, *Roe* invited such challenges. In *Planned Parenthood v. Danforth*, a case the Court describes as “the logical and anticipated corollary” to *Roe*, the Court took up a Missouri statute with multiple provisions restricting abortion. The statute: 1) required written, informed consent by a woman seeking an abortion, 2) the prior written consent of her husband, 3) parental consent to an abortion by an unmarried woman under 18 years of age unless the physician determines that it is necessary to preserve the life of the mother, 4) and outlawed saline amniocentesis. The Court upheld the first provision (informed,

America . . . do hereby proclaim and declare the unalienable personhood of every American, from the moment of conception . . .” The Proclamation is cited approvingly and appended to the brief filed by Catholic United for Life, *et al.* on behalf of Respondents.

written consent by a woman seeking an abortion), but concluded that each of the other provisions were inconsistent with *Roe* and thus, unconstitutional.

While it is easy to describe the Court's holding regarding the constitutionality of the particular restrictions at issue, it is more difficult to explain the logic behind the determinations, for the simple fact that differing Justices apply different logic to get to the same outcome. The splintered nature of the decision foreshadowed the coming battles over abortion:

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL and POWELL JJ., joined in all but Parts IV-D and IV-E of which STEVENS, J., joined in all but Parts IV-C, IV-D, IV-E and IV-G of which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined. STEWART, J., filed a concurring opinion, in which POWELL, J., joined. WHITE, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and REHNQUIST, J., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part.

In *H.L. v. Mateson* (1981), the Court again took up the issue of parental notification. This time in a 6-3 decision, the Court upheld a Utah law that required a physician to notify a minor's parents "if possible." The Court found that "the statute plainly serves important state interests, is narrowly drawn to protect only those interests, and does not violate any guarantees of the Constitution. . . ." (*H.L.* at 398.)

A 1983 case, *Akron v. Akron Center*, involved seventeen separate provisions by the City of Akron regulating abortions. The Court struck down all of them. Among the provisions held unconstitutional were requirements that:

- All second trimester abortions be performed in a hospital.
- Physicians follow a state "script" to inform patients of the status of pregnancy, stage of fetal development, expected date of viability, health risks of abortion, and availability of adoption agencies and childbirth resources;

- A patient wait 24 hours following signing a consent form to receive the abortion.

The Court concluded that the restrictions were not supported by a “legitimate state interest.”

Akron is significant, however, not so much because of what the Court held (though the case is arguably the high water mark of scrutiny by the Court of state regulation of abortion), but what Justice O’Connor argued in dissent. Joined by Justices Rehnquist and White she took issue with *Roe*’s trimester framework. “The *Roe* framework . . . is clearly on a collision course with itself.” (*Roe* at 458.) The reason—improvements in medical technology. According to O’Connor, medical technology “will move *forward* the point at which the State may regulate for reasons of maternal health” and will move backward the point of viability at which the State may proscribe abortions” (*Id.* at 456.) In her view, the trimester framework should be abolished and replaced with a test to determine whether a regulation imposes an “undue burden” on the right to seek an abortion. (*Id.* at 459 - 466.)

Moreover, according to O’Connor, choosing the point of viability “as the point at which the state interest in *potential* life becomes compelling” is arbitrary because “*potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward.” (*Id.* at 461, emphasis in original.) As she says, “the State’s interest in protecting human life exists throughout the pregnancy.” (*Id.*)

Finally, O’Connor dismisses the notion that regulations that increase the cost of an abortion are unconstitutional. “[I]ncreased cost does not unduly burden the availability of abortions or impose an absolute obstacle to access to abortions.” (*Id.* at 473.) Justice O’Connor would have to wait another ten years, but as we will see, her position becomes the Court’ position in *Casey*.

Three years later, virtually the same lineup of Justices struck down six provisions of a Pennsylvania act regulating abortion. *Thornburgh v. American College of Obstetricians and Gynecologists* (1986).⁸⁶ The Pennsylvania statute 1) required physicians to provide women with seven state-specified types of material; 2) imposed a 24-hour waiting period on abortion after receipt of this material; and 3) imposed conditions on post-viable abortions. With respect to post-viable abortions, Section 3210(b) of the statute required that "the abortion technique employed shall be that which would provide the best opportunity for the unborn child to be aborted alive unless," in the physician's good faith judgment, that technique "would present a significantly greater medical risk to the life or health of the pregnant woman." The following section further required that "a second physician be present during an abortion performed when viability is possible. The second physician is to "take control of the child and . . . provide immediate medical care for the child, taking all reasonable steps necessary, in his judgment, to preserve the child's life and health." (*Thornburgh* at 769-770.) Violations of these provisions are felonies under the Pennsylvania statute.

Writing for a majority of five, Justice Blackmun held these provisions to be unconstitutional. The post-viability requirements were invalid on their face, since they unconstitutionally valued a viable fetus more than the health of the mother. The notice requirements were also invalid. While informed consent by a patient of any medical procedure including abortion is a valid governmental interest, the "type of compelled information [demanded by the Pennsylvania statute] is the antithesis of informed consent." (*Thornburgh* at 764.) Much of the required information is irrelevant to the medical decision and "reveals the anti-abortion character of the statute and its real purpose." (*Id.*)

⁸⁶476 U.S. 747 (1986).

Justices Burger, White, Rehnquist and O'Connor all filed dissenting opinions with Justice Rehnquist joining both the White and O'Connor dissents. As with O'Connor's dissent in *Akron*, the thrust of these dissents is that the statutory provisions do nothing to unconstitutionally impede a woman's access to an abortion. The State can prefer childbirth over abortion. It can attempt to dissuade a woman from having an abortion. It can even make it more difficult or costly to have an abortion. And it can do any of these things without violating the Constitution.

It must be stated that *Thornburgh*, unlike *Akron*, is procedurally more complex. *Thornburgh* involves an appeal of a preliminary injunction. *Akron* does not. Thus, there are procedural issues at play that can and at times do subsume the substantive constitutional issues regarding the provisions. For example, while Justice O'Connor restates her "undue burden" test, she devotes most of her time to the appropriateness of Supreme Court review of the district court's preliminary injunction. A discussion of these procedural or technical issues is unnecessary. Suffice it to say that Justice O'Connor disagrees with the majority in the constitutional test they apply in analyzing the lower court's decision. In her view, not only does the majority ignore the "unduly burdensome" test, it "adopt[s] as its new test a per se rule under which any regulation touching on abortion must be invalidated if it poses 'an unacceptable danger of deterring the exercise of that right.'" (*Id.* at 829.) In short, as in *Akron*, Justice O'Connor wants to "revise" *Roe* and grant the state expanded authority to regulate and restrict abortion.

One final point regarding *Thornburgh*—it is Justice Blackmun, the author of *Roe*, writing for the majority and he is not inclined to let *Roe* die by a thousand regulatory cuts. He takes on the dissenters directly, posing the constitutional question as follows: In a sense, the basic question is whether the "abortion decision" should be made by the individual or by the majority

"in the unrestrained imposition of its own, extraconstitutional value preferences." (*Id.* at 777 – 78.) To ask the question this way is to answer it. In responding to Justice White’s dissent (which would uphold in its entirety the Pennsylvania statute), he writes: “JUSTICE WHITE is also surely wrong in suggesting that the governmental interest in protecting fetal life is equally compelling during the entire period from the moment of conception until the moment of birth Again, I recognize that a powerful theological argument can be made for that position, but I believe our jurisdiction is limited to the evaluation of secular state interests.” (*Id.* at 778.)

In *Thornburgh*, the Court’s disagreement over the morality of abortion and appropriate constitutional interpretation in cases of abortion restrictions is on full display. Justice Blackmun defends the logic and the substance of *Roe*, but the ethos of *Roe* is gone. No longer is the Court concerned first and foremost with constitutionally protecting a woman’s right to an abortion. Rather, the question has become the degree to which a state may regulate abortion. In determining in *Roe* that the State had a legitimate constitutional interest in protecting prenatal life, Justice Blackmun had given opponents of abortion a potent weapon to use to undermine *Roe*. Stretched far enough, the governmental interest in protecting prenatal life would swallow the privacy right identified in *Roe*. Some opponents of abortion were committed to stretching the governmental interest in prenatal life as far as it could be stretched—arguing that it accrued at the point of conception and that it trumped a pregnant woman’s right to abortion. Other opponents would be satisfied with nothing short of the Court overruling *Roe*. This debate exploded into public view among the Justices themselves in *Webster v. Reproductive Health Services*.

In *Webster*, the Court faced a constitutional challenge to yet another Missouri statute, this one a direct challenge to the logic and holding of *Roe*. As noted earlier, *Roe* concluded that a

fetus is not a person with constitutional rights since personhood begins at birth. Missouri attempted to legislatively reach a different conclusion. In the findings section of the legislation, the Missouri legislature found that the “life of each human being begins at conception” and that “unborn children have protectable interests in life, health, and wellbeing.” (*Webster* at 490, cite omitted.) The statute then went on to instruct that “all state laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Federal Constitution and this Court’s precedents. . . .” (*Id.*, cite omitted.) The statutory language appeared to a direct challenge to *Roe* as well as an invitation for the now more conservative Court to revisit and overrule *Roe*. The statute also went on to prohibit abortions at any public facility (defined broadly to include even private facilities leasing property or equipment from the state), and prohibit public employees from performing or assisting in any abortion not necessary to save the mother’s life. Finally, the statute required physicians to perform “such medical examinations and tests as are necessary” to determine gestational age and other characteristics of the fetus prior to performing an abortion on a woman believed to be 20 weeks or more pregnant.

In confronting these provisions, the Court again splintered. The plurality opinion by Chief Justice Rehnquist was joined only by Justices White and Kennedy. Justices O’Connor and Scalia both filed separate opinions concurring in part and dissenting in part. Justice Blackmun concurred in part and was joined in his dissent by Justices Brennan and Marshall and finally, Justice Stevens concurred in part and dissented in part.

In the end, the Court upheld all of the challenged provisions albeit using different rationales and theories. The jurisprudential fireworks, however, occurred over the “life begins at conception” language. Somewhat surprisingly, and perhaps in response to the lower court rulings, the State argued that the finding language did not relate to abortion but rather to how

other state laws (e.g. tort and criminal laws) were to be interpreted. In what can only be described as a creative reading of an abortion statute, the State contended that the “life begins at conception” finding had nothing to do with abortion. The plurality accepted this argument and accordingly concluded that there was no constitutional conflict with *Roe*. What had appeared to be a challenge to *Roe* and an invitation to overturn it, suddenly vanished. What was left was an opportunity (of which the Court availed itself) of “modifying and narrowing” *Roe* and succeeding cases. (*Webster* at 521.)

Not surprisingly, the dissenters including Justice Scalia on the right and Justice Blackmun on the left were unimpressed with this jurisprudential sleight of hand. For his part, Justice Scalia stated explicitly that he would overrule *Roe* and he criticized the Court for “contriving” to avoid doing so. He also criticized the court for its “newly contracted abstemiousness” (*id.* at 537) and lamented the constitutional barriers the Court had erected to avoid overruling *Roe*. “It . . . appears that the mansion of constitutionalized abortion law, constructed overnight in *Roe v. Wade*, must be disassembled doorjamb by doorjamb, and never entirely brought down, no matter how wrong it may be.” He concluded:

“The outcome of today’s case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike needlessly to prolong this Court’s self-awarded sovereignty over a field where it has little proper business . . .” (*Webster* at 532.)⁸⁷

Justice Blackmun also pulls no punches. “[Never] has a plurality gone about its business in such a deceptive fashion.” (*Id.* at 538.) “The plurality pretends that *Roe* survives. . . .” (*id.* at

⁸⁷ Justice Scalia is also highly critical of Justice O’Connor and her abortion jurisprudence. He calls her concept of “potential life when viability is possible” irrational and characterizes it as “the possibility of a possibility of survivability outside the womb.” (*Id.* at 537.) Similarly, he criticizes her concept of “undue burden” as empty and meaningless: “I know of no basis for determining [whether a burden] is ‘due.’” (*Id.*)

556) but the “plurality repudiates every principle for which *Roe* stands. . .” (*Id.*) He concludes pessimistically: “[N]ot with a bang, but a whimper,’ the plurality discards a landmark case of the last generation and casts into darkness the hopes and visions of every woman in this country. . .” (*Id.* at 557.) *Roe* remains but not as a limit on state regulation of abortion “until, sometime, a new regime of old dissenters and new appointees will declare what the plurality intends, that *Roe* is no longer good law.” (*Id.* at 556.) Justice Blackmun was only partly prescient. *Roe* still has not been overturned, but in *Casey*, the old dissenters and new appointees were successful in almost completely hollowing out the right established in *Roe*.

Overruling (?) *Roe: Planned Parenthood v. Casey*

Following the Court’s decision in *Webster*, Pennsylvania amended its abortion statute imposing a new set of restrictions on women seeking abortion services. Among the new provisions were:

- A requirement that a physician, and only a physician, provide state mandated information regarding abortion to women 24 hours before undertaking the procedure.
- A requirement that physicians providing abortion collect and submit to the State, detailed information regarding those receiving abortions and the characteristics of the aborted fetuses.
- A mandate that married women notify their husbands prior to receiving an abortion; and
- A requirement that women under the age of 18 obtain the informed consent of a parent or a court order waiving the requirement.

These provisions of the legislation and others not challenged in the litigation did not apply in the case of medical emergencies, but the legislation also adopted a new and arguably very narrow definition of medical emergency.

Planned Parenthood challenged the provisions outlined above. The district court applied strict scrutiny to most of the provisions, found them unconstitutional, and enjoined their enforcement. In the case of the parental consent provision, it applied a less strict “undue burden” test, but concluded that the provision was invalid under this test and enjoined its enforcement as well.

On appeal, the Third Circuit largely reversed the lower court. Concluding that *Webster* had established a new standard for review of abortion restrictions, the Court applied the “undue burden” test to all of the challenged provisions. It concluded that none of the provisions, except for the husband notification requirement, imposed an undue burden on women seeking an abortion. Both parties sought review and the Supreme Court granted both petitions for certiorari.⁸⁸

The Parties’ Briefs

Planned Parenthood’s first goal at the Supreme Court was to defend *Roe*, a heightened scrutiny approach to review of state regulation of abortion and abortion as a fundamental right. Stated differently, Planned Parenthood sought to stop in its tracks, the “undue burden” approach to analysis. Planned Parenthood rightly saw that adoption of the undue burden standard, especially as it was likely to be applied by conservatives on the Court, would hollow out the constitutional right to an abortion.

⁸⁸ Because both petitions were granted, Planned Parenthood is the petitioner and cross-respondent. Casey is the cross-petitioner and respondent. For simplicity, I will refer to Planned Parenthood as petitioner and Casey as the respondent.

Arguing in the alternative, Planned Parenthood also contended that none of the Pennsylvania provisions pass muster under the undue burden standard (or any other form of scrutiny for that matter.) Should the Court adopt Justice O'Connor's approach to analyzing abortion restrictions, Planned Parenthood sought a more rigorous application of the standard than had been applied by the Court of Appeals.

With respect to the first argument, Planned Parenthood—echoing Justice Scalia in *Webster*—attacked the undue burden standard as “vague and unworkable” and argued that it would result in “arbitrary and discriminatory applications by lower courts.” (Brief of Planned Parenthood at 15-16.)

In contrast to “the clarity and equity of *Roe*,” the undue burden standard “would invite intolerable legislative interference with private reproductive decisions.” (*Id.* at 16.) Pressing even harder, Planned Parenthood sought to force the Court to address the issue of the continued validity of *Roe*. Eschewing Justice O'Connor's arguments in *Webster*, Planned Parenthood argued that the undue burden standard and *Roe* are simply incompatible. “Because the invalidity of the instant provisions under *Roe* is indisputable, this Court cannot sustain the decision below without overruling *Roe* or so eviscerating its core holding as to render it meaningless.” (*Id.* at 19)

Planned Parenthood goes on to defend the trimester framework characterizing it as “workable” and fair to the competing individual and government interests. Similarly, viability is a logical point for determining that government interests become compelling. As noted earlier, they recognized that a compelling government interest in “potential life” throughout pregnancy would (or at least could in practice) render the right to an abortion “meaningless.” Concluding

their argument in defense of *Roe*, Planned Parenthood noted that “[n]ever before has this Court bestowed, then taken back, a fundamental right that has been a part of the settled rights and expectations of literally millions of Americans for nearly two decades.” (*Id.*) Such a decision would be “radical and unprecedented” (*id.*) and it would be bad public policy since “*Roe* resulted in dramatic advances in the safety of abortion” and “permitted American women to participate more fully and equally in every societal undertaking.” (*Id.* at 32 – 33.)

Turning to the undue burden test, they alternatively describe it as “less protective,” “wholly inadequate,” and inherently “arbitrary.” (*Id.* at 35-36.) They note that the standard in essence shifts the burden of proving a statute unconstitutional from the state to the individual. Under *Roe*, if a regulation has more than a *de minimus* impact, the state must show a compelling interest to justify the statute. Under the undue burden test, “women already suffering from an act’s coercive influence . . . must demonstrate its onerous burdens through costly, time-consuming litigation.” (*Id.* at 38.)

But Planned Parenthood goes on to argue (as it had to, given the lower court’s decision) that even under the undue burden test or “under any standard of review,” the Pennsylvania provisions fail. For example, the husband notification requirement:

- Increases the likelihood of violence against women leaving battered women vulnerable to a range of coercion and abuse;
- Will not further the state’s expressed interest in fostering marital communications;
- Interferes with the “sanctity” of marital communications;
- Denies women the equal protection of the laws since it grants rights solely to men.

In short, the requirement serves no legitimate state interest. Similarly, the “informed” consent requirements attempt to further an illegitimate purpose. Whatever the standard of review or constitutional test, “[A] state may not, under the guise of ‘informed consent,’ attempt to intimidate women into continuing their pregnancies by forcing physicians to deliver irrelevant, inaccurate, misleading, or inflammatory information.” (*Id.* at 51.) Planned Parenthood develops similar arguments with respect to the parental notification requirements and the public disclosure and reporting requirements. Parental notification requirements do not promote parental rights or family communication; they undermine it. The provision, they argue, will result in delay, increased cost, and increase medical risk for young women seeking abortions.

On the issue of the reporting requirements, the Commonwealth had asserted that the required information was justified on the grounds that the public has the right to know how its funds are used. Planned Parenthood countered that the requirements have nothing to do with public expenditures since the required information was not related to the use of public funds. “Rather, the requirements merely enhance the ability of abortion opponents to intimidate abortion providers.” (*Id.* at 58.)

In short, Planned Parenthood attacks the Pennsylvania statute by attacking the motives underlying the statute. *Roe* protected a fundamental right to an abortion. It granted that government has a legitimate interest in protecting maternal health and potential life but those interests cannot be used to undermine the fundamental right to an abortion. In contrast, this is exactly what the Pennsylvania statute does. With a wink and a nod, the Commonwealth says that it is merely trying to protect the rights of fathers, the health of pregnant women and the right of the public to know how public funds are spent. But the Commonwealth knows, abortion opponents know, and anyone looking closely at the legislation knows that the provisions are

intended to make it so difficult to obtain an abortion that women will not be able to do so. Such an illegitimate motive is not consistent with the way the Court has understood fundamental rights.

In response, the Commonwealth of Pennsylvania takes issue with Planned Parenthood's reading of *Roe* and their undue burden analysis. Characterizing Planned Parenthood's reading of *Roe* as sanctioning "an unlimited right to abortion on demand," they counter that *Roe* established only a "limited right" and that such a right is not fundamental. (Commonwealth Brief at 28.) Focusing on the government interests identified in *Roe*, they argue that it did not in fact create a "strict scrutiny" standard of review. Such a standard embodies an "undisguised hostility" to state regulation of abortion and "would . . . convert *Roe* into a regime of abortion on demand." (*Id.* at 29)

Rather, the appropriate analytic framework is Justice O'Connor's undue burden test. It rightly balances the non-fundamental right to an abortion with the important government interests at stake. In the case of the Pennsylvania law, there is no undue burden on women and all of the provisions "further one or more legitimate state interests." (*Id.*)

- The informed consent requirements require the "abortion industry" to provide their patients with "accurate, objective and relevant information at a time and in a manner that encourages well-informed and well-considered decision-making." Moreover, the requirements are consistent with many of the abortion providers own practices. (*Id.* at 30);
- The spousal notification requirement serves "the legitimate purpose of enabling a husband to protect his interests . . . in the life of the fetus and the marriage." (*Id.* at 32);
- The parental notice requirements include a judicial bypass procedure and thus comply with Supreme Court precedent;

- “The Act’s reporting requirements serve obvious and legitimate state purposes in protecting maternal health and ensuring compliance with the Act” (*Id.*)

As this list should make clear, the Commonwealth addresses the impact of the regulations seriatim, not cumulatively. The implication is that if each of the regulations is reasonable itself, the regulations in their totality cannot be unreasonable or more precisely, an undue burden.

The Commonwealth concludes by inviting the Court to overrule *Roe*.

Having said all this, it is nevertheless true that *Roe v. Wade* was incorrectly decided, and the Court may wish to take this opportunity to review and overrule it. *Roe*’s identification of the abortion right as fundamental finds no support in the Constitution, in history, in a societal consensus, or in the Court’s own precedents, and its use of trimesters and viability to define the contours of that right is at bottom arbitrary. . . . *Roe* should share the fate of *Lochner v. New York*, its equally ill-conceived forerunner in substantive due process. (*Id.* at 33.)

Several observations about the parties’ briefs are appropriate at this juncture. First, one cannot help but notice that the parties disagree not only in their interpretation and application of precedent and in their views regarding abortion, but also in their perceptions regarding the women who seek abortions, and the doctors who perform them. The Commonwealth’s brief consistently refers to the “abortion industry” characterizing it as self-serving and contemptuous of the rights and interests of women. Planned Parenthood, by contract, presents itself and other who perform abortions as the champions of women with unplanned pregnancies and the last line of defense between them and back-alley abortionists.

Second, there is something ironic (and perhaps disingenuous) about the Commonwealth’s defense of its statute. Pennsylvania had passed three versions of its abortion regulation statute, each more restrictive than its predecessor and it reacted to *Webster* by aggressively pushing the

boundaries of abortion jurisprudence in the version of the statute at issue here. And yet, the Commonwealth's brief defends the abortion restrictions as "merely" provisions. They may have the incidental effect of reducing the number of abortions but they are not an undue burden on women. The Commonwealth's brief suggests the weakness of the undue burden test—it can be manipulated to hide the true motive behind abortion regulations.

Finally, the competing briefs exemplify the often contested nature of precedent. Planned Parenthood argues that *Roe* created a "fundamental" right protected by strict scrutiny of state regulation of abortion. The Commonwealth counters that *Roe* created only a limited right, one that must be balanced with deference to governmental interests. As we saw in the discussion of post-*Roe* abortion cases, both parties can legitimately advance such arguments since the Court in *Roe* left room for arguments over the scope of the right to abortion and the standard of review of government regulation. This becomes even murkier in subsequent cases as the Court splinters and Justices suggest new "tests" to be applied to abortion regulation. Had the Court in *Roe* simply decided that there was a fundamental right to an abortion throughout pregnancy then subsequent Courts would have been more constrained, left only with the option of overruling *Roe*. But *Roe*'s recognition of the state's interest in prenatal life virtually ensured the type of regulations in *Casey* and that the meaning of *Roe* would be contested.

Amici Fight the Culture War

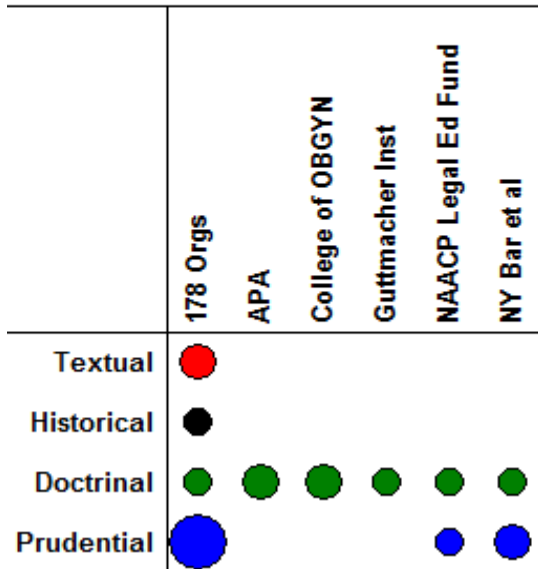
As noted in Chapter 2, the most amici briefs ever filed in a Supreme Court case were filed in *Webster v. Reproductive Health Services* (a case that is not even on the CQ list of most significant cases). After *Webster*, amici participation in *Casey* is a bit of a letdown. Only six

briefs are filed on behalf of Planned Parenthood and only fifteen are filed on behalf of Casey. But two observations are in order. First, *Webster* presented a direct opportunity to challenge *Roe v. Wade*. The language of the Missouri statute defining personhood at conception engaged every potential opponent and defender of *Roe*. *Casey* offered no such opportunity. The Pennsylvania statute “nibbled at the edges” of *Roe*. While Pennsylvania invited the Court to overrule *Roe*, the statute at issue did not provide the same direct challenge to *Roe* that the Missouri statute had. Second, focusing only on the number of briefs is misleading. A lot of organizations were engaged in *Casey*. 178 organizations signed on to one brief on behalf of Planned Parenthood and the brief was in turn signed by 300 professors at various academic institutions. If *Casey* did not present the direct threat to *Roe* that *Webster* had, it was still seen and was the shape of the battle over abortion to come.

Given that Planned Parenthood had largely lost at the Court of Appeals level and given petitioner’s full frontal attack on the Pennsylvania statute, the range and nature of arguments offered by amici is somewhat surprising. As noted in Chart 5.5, petitioner amici utilize a narrow range of argument modalities. Their arguments primarily fall into the doctrinal category. No petitioner amici advances a moral argument. The Guttmacher Institute focuses on the issue of fertilization as the defining point of “life.” They point out that that “up to 78 percent of fertilizations [do not progress] to the next developmental stage.” (Guttmacher brief at 32, cite omitted.) They stress that conception, fertilization and implantation (of a fertilized ovum) are not “one-stage processes” and that thus, they do not have any more validity (and in fact, less) than viability are the demarcation point for governmental interests. “[I]t is the probability of a live-born person that Justice Blackmun’s viability determination addressed as the point at which the state’s interest in the life of the fetus becomes compelling.” (*Id.* at 24-5, cite omitted,

emphasis in original.) In short, they argue that opponents of abortion and the Court itself do not understand the science of pregnancy.

**Chart 5.5
Petitioner Amici -
Modalities**



The American College of Obstetricians and Gynecologists attack the undue burden test and the application of this test by the lower court. The Pennsylvania statute will “delay, discourage, and defeat women in their attempt to obtain a medically provided abortion.” (College brief at p. 5) Like Scalia in Webster, they characterize the undue burden test as “an inherently subjective standard of evaluation.” (Id. at 14) Challenging the notion that the test is to be applied to a “class” of women, they argue that the abridgement of a fundamental right is “undue” if “only a small number of women are affected.” (Id. at 19.) They, in fact, challenge the motive or purpose of the statute. The provisions of the Pennsylvania statute exist for one (unconstitutional) purpose—to make getting an abortion more difficult.

The NAACP and the Bar of the City of New York raise prudential concerns. The NAACP argues that the statute has a disproportionate impact on poor women and women of color. The Bar of the City of New York points out that after New York made abortion legal, out-of-state residents “flooded the City” and that the Pennsylvania statute, if approved, will also result in an “undue burden” on the City’s health care providers.

By far, the most aggressive and creative brief is that filed on behalf of “178 organizations.” Their brief makes a variety of claims including that the Pennsylvania statute implicates other constitutional rights, specifically rights under the Fourth and Eighth Amendments as well as the right to travel and vote. They also raise a number of prudential considerations and “slippery slope” hypotheticals. For example, they ask:

Could a state condition its granting of other public benefits upon the agreement by a recipient that she will not seek an abortion? . . . Would the Court approve denial of public assistance benefits or pensions as a consequence of a woman’s obtaining an abortion? . . . Suppose a state were to condition medical licensure or a hospital or clinic’s tax exemption upon its agreement not to perform abortions or even to provide information about how to obtain legal abortions out of state. (*Id.* at 27-18.)

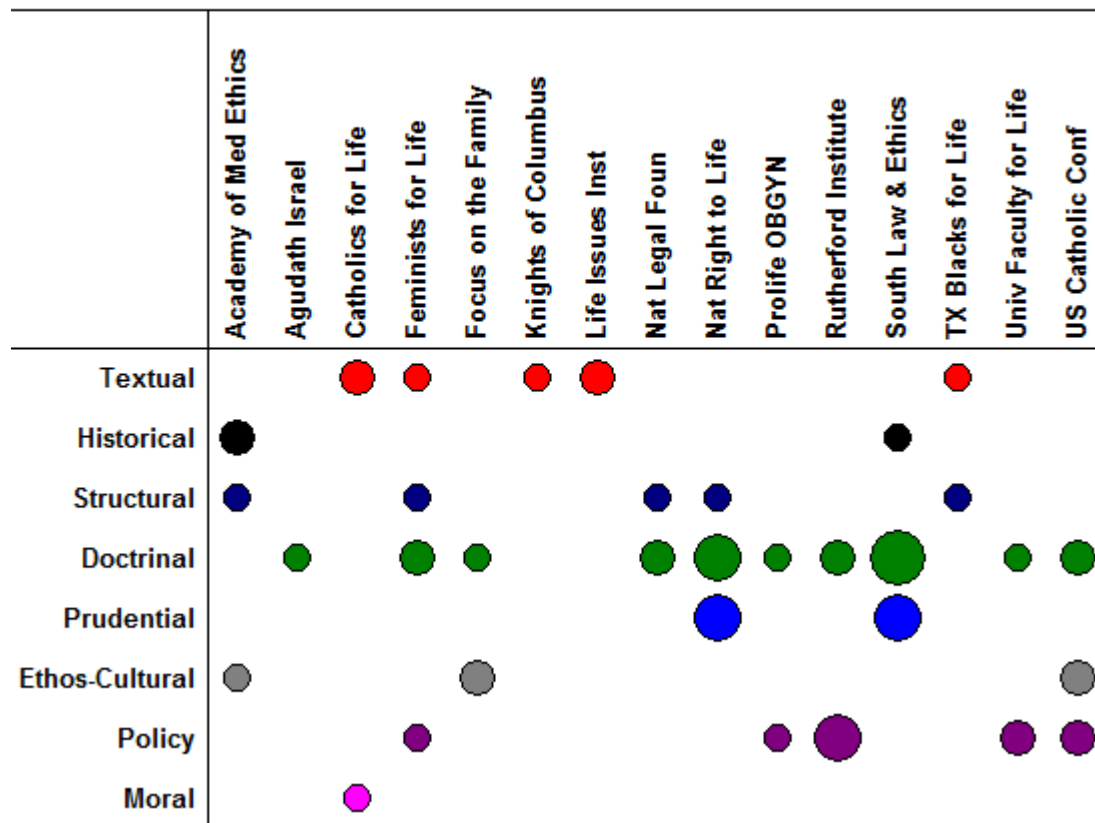
The 178 organizations also make an interesting argument regarding the impact of state’s defining when “life” begins. To do so allows each state to determine when “personhood” begins and “if each state were free to determine for itself what should be counted as a ‘person,’ the allocation of congressional seats among the states would be susceptible to improper manipulation.” (*Id.* at 17.) If this were in fact to come to pass, one can only marvel at what would be the complexity of the decennial census.

Not surprisingly, all of the briefs are unflinching in their defense of *Roe* and in their criticism of the undue burden test. All of the briefs repeat similar themes: “[T]o permit the

states to deter and punish women from exercising their full panoply of constitutional rights breaks faith with the women who took to heart this Court’s solemn guarantees.” (*Id.* at 28.) In short, “[t]he consequences of reversing *Roe* would be disastrous.” (*Id.* at 3.)

Chart 5.6 illustrates the argument modalities employed by amici supporting the Commonwealth. Unlike petitioner amici, they employ a full range of arguments. What is somewhat surprising is that only Catholics for Life make overt moral arguments in defense of the Pennsylvania statute.

**Chart 5.6
Respondent Amici - Modalities**



By far the most common argument is the doctrinal one. There are two distinct versions of this type of argument. First, numerous briefs attack *Roe* and argue that there is not and should

not be a fundamental right to have an abortion. Some briefs suggest that at best the right is a “limited” fundamental right. Either way, the logical next step in the doctrinal analysis is that absent a fundamental right to an abortion, the state need not show a compelling interest in adopting abortion regulations. Several briefs recommend Justice O’Connor’s undue burden test. Others go even further and suggest that as long as there is a rational basis for abortion regulations then they should pass constitutional muster.

The brief of the Southern Center for Law and Ethics addresses a particularly thorny doctrinal issue. *Roe* was grounded in a right of privacy that had been first articulated in *Griswold* and *Eisenstadt*. The right to conception was based upon this privacy right and this same privacy right was the basis of the Court’s decision in *Roe*. One strong argument for not overruling *Roe* was that such a step would call into question the right to contraception upheld in those cases. The Southern Center steps into this thicket by suggesting that *Roe* can be overruled and a line drawn between *Griswold* and *Eisenstadt*. Whereas *Griswold* had created a privacy right grounded in the family, *Eisenstadt* created a radical new individual privacy right of bodily autonomy. In *Roe*, this right gets elevated even further now protecting the “inherently destructive act” of abortion. The Southern Center suggests that the Court can pare back this autonomy right without calling into question *Griswold*.⁸⁹ The Court can draw a “constitutional line between conception and abortion.” (Southern Center Brief at 21.) Contraception can be constitutionally protected based upon a family-based right of privacy and at the same time, the Court can withdraw constitutional protection for abortion. An obvious question arising from this approach is the constitutional status of the “morning-after” pill.” Since the pill is designed to

⁸⁹ It is not clear how *Eisenstadt* would be affected. The Southern Center does not suggest that it would have to be overruled and there is nothing in a new constitutional line drawn at conception that would require that it be overruled. On the other hand, it is also clear that the Center believes that *Eisenstadt* is constitutionally suspect since it is based upon the “new and radical” autonomy privacy right.

prevent the implantation of a fertilized ovum, it would seem to be appropriately characterized as an abortifacient and outside the protection of *Griswold/Eisenstadt*. The Southern Center anticipates this issue suggesting that the morning after pill has too many side effects to recommend its regular use and thus it will be used primarily by rape victims. Given this, they reassuringly suggest that it is “highly unlikely” that any state would bar its use. (*Id.* at 21.)

The American Academy of Medical Ethics tackles the issue of the history of abortion and argues that Justice Blackmun’s history in *Roe* is seriously flawed. According to the Academy, Blackmun’s history was wrong and it was biased. It did not recognize that abortion was regularly condemned under the common law, but more questionably, Justice Blackmun relied on the general counsel of the National Abortion Rights Action League (NARAL) for his history. Since *Roe* was built on flawed historical analysis, it must be reversed.

By far the most interesting brief is that of Catholics United for Life. It takes aim at another part of *Roe*. In *Roe*, Justice Blackmun concluded that “persons” in the 14th Amendment did not include unborn life. Looking at the various provisions of the Constitution using the term “persons,” he concluded that the term was meant to apply only post-natally. Arguing legislative intent, Catholics for life argue that the drafters of the 14th Amendment intended for “persons” to include those “conceived but not yet born.” But they reach back even further.

The founding fathers considered even slaves to be persons. There is no reason to believe that they denied personhood to unborn children. (Catholics United for Life Brief at 12.)

They go on to argue that science, logic and justice require the inclusion of unborn children within the scope of the 14th Amendment. Science has discovered “the humanity of unborn children. . .” (*Id.* at 2.) They do not explain what they mean by this. They also assert

that logic demands that the unborn be treated as persons. “The total meaninglessness of birth as a criterion for personhood is more apparent today than ever . . .” (Id. at 18.) “The child of seven or eight months’ gestation who still resides in the maternal womb is essentially indistinguishable from the child of identical age who has been born prematurely.” (Id. at 17.) Justice also demands that the unborn be treated as persons. Unborn children need the protection of the state and they need it even more than other persons because of their vulnerability. “To deny protection of the basis of one’s need for protection is no more sensible than to deny those who cannot swim the right to stay on board a ship.” (Id. at 19.) There is no apparent recognition that the analogy is accurate only if we think of the unborn as voluntary passengers on a nine month prenatal cruise. They conclude by referring to abortion as “a fundamental moral issue” and suggest that statutes that affirmatively authorize abortion sanction murder.

Several other arguments are of interest. The ProLife Obstetricians and Gynecologists argue that abortion defenders wrongly conflate pregnancy with disease, treating abortion as the cure. The Knights of Columbus argue that abortion is “*malum in se*,” that is, evil in nature. As such, it cannot be protected as a liberty interest. Several briefs are openly contemptuous of those who provide abortions referring to the “abortion industry.” As Feminists for Life say:

The abortion industry is a highly profitable business. The livelihood of the abortionist and her staff depends upon the selling of abortions. (Feminists for Life Brief at 9.)

They characterize Planned Parenthood as “paternalistic and condescending” to women and suggest that they do not have the best interests of women at heart.

In short, respondent amici employ all of the argument modalities at their disposal. Because doctrine—fundamental rights, compelling state interests, undue burdens, rational

basis—is so important to the direction of abortion jurisprudence, a lot of time is spent on these concepts. But it would be wrong to think that respondent amici do not make moral arguments. Chart 5.6 suggests as much. Only one organization—Catholics for Life—makes an overt moral argument, but a moral architecture is built into most of the briefs. One need not—indeed must not—look only for arguments that are obviously moral. It is also important to look at the terminology used by amici is developing other types of arguments. A good example is the use of the term, “unborn child.”

The term “unborn child” does not appear in the petitioner’s brief or in any of the petitioner amici briefs. In fact, more than one petitioner amici brief goes to great length to explain medical terminology describing prenatal life. Post-conception, the appropriate term is a fertilized ovum or zygote. Following implantation, it is embryo and only after eight weeks (when major organ systems have developed), is unborn life appropriately referred to as a fetus. In contrast, respondent amici regularly refer to prenatal life as an “unborn child.” This term appears a total of 167 times in the respondent amici briefs. Of course, this total is somewhat skewed in that in the Catholics for Life brief alone it appears 85 times.

One other observation about the amici briefs is in order. In the Commonwealth’s brief, reversal of *Roe* was an afterthought. The Commonwealth was satisfied to defend its statute based upon the undue burden test. It did not need to convince the Court to overrule *Roe*; it rightly saw the undue burden test as a potent new jurisprudential tool allowing aggressive restrictions on abortions. Respondent amici were not so content to let *Roe* stand.

Overruling *Roe* (?): The Court's Decision

While the Pennsylvania statute (unlike the Missouri statute in *Webster*) does not pose a direct threat to *Roe*, the Court in *Casey* is no less splintered than it was in the previous case. Justices O'Connor, Kennedy and Souter "announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, VA, VC and VI, an opinion with respect to Part VE, in which Justice Stevens joins, and an opinion with respect to Parts IV, VB and VD." (*Casey* at 843-4) Justice Blackmun concurred in the judgment that the spousal notification provision was unconstitutional but would have struck down all of the provisions of the Pennsylvania statute. Chief Justice Rehnquist along with Justices White, Scalia and Thomas concurred in the judgment but would have also upheld the spousal notification provision. More importantly, the four "dissenting" Justices make it clear that they would have overruled *Roe*: "We believe that *Roe* was wrongly decided, and that it can and should be overruled . . ." (*Casey* at 944.)

Casey famously begins: "Liberty finds no refuge in a jurisprudence of doubt" and continues with a recommitment to "*Roe*'s essential holding." (*Casey* at 844.) This is followed with a protracted explanation and defense of *stare decisis*.⁹⁰

The Court explains that there are three parts to *Roe*, each of which is reaffirmed:

- A woman has a right to choose an abortion until the point of viability without "undue interference" from the state;

⁹⁰ Casey's discussion of *stare decisis* has been described as the boldest and most emphatic restatement of the importance of respecting precedent to be issued by the Court in modern history. However, others have criticized the Court for misunderstanding the concept of *stare decisis*, abrogating to itself unlimited power and rejecting the notion of popular sovereignty. See Eastman (2005, 728).

- A state can restrict or prohibit abortion after viability as long as there is an exception for women whose life or health would be “endangered” by carrying the fetus to term; and
- The state has an interest from the outset of pregnancy in protecting the health of the woman and the “life of the fetus that may become a child.” (*Casey* at 846.)

This “essential holding,” however requires some “unpacking” as it raises many or more questions than it answers: what is “undue interference?” What does “endangered” mean? Most pertinent to the Pennsylvania statute—what is the scope of the state’s interest in protecting the health of women and “the life that may become a child?”

The majority opinion is not logically complex but it is logically detailed. It reiterates much of the analysis of earlier cases but is new in its treatment of the interest of the state. As in previous cases, the Court stresses that the Due Process Clause protects substantive as well as procedural rights and that these are not limited by the specific provisions of the Bill of Rights or the specific practices at the time of adoption of the Fourteenth Amendment. One of these substantive rights is the right to privacy and to determine the scope of the right to privacy, the Court must employ “reasoned judgment” because the boundaries of the right to privacy are not “susceptible of expression as a simple rule.” (*Casey* at 849.) Rather, “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” (*Casey* at 851.) Moreover, this liberty interest is critical to “personal dignity and autonomy.” (*Id.*)

Turning to the issue of *stare decisis* and the status of *Roe*, the Court stressed that the scope of that privacy right as determined in *Griswold*, *Eisenstadt* and *Roe* was correct. Further, there is no reason to overrule *Roe*. The Court gives four reasons for this conclusion:

- *Roe* is not “unworkable.” States and the Courts have been able to apply its principles.
- While “reliance” on *Roe* cannot be exactly measured, people “have ordered their thinking and living” around *Roe*.
- *Roe* is not doctrinally weaker than it was when decided.
- A comparison to other significant cases, specifically *Lochner* and *Brown*, indicate that *Roe* should not be overruled.

Anticipating the attack to come from the “dissent,” Justices O’Connor, Kennedy and Souter bluntly state that “the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court in 1973.” (*Casey* at 869.)

Having strenuously reaffirmed *Roe*, the Court then proceeds to jettison a key part of the decision—the trimester framework. Concluding that the framework was not part of the essential holding in *Roe*, the Court concludes that it suffers from two basic flaws: “it misconceives the nature of the pregnant woman’s interest” and “it undervalues the State’s interest in potential life” (*Casey* at 873.) With the trimester framework disavowed and with a clear goal of rebalancing the interests of a pregnant woman and the state, the Court proceeds to adopt Justice O’Connor’s undue burden test. The proper test is whether the state regulation “places an undue burden on a woman’s ability to make [the abortion] decision. . . .” (*Casey* at 874.) “An undue burden exists . . . if [a provision of the law’s] purpose or effect is to place a substantial obstacle in the path of a woman seeking abortion before the fetus attains viability.” (*Casey* at 878.) In further explaining the test, the Court stresses that it is important to recognize that “there is a substantial state interest in potential life throughout pregnancy.” (*Casey* at 876.)

At this juncture, two observations are in order. First, as both Justice Blackmun and the “dissenting” justices note, Justice O’Connor *et al.* arguably overrule *Roe* without directly doing so. It is not clear why the trimester framework was not part of *Roe*’s “essential holding” and it is even less clear why in constitutional terms, it needed to be jettisoned. Even before *Casey*, Justice O’Connor had concluded that the trimester framework was on a collision course with itself because of changes in medical technology, but that conclusion is almost certainly factually dubious. Briefs filed by physician petitioner amici made plain that there is a point before which a fetus is not viable—regardless of the state of medical technology. Perhaps Justice O’Connor had in mind artificial wombs allowing for continued gestation of a pre-viable fetus but if this is the case then there is little if anything left of a woman’s right to abortion.

Second, the opinion is opaque with respect to the nature of an “undue burden” and potentially requires even more “fuzzy” analysis by the Courts than the analysis required by *Roe*. The Court states simply that “an undue burden is an unconstitutional burden.” (*Casey* at 877.) The fact that a law has “the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.” (*Casey* at 874.) Rather, it must have “the purpose or effect” of placing a “substantial obstacle” in the path of a woman seeking an abortion. This explanation begs a number of important questions. How is a court to determine when an obstacle is “substantial” as opposed to “incidental?” The Court suggests that the application of this test is individualized—“in the path of *a woman* seeking an abortion”—but that can’t be right because that would mean that a statute could be constitutional as applied to certain women and unconstitutional as applied to others. For example, a law requiring a woman to have an abortion only in a hospital after three independent physician consultations would not appear to pose an undue burden to women with significant financial resources but would to women who are poor.

As revealed in its subsequent application of the undue burden test to the Pennsylvania statute, the test does not operate in the manner the Court suggests it would.

Finally, there is the issue of the “purpose” of the statute. The Court states that a statute may be invalid if it has either the purpose or effect of substantially burdening abortion. How are Courts to determine purpose? As the Court should certainly recognize, most state statutes regulating abortion are intended to make obtaining an abortion more difficult. A strictly applied “purpose” test would thus invalidate most of the statutes designed to protect “potential life.” As the opinion demonstrates, that is not how the undue burden test is to operate. But regardless of the strictness of the application of the test, it still poses the thorny problem of determining legislative purpose or intent. Are legislators’ views about the rightness or wrongness of abortion to be taken into account in determining whether a statute poses an undue burden?

After framing the new test, the Court upholds all of the provisions except the spousal notification provision. The informed consent provision “furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully formed.” (Casey at 882.) With respect to the 24-hour waiting period, “[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable.” (Casey at 885.) The parental consent provision recognizes that minors are not as sophisticated in their decision-making and the record-keeping provisions (except for those dealing with spousal notification) promote public health.

Only the spousal notification provision violates the undue burden test. According to the Court, it does not merely make abortions “a little more difficult or expensive to obtain.” (Casey

at 893.) “[A] significant number of women . . . are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.” (*Casey* at 894.) The Court does not explain, however, how it reaches the conclusion that a “significant” number of women will be affected.

In response, the four dissenting members take issue with the majority’s defense of *Roe*, its new undue burden test and its application of that test. Pulling no punches, they begin: “We believe that *Roe* was wrongly decided, and that it can and should be overruled. . . .” (*Casey* at 944.) The Court should not take an “expansive” view of fundamental rights (*id.* at 953) and the state has legitimate interests in strictly regulating abortion throughout the term of pregnancy. Eschewing the majority’s view of *stare decisis*, they contend that “adherence to *Roe* today under the guise of legitimacy” resembles the Court’s prior adherence to *Plessy v. Ferguson*. Again, the contested nature of *Roe* is fully visible. Defenders of *Roe* liken it to *Brown v. Board of Education* and the critics liken its precedential value to that of *Plessy*.

But the real legal fireworks come in Justice Scalia dissent. Joined by Justice Thomas, he castigates the plurality. Echoing the majority’s statement that “liberty finds no refuge in a jurisprudence of doubt,” Scalia responds: “Reason finds no refuge in this jurisprudence of confusion.” (*Casey* at 993.) For Scalia, the majority’s analysis is a hopeless mess based as it is on a made-up and meaningless undue burden test. “The ultimately standardless nature of the undue burden inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis.” (*Id.* at 987.)

His greatest contempt, however, is reserved for *Roe*. *Roe* was “plainly wrong” (*Casey* at 983) merely reflecting the “philosophical predilections” and “moral intuitions” (*Casey* at 1000)

of an “Imperial Judiciary.” (*Casey* at 996.) Practically speaking, *Roe* mandated abortion on demand and eliminated the “moral opprobrium” of the act of abortion. (*Casey* at 995.) But even more practically, *Roe* created a culture war over the issue of abortion. “Not only did *Roe* not, as the Court suggests, resolve the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve.” (*Id.*) And it did all of this in defense of a judicially created right to destroy human life. “[T]he best the Court can do to explain how it is that the word liberty must be thought to include the right to destroy human life is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.” (*Casey* at 983.) It is fair to say that Justice Scalia believes not just that the Court has taken sides in the culture war (as he also believes it did in gay rights cases) but that in deciding *Roe*, the Court both elevated cultural warfare over abortion to a national scale and provided material support to proponents of abortion rights.

Abortion and the Culture Wars

The evolution of abortion jurisprudence from *Roe* to *Casey* tells us much about the changing (and unchanging) battle over abortion. While Scalia does not say that the Court has taken sides in the culture war (as he famously said in *Lawrence*), he does not need to. It is clear from the conservatives on the Court that Justice Blackmun and his colleagues were both constitutionally and morally wrong in *Roe* and that the Court in failing to overrule *Roe* has aided and abetted those who support abortion rights.

Of course, the debate between the majority and the dissenting justices in *Casey* (and in *Roe*) can be characterized as purely a jurisprudential and doctrinal debate and thus, not evidence

of Hunter's culture war. The conservatives on the Court take a dim view of the expansive definition of liberty and fundamental rights. The 14th Amendment is to be read narrowly. It does not mention abortion. Abortion rights are also not part of the "longstanding traditions of American society." (*Casey* at 980, cite omitted.) Thus, there is no right to an abortion and states can regulate abortion as they wish—presumably even making it a crime for a woman to have an abortion following conception. This argument may be that of a moral traditionalist—it does look to tradition for insights into proper constitutional interpretation—but it is not Hunter's moral traditionalist. It does not rely on "an external, definable, and transcendent authority" for answers to the constitutional status of abortion.

That said, even more than in the case of gay rights, there is a moral aspect and moral grounding to the constitutional argument being made. Justice Scalia criticizes the Court for creating a right "to destroy human fetuses." Unlike *Lawrence*, where Justice Scalia argues that he is taking no position with respect to the moral status of homosexuality, in *Webster* and *Casey*, there is no such disclaimer. If pressed, Justice Scalia would likely suggest that the moral and legal status of abortion should be decided by the states. He needs not take a moral position on abortion to reach his conclusion regarding its constitutional status. But given the venom he directs at *Roe* and his characterization of abortion, it is hard not to believe that his moral views infuse his constitutional interpretation.

No such ambiguity exists with many of the respondent amici filing briefs in *Casey*. As noted earlier, the term "unborn child" appears regularly in these briefs and while the groups do not make overt moral arguments as often as one would expect, there is nonetheless a moral undertone to the otherwise legal, doctrinal and prudential arguments. As one amicus puts it:

When a sperm fertilizes an egg, there is new life—life that did not exist before. And it is inarguably human. Therefore, it should be protected by law and the Constitution.

Roe attempted to sever the moral and constitutional questions. In the style of Hunter’s moral modernist, the Court said that it could not and need not determine when life begins. Rather, it needed only to determine when “personhood” begins. Since the Constitution does not apply that term to prenatal life, the unborn are not and cannot be persons. It is not surprising that Justice Scalia and opponents of abortion would describe this position as a “secular” one, imbued with secular values. Like Hunter’s moral modernist, the “secular” *Roe* majority rejects the notion that there is one, true answer to when life begins and it takes this decision away from democratically elected majorities.

The failure to engage this moral issue may explain much about the continuing battle over abortion. Justice Scalia is certainly right that neither *Roe* nor later cases resolved the divisive issue of abortion.⁹¹ *Casey*, in fact, appears to have given opponents of abortion new latitude to restrict abortion. We will see if this holds as TRAP cases wind their way through the courts. But the more important point is that at least with respect to abortion, and unlike the case of gay rights, proponents of abortion rights have not engaged in a moral debate—at least not in the judicial context. Not one petitioner amici brief advances a moral defense for abortion. The aphorism coined by President Clinton captures the moral dilemma facing defenders of abortion: abortion should be affordable, safe and rare. Defenders of abortion often seem to concede that abortion is morally questionable. Perhaps this is a necessary concession but in making this

⁹¹ Garrow (1999) and other pro-abortion advocates argue that *Casey* “resolve[d] the basic constitutional question of abortion for all time.” (845) Thus, while *Casey* allows and perhaps even promotes more regulation of abortion, the question of the constitutional status of a right to abortion is forever settled. This may be wishful thinking on the part of abortion advocates. There may be as many as four current Supreme Court justices who are not only prepared to overrule *Roe* but also to say that a fetus has constitutional rights that trump any right to privacy by a woman.

concession and advancing the right to abortion as a right to choose, they have hollowed out the moral nature of the liberty right at issue. As Justice Blackmun has written, there is a right to decide to have children and a right to decide not to have children. That is the proposition behind *Griswold* and *Eisenstadt*. And this is not some abstract right to choose but it is a fundamental moral right reflective of the equally fundamental rights of dignity and autonomy. Those rights do not become any less fundamental at the moment after conception than there were the moment before. This is a fundamental and definitive moral position and not of the same character as the relativistic moral arguments advanced by moral modernists. At the same time, it is not dependent upon “an external, definable, and transcendent authority.”

In short, a culture war over abortion has waged for the last thirty odd years and it shows no sign of abating. Unlike gay marriage, where public opinion has shifted dramatically and where the courts have taken notice of the shifting opinions, the battle over abortion continues to be fought with no side gaining definitive advantage. (Opponents of abortion have been very successful in restricting abortion legislatively but they have not been able to overturn *Roe* nor have they been able to shift public opinion.) But unlike the victory of gun rights proponents in *Heller*, opponents of abortion have won more than a Pyrrhic victory. *Casey* did not overturn *Roe*, but it gave opponents of abortion more room to make abortion regulations more restrictive. As in *Heller* where the Court deemed that the Constitution created an enforceable right, the Court in *Roe* and all subsequent abortion cases has stressed that the Constitution protects a right—the privacy-based right to abortion. But also like *Heller*, the Court has allowed significant government regulation of that right. Increasingly, the victory of abortion advocates in *Roe* is beginning to look Pyrrhic.

To some, the battle over abortion is part of a bigger culture war. For supporters of abortion rights, attempts to limit a woman's right to an abortion is about preserving traditional gender roles. "Attacks on abortion were about more than abortion—they were evidence of a breakdown of traditional roles that required men to be prepared to kill and die in war and women to save themselves for marriage and devote themselves to motherhood." (Greenhouse and Siegel, 2011, 2057.) The fight over *Roe* is not just about abortion, it is about all of the momentous changes brought on by the sexual revolution.

Opponents of abortion seem to agree. Many of the briefs by opponents of abortion suggest that unwanted pregnancy is a "punishment" for sexual licentiousness. "[T]he availability of abortion makes it easier for men to engage in sex without risking any consequences—reason enough for abortion rights to be enshrined among the tenets of the Playboy Philosophy." (McConnell, 1991, 1191.)⁹²

In short, the battle over abortion is but a battle in a larger culture war over sex. I will return to this point in the concluding chapter.

⁹²McConnell's cost-benefit analysis focuses on the mental calculus of men, suggesting that it is men that face the consequences of unwanted pregnancy. While certainly there are "consequences" for men, it seems undeniable that the greater consequences are borne by women.

Chapter 6: God – The Battle Over Religion in Public Life

In his chapter on “Law,” Hunter states: “the definition of religion and the debate over church and state are the principal battlegrounds over which the *procedural dimension* of the culture war is fought” (Hunter 1991, 269, emphasis added) At another point, he adds:

The significance of the debate bears repeating: what is ultimately at stake [in the culture wars] is the ability to define the rules by which moral conflict of this kind is to be resolved. Once again, those who define how a contest is to be played out will have the advantage of shaping its final outcome. (Id. at 271)

Hunter is clearly right that the courts have been a battleground between parties contesting the appropriate role of religion in public life. But it is far from clear what Hunter means by “the procedural dimension of the culture war” nor is it obvious that “the definition of religion” is a central culture war issue. Rather, a review of First Amendment religion jurisprudence reveals an ongoing debate over the proper role of religion in public life and more specifically, whether religious belief is to be favored over other types of strongly-held beliefs especially when these beliefs come into conflict with the demands of the modern welfare state. Can only the religiously devout avoid military service? Must all but religious believers comply with drug laws? Do religious believers get a pass from “generally applicable” laws?

In this chapter, I will examine the battle over religion in public life. I will do so by looking at two particular cases that reach disparate conclusions over whether religious belief is to be preferenced over other forms of belief. The analysis will reveal that cultural warfare over religion is nuanced. It is not a question of being “pro-religion” or “anti-religion. Rather, the Court and elites mostly take a “Goldilocks” approach to religion in public life—the relationship between the two should neither be too hot nor too cold. As in previous chapters, I will also look at the groups fighting over religion in public life. Some are moral traditionalists; some are moral

modernists and some do not fit neatly into either category. Finally, this chapter will closely examine a case not on the CQ list but only because it is too new. *Hobby Lobby* will appear on future CQ significant case lists. It is arguably one of the most important decisions of the Roberts Court. In *Hobby Lobby*, the relationship between church and state is front and center but even more importantly, Hunter’s culture war dichotomy is front and center. *Hobby Lobby* answers the question—albeit in a limited and circumscribed way—can religiously traditional moral views trump morally modernist demands of the welfare state? The answer to that question will prove to be most relevant to future culture war battles at the Court. Before turning to *Hobby Lobby*, however, it is useful to first briefly review modern First Amendment religion jurisprudence.

Religious “Schisms” and the First Amendment

Historically, Protestantism was the *de facto* “state religion” and for most of the late 18th and early 19th century, the judicial contest was between Protestantism and Catholicism, with the Protestant establishment attempting to limit and circumscribe the role, rights and influence of Catholics.⁹³ It is important to remember that as recently as 1960, political commentators could legitimately ask—can a Catholic be elected President?

Beginning in the 1960s, however, the cultural contest began to change. With the country’s increasing pluralism (and with the election of a Catholic president), the debate between

⁹³ For an excellent discussion of both the political and constitutional history of religion in America, see Conkle (2000), “The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future.”

Protestantism and Catholicism subsided and it was replaced by a new schism—between religious traditionalists, religious modernists and the irreligious.⁹⁴

This debate played out on two fronts as reflected in the twin provisions of the First Amendment. The First Amendment reads: “Congress shall make no law respecting an establishment of religion or restricting the free exercise thereof.” While the Supreme Court long ago decided that the First Amendment also applies to states through the Fourteenth Amendment, the Court has struggled with the substance of the Amendment. What is an “establishment”? It is easy enough to say that the First Amendment does not permit a state-endorsed church or religion but the Amendment gives little guidance as to when state support of religion or religious establishments become an “establishment?” Similarly, it is equally clear that the Free Exercise Clause does not allow government to intervene into the internal affairs of a religious institution or prescribe religious belief, but to what extent must the state “accommodate” religion? Two competing interpretations of the First Amendment have vied with each other for supremacy. At one extreme are those who call for a “strict separation” of church and state. Relying on Jefferson’s metaphor of a “wall between church and state,” those who favor strict separation would limit the amount and role of religion in public life. They also see little need for broad accommodation of religion. The State may not intervene in the affairs of religious organizations or mandate religious belief but it may apply laws of “general applicability” to religious organizations and individuals. At the other extreme are those who seek a more vigorous role for religion in public life. The most ardent argue that the state may constitutionally endorse religion over irreligion and that it should do so. In addition, accommodationists would carve out a wide

⁹⁴ See Conkle (2000), Layman (2005), “Wars and Rumours of Wars: The Contexts of Cultural Conflict in American Political Behaviour” and of course, Hunter (1991).

unregulated territory for religious belief and behavior. For accommodationists, the state must refrain from any action that would have any negative impact on religious belief or behavior.

Hunter correctly points out that progressives and religious modernists have generally favored strict separation since this tended to “reinforce the privatization of religious faith.” (Hunter, 1991, 263) Orthodox Protestants and Catholics, by comparison, have favored accommodation where the state allows more rather than less religion in the public square.

While all of this is true and a review of First Amendment religion jurisprudence reveals a long-standing contest and tension over separation versus accommodation, it is not clear what Hunter means when he argues that the fight over the relationship between church and state “defines the rules” of how the culture war is to be fought. To take but one example, there is no clear connection between allowing governmental display of the Ten Commandments on government property and “rules” of cultural conflict. The Court’s decision to allow display of the Ten Commandments on government property (in certain circumstances) might say something about who is winning the culture war (or at least the cultural battle over the role of religion in the public square), but it doesn’t set any meaningful rules of conflict. Stated differently, decisions about the role of religion in the public square do not give any culture warriors the upper hand in the battle over guns, gay rights or abortion.

There is one obvious way in which Hunter’s assertion might be true. Churches and other religious organizations and institutions are generally tax-exempt. However, in order to maintain their tax-exempt status, they must refrain from political advocacy. Many conservative Protestant churches have long chafed at this requirement arguing that it unfairly restricts their First

Amendment rights.⁹⁵ To the extent that religious entities could lower the wall between church and state, especially with respect to political advocacy and tax-exempt status, they could conceivably increase their political involvement and influence.

But despite their public displeasure with the tax code, there is little evidence that the Religious Right feels or indeed is constrained by it.⁹⁶ There are no cases on the CQ list of significant cases dealing with the tax-exempt status of churches. There are few if any cases in which the IRS has challenged the tax-exempt status of a religious organization and religious leaders have regularly boasted of their ability to affect election turnout and outcomes.

Contrary to Hunter's assertion, the battle over the role of religion in public life would appear to be a symbolic battle—albeit a symbolic battle of great perceived importance—and not a battle over the rules of the culture war. It is instructive to begin with the Court's jurisprudence in this area. Table 6.1 shows the list of CQ significant cases dealing with the religion clauses of the First Amendment. As noted earlier, the First Amendment contains two separate but related provisions: The Free Exercise Clause and the Establishment Clause. As Table 6.1 makes clear, the large majority of cases deal with the “establishment” of religion.

⁹⁵ See Kumar, Anugrah, “Over 1,800 Pastors Take Part in Pulpit Freedom Sunday.” The Christian Post, October 11, 2014 at <http://www.christianpost.com/news/over-1800-pastors-take-part-in-pulpit-freedom-sunday-127914/> (accessed October 11, 2014). “More than 1,800 pastors from across the United States have participated in this year's Pulpit Freedom Sunday since the Alliance Defending Freedom's annual event began last Sunday to protest an Internal Revenue Service rule which is used to silence churches. ‘The tax-collecting IRS shouldn't be playing speech cop and threatening a church's tax-exempt status simply because its pastor exercises his constitutionally protected freedom of speech,’ ADF Senior Legal Counsel Erik Stanley, who heads the Pulpit Freedom Sunday event, said in a statement.”

⁹⁶ The most vociferous critics of restrictions on political speech by non-profit religious organizations are religious conservatives. But it should also be noted that black clergy have also openly engaged in political activity during church services.

Table 6.1
CQ RELIGION CASES

CASE	YEAR	TYPE	ISSUE
Lemon v. Kurtzman	1971	Establishment	Public Funding
Aguilar v. Felton	1985	Establishment	Public Funding
Zobrest v. Catalina Foothills School District	1993	Establishment	Public Funding
Board of Education v. Grumet	1994	Establishment	Public Funding
Rosenberger v. University of Virginia	1995	Establishment	Public Funding
Agostini v. Felton	1997	Establishment	Public Funding
Zelman v. Simmons-Harris	2002	Establishment	Public Funding
Lynch v. Donnelly	1984	Establishment	Public Displays
County of Allegheny v. ACLU	1989	Establishment	Public Displays
McCreary County v. ACLU	2004	Establishment	Public Displays
Van Orden v. Perry	2005	Establishment	Public Displays
Pleasant Grove City v. Sumnum	2009	Establishment	Public Displays
Abington School District v. Schempp	1963	Establishment	School Prayer
Wallace v. Jaffree	1985	Establishment	School Prayer
Lee v. Weisman	1992	Establishment	School Prayer
Santa Fe Independent School District v. Doe	2000	Establishment	School Prayer
Edwards v. Aguillard	1987	Establishment	Evolution/ Creationism
Employment Division v. Smith	1990	Free Exercise	Drugs/Unemployment Insurance
Lamb's Chapel v. Center Moriches Union Free School District	1993	Free Exercise	Access to School by Church
Locke v. Davey	2004	Free Exercise	State Scholarship Program

The establishment cases fall into three distinct categories: public funding (or the lack of funding) of religion; public displays of religious symbols and school prayer. The early public funding cases dealt with the extent to which governmental entities can support religious schools. For example, can government supply books to a religious school? Transportation for the students of these institutions? Later cases address the question of when government can refuse to fund religious activities or organizations. If a state university provides funding for non-religious organizations, must it also provide funding to religious ones?

The public display cases involve either public displays of the Ten Commandments or public display of religious symbols during the Christmas/Chanukah season. Generally speaking, the Court has allowed holiday displays that reference Christianity (nativity scenes) or Judaism (menorahs) as long as these are accompanied by secular symbols (e.g. Santa Clause). The Court has also allowed public displays of the Ten Commandments as long as they appear to be a “historical” display as opposed to a “religious” one.

The school prayer cases have generally restricted prayer at school events. While allowing the “free exercise” of religion by students, the Court has made clear that such exercise cannot be promoted or endorsed by governmental entities.

There are only three free exercise cases on the CQ list. The first of these, *Employment Division v. Smith*, involved the religious use of peyote and whether unemployment benefits could be denied based upon a discharge for using peyote. The Court held that benefits could be denied and that peyote use was not protected by the First Amendment, but the Court’s decision was quickly overturned by Congress when it passed the Religious Freedom Restoration Act (RFRA).

The second case, *Lamb's Chapel*, involves an evangelical church that sought to use school facilities to screen a religiously-oriented series of films. The school denied the request on the grounds that allowing the church to use government facilities to show a religious film would constitute an endorsement of religion. The school district prevailed in the lower courts but the Supreme Court disagreed. A unanimous Court concluded that there would be no establishment and that denying access to the church when access was granted to a wide variety of other organizations violated the First Amendment. As a technical matter, *Lamb's Chapel* is not a free exercise case. While the church argued that the school district's decision violated its rights under the Free Exercise clause, the Court actually decided the case based on the Free Speech clause of the First Amendment. Still, the case reveals the Court's thinking about the tension between the Free Exercise and Establishment Clauses.

In the final case, *Locke v. Davey*, a pastoral studies major was denied a state scholarship that he would otherwise have been eligible to receive had he not been majoring in theology. Pursuant to state law, the scholarships were available to all students except those majoring in theology. The student claimed that this restriction violated the Free Exercise clause. The Supreme Court disagreed. They concluded that the state did not run afoul of the First Amendment in singling out religious studies for exemption for scholarship eligibility.

While my goal here is not to provide a historical account of the development of First Amendment religion jurisprudence, suffice it to say that the area is a hodgepodge of conflicting and inconsistent precedent. There are very few if any "bright-line" rules. Instead, the Court's jurisprudence is very case-specific and fact-specific. Moreover, a fair reading of the cases in this area reveals that neither religious traditionalists nor religious modernists have vanquished the

other. While both sides have expressed their dissatisfaction with the Court's resolution of these issues, the Court has attempted to find the "not too little and not too much" middle ground.

To say that all of these cases are primarily symbolic is not to suggest that they are not significant. All of them involve efforts to define the "meaning" of America. Is the United States a religious country, specially ordained by divine providence? Or is the United States primarily a secular country albeit one that protects the rights of all religious believers and unbelievers alike? The Court has struggled intensely with these competing narratives for the last fifty years. But these cases do not involve a battle over rights in the same way that *Heller*, *Lawrence* or *Casey* do. Those cases involve establishing substantive rights and in the abortion cases, fights over the scope of the right. In the area of religion, no one denies that religious belief, and in most cases, religious behavior is constitutionally protected. As the fights in these cases—over school funding, the permissible placement of the Ten Commandments and public prayer—demonstrate, the fights are mostly at the margin of the role of religion in public life. To be more specific, no one is attempting to prevent individuals from being religious, in private or in public. The issues revolve around the role of the state vis-à-vis religion.

But it would also be premature to conclude that fights over the First Amendment religion clauses, especially the Free Exercise Clause, are only symbolic. As the Court's recent decision in *Hobby Lobby v. Sibelius* demonstrates, the Free Exercise Clause can be used as the basis for advancing claims regarding "substantive" culture war issues—in this case, abortion.

In *Hobby Lobby*, a splintered 5-4 Supreme Court held that religious liberty exempts closely held corporations from a federal requirement that they provide contraceptives under the

Affordable Care Act.⁹⁷ The decision may very well foreshadow the shape of the culture wars to come. Immediately, those opposing gay rights and gay marriage saw an opportunity to exempt themselves from statutes protecting homosexuals.⁹⁸ Thus, it is worth looking at the *Hobby Lobby* case in depth. Before doing so, however, several comments are in order.

First, *Hobby Lobby* is not technically a constitutional law case; it is a statutory case. It involves the interpretation of the Religious Freedom Restoration Act (RFRA) mentioned earlier. But to call *Hobby Lobby* only a statutory case is to misread the case and its import. RFRA codified (or attempted to codify) an interpretation of the Free Exercise Clause that predated *Employment Division v. Smith*, so in a sense *Hobby Lobby* is a constitutional law case once removed.

Second, *Hobby Lobby* is not on the CQ list of significant cases; it is too new. But there is little doubt that in the future it will make the list, both because of the ground-breaking implications of the case and the degree of interest in the case. Like *Webster* and *Heller*, culture warriors saw the case as an opportunity to significantly shape the law. Over 80 amicus briefs were filed in the case. (See Charts 6.1 and 6.2.)

⁹⁷ The Patient Protection and Affordable Care Act (PPACA) - commonly known as the Affordable Care Act (ACA) - was signed into law on March 23, 2010. Along with the Health Care and Education Reconciliation Act, it was the most significant regulatory overhaul of the U.S. healthcare system since the 1965 passage of Medicare and Medicaid. The goals of the ACA were to increase affordability, access, and quality of healthcare. The ACA is complicated with numerous requirements, but in general, it established new tax credits and competitive marketplaces for healthcare. The ACA created a Patient's Bill of Rights that ended the practice of denying insurance coverage due to a pre-existing condition; ended lifetime dollar limits on essential health benefits; and extended coverage under parents' insurance plans to adults until the age of 26. The ACA also strengthened Medicare and Medicaid. A controversial portion of the ACA was the individual mandate, which required that US citizens obtain healthcare coverage beginning in 2014 or face a tax penalty. The constitutionality of the individual mandate portion of the ACA was challenged in *National Federation of Independent Business v. Sebelius* under Congress' taxing power; on June 28, 2012, this was upheld by the United States Supreme Court. As noted, the contraception rule was also challenged as a burden against corporate religious expression. The Supreme Court ruled that closely held corporations, such as Hobby Lobby, are exempt from the contraception rule under the Religious Freedom Restoration Act (RFRA).

⁹⁸ See Levy, Pema. "Does the Hobby Lobby Decision Threaten Gay Rights?" *Newsweek Magazine*, July 9, 2014 at <http://www.newsweek.com/does-hobby-lobby-decision-threaten-gay-rights-258098> (accessed October 11, 2014.)

Finally, as in previous chapters, I code the amicus briefs by type of argument proffered. It should be noted however, that because *Hobby Lobby* is primarily a statutory case, many of the arguments involve statutory construction and legislative history. Stated differently, many of the briefs focus on doctrinal arguments—what do the key terms in the statute mean? How are they to be interpreted? Thus, the variety of arguments is somewhat more limited than we have seen in other culture war cases. That said, not all amici are content to raise only statutory claims and arguments. Some also advance free exercise arguments in addition to, or instead of, RFRA arguments. In addition, because *Hobby Lobby* involves issues of contraception and abortion, some of the arguments in these amicus briefs are similar to arguments made in the abortion cases reviewed in the previous chapter.

Finally, before turning to *Hobby Lobby*, it is necessary to understand two precursors to *Hobby Lobby*—*Employment Division v. Smith* and RFRA. *Hobby Lobby* can only be understood in reference to these.

Employment Division v. Smith: Peyote and the Free Exercise of Religion

In *Employment Division v. Smith*, two drug counselors were dismissed from their jobs as the result of their use of peyote in Native American rituals. Both then sought unemployment compensation. In an administrative hearing, the State denied the request on the grounds that they had been discharged for work-related “misconduct” and were thus ineligible for compensation. They appealed that decision and the Oregon Court of Appeals reversed, concluding that the denial violated the counselors’ First Amendment free exercise rights. The State, in turn, appealed and in the Oregon Supreme Court, Smith and his co-worker again prevailed. While

recognizing that the use of peyote was illegal under Oregon law, the Oregon Supreme Court concluded that this was irrelevant to the case at hand. In making determinations regarding unemployment insurance, Oregon was not trying to enforce its criminal law. Rather, it was simply trying to ensure the financial integrity of its compensation fund. That purpose was insufficient to allow it to burden the workers' free exercise rights.

The U.S. Supreme Court granted certiorari, but then vacated the judgment of the Oregon Supreme Court and remanded the case for a determination as to whether the use of peyote for sacramental purposes was in fact a criminal offense under Oregon law. The Oregon Supreme Court concluded that the Oregon statute made no exception for the religious use of peyote but then reaffirmed its original ruling that the State could not deny unemployment benefits to Smith and his co-worker. The U.S. Supreme Court again granted certiorari.

Interestingly, the case drew little attention by amici. No amicus briefs were filed on behalf of the state and only four—by the ACLU, the American Jewish Congress, the Association of American Indian Affairs, and the Council on Religious Freedom—were filed on behalf of respondents. Each of the amici was predictable in their arguments. They pointed out the unique and special history of the Native American Church (NAC) and noted that federal law had long granted religious exemptions to federal restrictions on peyote use. Most argued that the state's action was not supported by a "compelling" interest and that the State could easily accommodate the NAC without undermining its drug regulation regime.⁹⁹

⁹⁹ In its brief, the ACLU argues that the writ of certiorari should be dismissed as having been improvidently granted. Upon remand, the Supreme Court of Oregon had held that the only state interest relevant to denial of unemployment benefits was the State's interest in the fiscal integrity of the unemployment compensation fund. The state's interest in the criminal prosecution of drug use was irrelevant. Given this arguably binding conclusion, the issue of a religious exemption for peyote use was not properly before the Supreme Court. Justice Scalia and the other

Writing for the majority, Justice Scalia reversed the decision of the Oregon Supreme Court. After conceding that the Free Exercise clause protects religious behavior as well as belief, the majority concluded that religious convictions do not “relieve[] the individual from obedience to a general law not aimed at promotion or restriction of religious beliefs.” (*Smith* at 879.) Seeking to establish that this conclusion is consistent with precedent, Justice Scalia writes:

We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. (*Id.* at 878-79)

Justice Scalia goes on to explain that previous cases that did excuse compliance with generally applicable laws involved both free exercise and other constitutional claims. For example, parents could be excused from compliance with mandatory schooling statutes because the mandate violates their free exercise rights and their parental rights under the Constitution.¹⁰⁰ Justice Scalia explains that the current case does not involve a “hybrid” situation implicating more than one constitutional right.

Finally, petitioners had suggested that the Court should apply a “compelling interest” test in evaluating the State’s actions. Justice Scalia flatly dismisses this suggestion. Requiring a state to have a compelling interest to apply a law of general applicability would be “courting anarchy.” (*Id.* at 888.) Such an approach “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind”—including military service laws, child neglect laws, compulsory vaccination laws, minimum wage laws, equal opportunity laws and environmental laws. (*Id.*) In short, the question of exemption from

conservatives on the Court have thus been criticized as “activist” for reaching to decide an issue that was not relevant or necessary for disposition of the case.

¹⁰⁰ It is of course ironic that Justice Scalia distinguishes prior “hybrid” cases in which exemptions from statutes were granted. These cases are “hybrid” cases because they involve a substantive due process right (e.g. the right to parent) nowhere found explicitly in the Constitution. Justice Scalia is generally dismissive of such rights.

generally applicable laws must be left to the democratic process otherwise we risk having a system “in which each conscience is a law unto itself . . .” (*Id.* at 890.)

The response to *Smith* was immediate and generally negative.¹⁰¹ Both religious conservatives and religious and secular liberals believed that the Court had “gotten it wrong” (Beschle 2013, 364). Many commentators also argued that the Court had substantially mischaracterized free exercise precedent. Like the dissent, commentators were surprised by the Court’s assertion that exemptions from generally applicable laws were limited to “hybrid” cases.

Legislative reaction to *Smith* was also swift. Within three years, Congress had passed the Religious Freedom Restoration Act (RFRA) explicitly designed to overturn *Smith*. In RFRA, Congress purported to restore the pre-*Smith* jurisprudential regime governing free exercise claims. Thus, to understand RFRA, it is necessary to understand pre-*Smith* jurisprudence.

At the juncture, it is important to note that pre-*Smith* free exercise jurisprudence is anything but clear. As Lowentheil (2014) notes: “It has been called ‘unprincipled, incoherent, and unworkable,’ ‘a disaster,’ ‘in serious disarray,’ ‘chaotic, controversial and unpredictable,’ ‘in shambles,’ ‘schizoid,’ and ‘a complete hash.” (Lowentheil 2014, 455 citing Koppelman 2013) In short, when *Smith* arrived at the Court, the Court had a jumble of case law to attempt to

¹⁰¹ For a discussion of reactions to *Smith*, see Lupa (1995). For criticisms of *Smith*, see, for example, Laycock (1990), “The Remnants of Free Exercise” and McConnell (1990), “Free Exercise Revisionism and the *Smith* Decision.” For a contrasting view, see Marshall (1991), “In Defense of *Smith* and Free Exercise Revisionism.” Beschle (2012) suggests that *Smith* was the result not of insensitivity to religion but to the “vast expansion of the concept of religion in constitutional law since the Court’s first free exercise decisions employing strict scrutiny.” (Beschle 2013, 357)

reconcile. Two cases figure prominently.¹⁰² They are cited by the Court and the first of these is cited by the architects of RFRA in its “purposes” section.

In *Sherbert v. Verner* (1963), the Court ruled in favor of a Seventh-day Adventist who had been fired from her job for refusing to work on Saturday, the Adventist Sabbath.¹⁰³ Like *Smith*, *Sherbert* involved a claim for unemployment benefits. In rejecting the state’s denial of benefits, the Court held that the state had failed to successfully assert a “compelling interest” in its law and had not demonstrated that there were no alternative forms of regulation that would protect its interests. Stated differently, the Court held that the state could, with minimum effort, accommodate the free exercise interests of the claimant.

The second case of import is *Wisconsin v. Yoder* (1972). In *Yoder*, the state sought to enforce a compulsory school education statute on Amish parents. The Amish parents argued that the statute violated their free exercise rights and the Court agreed. It held that the State had not shown a “compelling interest” in requiring that its citizens attend school it did not have a compelling interest for the statute as applied to the Amish.¹⁰⁴ Moreover, the Court appeared to reject the “generally applicable law” defense. “[T]his case [cannot] be disposed of on the grounds that Wisconsin’s requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion. . . .” (*Yoder* at 220.)

¹⁰² It is also ironic that religious conservatives, protective of free exercise rights, look to Warren era precedents as the “golden age” of free exercise protection. Other types of Warren era cases do not have the same kind of iconic status.

¹⁰³ Beschle (2013) argues that *Sherbert* marked “the end of a period of exceptionally high acceptance of traditional Judeo-Christian religious beliefs” and the beginning of a period of rapid growth of nontheistic philosophies. (Beschle 2013, 377.)

¹⁰⁴ While the Court discusses the Amish parental interests, contrary to Justice Scalia’s assertion in *Smith*, it does not explicitly ground its decision on a substantive due process parental right.

In both cases, the Court granted exceptions to generally applicable laws and in doing so, applied a facially stringent test to the statutes at issue. As numerous commentators have noted however, the pre-*Smith* test was often “strict in theory but feeble in fact.” (Eisenruber and Sager, 1994, 1247.) While the Court seemed solicitous of non-mainstream religions (*e.g.* the Amish, Seventh-Day Adventists), most challenges to generally applicable laws failed.¹⁰⁵ Nonetheless, there was a perception that the Court was protective of the free exercise of religion and a perception that *Smith* had changed the rules of the game. Congress thus intervened to “change the rules back.”

The Religious Freedom Restoration Act (RFRA) was introduced in Congress a mere three months after *Smith* was decided. Its explicit purpose was to overturn *Smith*. It was largely uncontroversial, supported by both cultural conservatives and culture liberals. As least with respect to *Smith*, there appeared to be a truce in the culture wars.¹⁰⁶

The final version of RFRA as passed was simple: “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”¹⁰⁷ Congress was judicially conscious of what it was doing. In the “findings” section of the statute, Congress

¹⁰⁵ See Eisenruber and Sager (1994). “Outside of the charmed precincts of unemployment benefits . . . those seeking religious exemptions from otherwise valid laws have prevailed only on one occasion: in *Wisconsin v. Yoder*. . . .” (p. 446.)

¹⁰⁶ It initially appeared that RFRA would sail through Congress with little or no opposition. But after review of the Act, the United States Catholic Conference and some anti-abortion groups opposed it. *Planned Parenthood v. Casey* had not yet been decided and there was hope by abortion opponents that *Roe* would be overturned and states could then implement abortion bans. Abortion opponents feared that the RFRA could be used by women to exempt themselves from state abortion bans. Of course, the abortion bans never materialized and so this fear was ultimately unfounded. In light of the later *Hobby Lobby* litigation in which Catholic and other anti-abortion organizations used RFRA to their advantage, their initial opposition to the Act is ironic. If they had been successful in blocking RFRA, there is probably no *Hobby Lobby*.

¹⁰⁷ 42 U.S.C. § 2000bb-1.

stated that the purpose of the statute is “to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened”¹⁰⁸ In short, whatever the condition of free exercise jurisprudence before or immediately after *Smith*, Congress believed that it was clarifying the analysis to be used in analyzing First Amendment Free Exercise claims.¹⁰⁹

Hobby Lobby: A New Front in the Culture Wars

In 2010, Congress passed and President Obama signed The Patient Protection and Affordable Care Act of 2010 (ACA).¹¹⁰ The Act (derided by critics and later endorsed by supporters as “Obamacare”) set out to dramatically increase health care coverage for Americans, expand access to preventive care and reduce the cost of health care. To both supporters and critics alike, the Act was viewed as the most significant reform of the health care insurance and delivery system since the adoption of Medicare and Medicaid in the 1960s.

Reform provisions under the Act included a requirement that all Americans purchase health insurance (the “individual mandate”), federal financial incentives to expand Medicaid and

¹⁰⁸ *Id.*

¹⁰⁹ There is academic debate over the constitutionality of statutes such as RFRA that seek to bind the Court to a particular interpretation of a constitutional provision but RFRA has never been successfully challenged with respect to its application to federal legislation. In *City of Boerne v. Flores*, the Court struck down RFRA as applied to states concluding that Congress exceeded its power under the Fourteenth Amendment. (521 U.S. 507, 534 (1997)). In response, Congress passed a more limited version of the RFRA pursuant to its Spending and Commerce Clause powers. That Act, the Religious Land Use and Institutionalized Persons Act (RLUIPA), was later upheld by the Supreme Court. (*Cutter v. Wilkinson*, 544 U.S. 709 (2005)). The Court also presumed the constitutionality of RFRA as applied to the federal government in *Gonzales v. O Centro Espirito*, 546 U.S. 418 (2006).

¹¹⁰ Pub. L. 111-148 (2010).

federal regulation of group health plans.¹¹¹ As part of the effort to expand access to health care, the Act also required certain employer group health plans to furnish “preventive care and screenings [for women without] any cost sharing requirements.”¹¹² The Act did not prescribe the exact nature of the preventive care to be provided but delegated the decision to the Health and Human Services (HHS) Department.¹¹³

Following public input, HHS promulgated regulations requiring covered health plans to provide insurance coverage for the twenty contraceptive methods approved by the Food and Drug Administration. Anticipating opposition from religious groups, the regulations exempted religious employers including churches as well as religious non-profit organizations such as colleges and charities. In the case of an exempt organization, the regulations required the insurer to exclude contraceptive coverage from the exempt organization’s insurance plan but the insurer was required to directly provide contraceptives to plan participants. Insurers could not impose any cost-sharing or other payment on the employer or the employees. Significantly, the regulations did not exempt for-profit entities from the coverage requirements.

The regulations satisfied few. Opponents of abortion argued that the regulations did not go far enough in protecting their free exercise rights. Non-profit religious organizations chafed at the requirement that they “certify” their exempt status to HHS. They likened the “certification” process to asking permission to exercise their religious freedom. Religious

¹¹¹ The constitutionality of the individual mandate and the Medicaid expansion were challenged in numerous cases. In *NFIB v. Sebelius* (2012), the Court held that Congress in adopting the individual mandate exceeded its power under the Commerce Clause. Nonetheless, by a 5-4 majority, the Court upheld the mandate as a valid exercise by Congress of its taxing powers. The Court struck down provisions of the Medicaid expansion on federalism grounds. As a result, states could expand Medicaid coverage but would not face reductions in federal Medicaid funds if they did not. To date, over twenty states, mostly those governed by Republicans have declined to expand Medicaid coverage.

¹¹² See 42 U.S.C. §300gg-13(a)(4).

¹¹³ Within HHS, the agency responsible for promulgating relevant regulations is the Health Resources and Services Administration (HRSA).

owners of for-profit businesses argued that they should also be exempted from the contraception mandate. Supporters of the ACA and advocates for women's health care viewed these objections as simply an attempt to end-run the Act. In their view, the HHS regulations went too far in exempting entities from the mandate. They undermined the goals of the contraception mandate and harmed women's health.

Hobby Lobby, Inc. is a for-profit arts-and-craft store with over 500 stores nationwide. While it is a for-profit company incorporated under the laws of Oklahoma, it is "closely held" by David and Barbara Green and their three children. One of their sons also operates 35 Christian bookstores, Mardel, which is also organized as a for-profit entity under Oklahoma law. Both businesses are "closely held" in that while they are incorporated, the Greens and their children retain exclusive control of both companies.

Norman and Elizabeth Hahn operate Conestoga Wood Specialties. Conestoga is a for-profit company organized under Pennsylvania law. Like Hobby Lobby, it is a closely held company. The Hahns control Conestoga's board of directors and hold all voting shares.

The Hahns are members of the Mennonite Church. The Greens are simply described as "Christians." Both the Hahns and Greens operate their businesses in accordance with their understanding of the mandates of their respective religions. According to the Hahns and the Greens, their religions teach that "human life begins at conception" and that abortion is a sin against God. Both objected to the contraception mandate on the grounds that certain of the FDA approved contraceptives were abortifacients and that accordingly, supplying these contraceptives would make them accomplices in the sin of abortion. While the owners of both businesses agreed to provide contraceptives under their employer-sponsored health insurance plans (and did

so before passage of the ACA), the plans were not in compliance with the HHS regulations since only certain contraceptives were covered.

Conestoga and the Hahns (in their personal capacity and not in their capacity as corporate officers) sued HHS challenging the contraception mandate on the grounds that it violated their rights under the Free Exercise Clause and RFRA. The suit was filed in Pennsylvania. In a separate suit in Oklahoma, the Greens (in their personal capacity), Hobby Lobby and Mardel also challenged the regulations.¹¹⁴ The Third Circuit (in the Pennsylvania suit) rejected the challenge to the regulation holding that for-profit corporations cannot engage in religious exercise. They also concluded that the regulations did not impose any requirements on the Hahns themselves and thus they could not sue in their personal capacity.

The Tenth Circuit reached a contrary conclusion. It held that corporations are “persons” within the meaning of RFRA, that the contraceptive mandate “substantially burdened” the company’s exercise of religion, that HHS had failed to demonstrate a “compelling interest” for the regulation. Further, even if there was a compelling reason for the mandate, HHS had failed to establish that the regulation was the “least restrictive means” of accomplishing the government’s interest.¹¹⁵ Accordingly, the regulations violated RFRA and were invalid. In light of the disagreement between the Courts of Appeal, the Supreme Court granted certiorari.¹¹⁶

¹¹⁴ The suit by the Hahns and Conestoga was filed in federal district court in Pennsylvania. The Greens, *et al.* suit was filed in Oklahoma. Strategically the Hahns and the Greens positioned themselves for a Supreme Court challenge. If they prevailed in one case at the appellate level and lost in the other, they would have a “split in Circuits” that would virtually assure that a writ of certiorari would be granted by the Court.

¹¹⁵ In both cases, the courts focused their analysis on RFRA as opposed to the Free Exercise Clause.

¹¹⁶ The original case was styled, *Sebelius v. Hobby Lobby Stores, Inc.* Before the decision was rendered however, Secretary Sebelius resigned as a result of problems with the implementation of the ACA. Sebelius was replaced by Sylvia Burwell, thus the final opinion is styled *Burwell v. Hobby Lobby, Inc.*

The Parties' Arguments

In granting certiorari, the Court limited its review to the question of whether the contraception mandate violated RFRA. The parties' briefs are straightforward analyses of the application of RFRA to the mandate. Not surprisingly, they reach diametrically opposed conclusions to almost every element of the RFTA test. As noted earlier, under RFRA government may burden a person's free exercise of religion only to serve a compelling government interest and if done so in the least restrictive means available to further that interest. Thus, pursuant to RFRA, there are four key questions at issue:

1. Who are "persons" for purposes of RFRA?
2. If Hobby Lobby or the Greens are persons within the meaning of RFRA, is either "substantially burdened" by the mandate?
3. If either is substantially burdened, does the government nonetheless have a compelling interest?
4. If the government does have a compelling interest, is the mandate the "least restrictive means" of furthering that interest?

Before turning to the issue of the mandate itself, there is the threshold question of whether Hobby Lobby and its owners had a right under RFRA to challenge the mandate. The government contended that the Act did not grant rights to for-profit corporations or to the individual owners of such a corporation. Recognizing that Congress was attempting with RFRA to restore "pre-*Smith*" free exercise jurisprudence, it noted that "[n]one of the Court's pre-*Smith* decisions held or (even suggested) that for-profit corporations exercise religion within the meaning of the Free Exercise Clause." (Petitioner's brief at 15.) Further, relying on legislative history, it pointed out that nowhere in "[t]he committee reports, hearing, and debates" is there any reference to for-profit corporations." (*Id.* at 17.) "Had Congress, in enacting RFRA,

intended to extend free-exercise rights to for-profit corporations for the first time in our Nation’s history, there would surely have been some express mention of that intent in either the statutory text or in the legislative history.” (*Id.*) Reinforcing this argument, the government noted that in employment discrimination statutes, Congress had expressly granted exemptions to religious corporations. In short, if Congress wanted to include or exclude religious for-profit corporations from the reach of a statute, it knew how to do so.

In response, Hobby Lobby contended simply that the Dictionary Act should control.¹¹⁷ The Dictionary Act defines various terms that appear in federal statutes. Where a statute itself fails to define a term, the Dictionary Act definition controls. Under the Dictionary Act, “person” is defined to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies” unless the context indicates otherwise.¹¹⁸ According to respondent, the Court had long recognized that corporations enjoy various constitutional rights. In 2010, in *Citizens’ United v. FEC*, the Court concluded that for-profit corporations have free speech rights. It would thus be anomalous to conclude that these corporations did not have free exercise rights. The government countered that the Dictionary Act instructs that “person” included corporations “unless the context indicated otherwise” and thus the term to be interpreted is not “person” but “person[s] engaged in the exercise of religion.” Again, based upon pre-Smith jurisprudence, the Court had never held that a corporation exercises religion.

The Greens also claimed that not only could Hobby Lobby challenge the mandate but they could personally challenge the mandate as well since the corporation could comply with the mandate only if directed to do so by the Greens. Accordingly, the Green’s free exercise rights

¹¹⁷ 1 U.S.C. §1.

¹¹⁸ *Id.*

under RFRA were compromised by the mandate. While conceding that the Greens “direct” Hobby Lobby and Mardel, the government countered that it is the corporation and not the Greens that are required to provide health insurance and particular benefits. A corporation and its shareholders are “separate and distinct.” To put a finer point on the argument, the Greens would face no personal liability in the event that the corporation failed to abide by the mandate. Since the Greens would face no negative consequences of the corporation failing to act, the Greens cannot be burdened by the mandate.

Turning from the issue of whose rights are burdened to whether free exercise rights are burdened at all, respondents make three points, addressing the three key elements of RFRA: 1) the mandate substantially burdens their free exercise of religion; 2) the government does not have a compelling interest for the mandate; and 3) even if it does, there are less restrictive means of advancing the government’s interests. Critical to the first prong of the analysis is the question of what exactly is being burdened. In the “substantial burden” analysis, the Court must first identify a “sincerely held” belief or a sincere religious practice that is burdened by the government’s action. The Court does not examine the sincerity of the belief or practice. It is sufficient that a challenger assert that the belief is sincerely held or the practice sincere. The Court also does not examine the nature of the belief or practice. A belief need not be “true.” It is sufficient that it is sincerely held. In this case, the Greens asserted that three required drugs and devices resulted in abortion¹¹⁹ and the mandate, by making them complicit in abortion, violated their sincerely held religious belief that abortion is morally wrong.¹²⁰ Thus, having

¹¹⁹ There is significant disagreement among medical professionals as to whether the four challenged contraceptive methods are abortifacients.

¹²⁰ Interestingly, Hobby Lobby’s insurance plan covered the four contraceptives prior to passage of the ACA. It was only after the implementation of the Act that the Greens reviewed their insurance policy and determined that the four contraceptives were among the covered forms of contraception. The failure of the Greens to scrupulously

identified a religious belief, the question becomes whether the mandate “substantially” burdens that belief.

The crux of the Greens’ argument is that the fine for non-compliance with the mandate is substantial and therefore the burden is substantial. “[A fine] for adherence to religious belief is as direct and obvious a burden as one could imagine.” (Respondent’s Brief at 36.) According to respondent’s calculation, failure to comply with the mandate would cost the corporation “close to \$475 million per year.” (*Id.* at 37) Dropping insurance coverage, as they could do under the ACA, would result in penalties of \$26 million per year.¹²¹ Both of these amounts are substantial and thus the burden is substantial.¹²²

Finally, the respondents note that the government has allowed exceptions to the mandate for others. This stands as evidence that the burden of the mandate is substantial. “[L]ogically the government cannot accommodate the religious exercise of some while denying that the law substantially burdens others engaged in the exact same religious exercise.” (*Id.* at 39.)¹²³

The government responds that the financial issue misses the point. The corporation pays money “into an undifferentiated fund to finance covered benefits under its ERISA-regulated health plan.” (Petitioner’s brief at 33.) Individual employees determine whether to use these

review their insurance coverage and ensure it excluded the claimed abortifacients at least calls into question the degree of the sincerity of their beliefs.

¹²¹ The respondents do not put these numbers in context. For example, they do not provide any information regarding corporate profits so it is impossible to determine whether these amounts are a small or large percentage of revenue after expenses. Similarly, they do not provide any information regarding Hobby Lobby’s tax liability so if these penalties are considered taxes (as the Court in *NFIB v. Sebelius* concluded they constitutionally must be), it is impossible to determine how the penalties affect the corporation’s tax position.

¹²² The respondents note that they do not object to their tax dollars being used to subsidize practices with which they concede but that they do object to the government “forcing them to facilitate such services directly or face draconian penalties.”

¹²³ “Logically” it does not follow that accommodation indicates that the government has conceded that the mandate is a substantial burden. The government could have simply provided accommodation to avoid a political confrontation over a burden that it viewed as insubstantial. Respondent’s argument is more akin to an equal protection argument: if the government accommodates some, it must accommodate all with a similar belief.

benefits. Employees may or may not use a benefit. In either case, the decision to use a coverage benefit is simply too far removed from the employer's funding of coverage to be a substantial burden. Put in more stark terms, suppose that the four contraceptive methods are covered under the insurance plan but no employee chooses to take advantage of this coverage (*i.e.* no employee uses any of the four contraceptives at issue or at least none uses the employer-sponsored insurance to pay for one of them). In this case, the employer is not burdened at all. It has not paid, even indirectly through its premium payments,¹²⁴ for any of the contraceptives at issue.

Having asserted a substantial burden, respondents next contend that the government does not have a compelling interest to justify the mandate. The government asserted three compelling interests: 1) "ensuring a comprehensive insurance system with a variety of benefits available to all participants" (Petitioner's brief at 38, cite omitted); 2) advancing the public health (*Id.* at 46); and 3) promoting equal access for women to health-care services. (*Id.* at 49.) In the case of the first interest, the government argues that Congress created a private right to coverage of preventative services by those participating in covered plans. The government thus attempts to focus on the impact on employees. Using Social Security as an analogy, the government argues that comprehensive governmental programs and those intended to benefit from such programs should not be held hostage by those who disagree with such programs on religious grounds. Just as Social Security could not function if employers were broadly exempted from the program,

¹²⁴ In their reply brief, the government also argues that the premium paid by the employer is actually part of the employee's benefit package and therefore, the employer cannot be burdened because it is simply making the employee's payment on the employee's behalf.

employer opt-outs of the kind requested by Hobby Lobby would compromise the health coverage program enacted by Congress.¹²⁵

Second, the mandate promotes public health because it reduces unwanted pregnancies. This reduction results in improved health for those that do become pregnant and better health for the babies they bear. The government goes on to point out that contraceptive methods are not interchangeable, that the three methods objected to by the respondents may not only be medically appropriate but also medically necessary for some women. (Petitioner’s brief at 48.)

Finally, the government argues that “[t]he contraceptive-coverage provision also advances the government’s related compelling interest in assuring that women have equal access to recommended health-care services.” (*Id.* at 49.) Noting that Congress had determined that women bear more out-of-pocket health care costs than men, that cost is an impediment to obtaining some forms of birth control and that preventative services improve women’s health, the regulation mandate is a reasonable approach to implementing Congressional objectives.

Respondents reject each of these interests. As interests, protecting the public health and gender equality are “overbroad.” The interests advanced are too abstract. According to respondent’s interpretation of precedent, the Court must advance a compelling interest through application of the challenged law to “the particular claimant whose sincere exercise of religion is being substantially burdened.” (Respondent’s brief at 45.) While respondents cite previous Court cases for this proposition, they are less than clear as to how this principle should work in the case of the ACA. The suggestion seems to be that since the government has granted exemptions to its mandate then it cannot be “strictly necessary to both public health and gender

¹²⁵ The government also argues that ACA granted private enforcement rights under the Employment Retirement Income Security Act of 1974 (ERISA) and that exemption from the mandate would disrupt this comprehensive scheme of privately enforceable rights.

equality for all employers to pay for these four drugs and devices. . . .” (*Id.* at 49.) But this seems to confuse (or at least to conflate) the question of whether the interest asserted is compelling with the question of whether the government’s actual implementation of the law in fact furthers the interest. Viewed this way, the government could have a generalized compelling interest, but it must do nothing to undermine its interest if the interest is to retain its compelling nature.

Finally, respondents reject “the government’s newly-identified interest in ensuring a ‘comprehensive health system.’” (*Id.* at 51.) Pointing out that the government had not made this argument in the lower courts, respondents argue that the analogy to Social Security is misplaced.¹²⁶ Social Security demands “virtually uniform and universal participation.” (*Id.* at 53.) Obamacare does not, as evidenced by the myriad exemptions to the mandate granted by the government.

Turning to the last element of the RFRA test—that the government must utilize “the least restrictive” means of achieving its interest—respondents argue that there is an “obvious” alternative to the mandate: the government can pay for its favored contraceptive methods itself.¹²⁷ (*Id.* at 57.) The government responds that RFRA cannot be interpreted to require the government to “create or expand federal programs” to comply with the least restrictive

¹²⁶ They also dismiss the government’s reliance on ERISA. Succinctly put, even if the ACA creates a private right of action under ERISA this system of enforcement is not “comprehensive” because so many employers are not subject to ERISA.

¹²⁷ There is no small irony in this suggestion. While the Greens profess not to be opposed to paying taxes for programs with which they do not agree, it seems likely, given their views regarding the four contraceptive methods at issue, that they would oppose government funding of these contraceptives. Moreover, respondents (or at least their counsel) are certainly aware of the legislative politics of federal funding of abortion. The Hyde Amendment, passed in 1976) prohibits federal funding of abortions except in cases of rape or incest. In addition, an amendment to the ACA by Representatives Stupak and Pitts contained a similar provision. In an executive order signed March 24, 2010, President Obama confirmed that the Hyde Agreement applies to federal funding of health plans under the ACA.

alternative test. (Petitioner’s brief at 57.) According to respondents, however, this is exactly what RFRA requires.

In short, the parties disagree about everything. No surprise there. But put to the side all the tests and legalese. It is important to remember what is at the core of their disagreement: abortion. This becomes plainer in looking at the amicus briefs.

Amici and Their Arguments

As noted earlier, *Hobby Lobby* is not on the CQ list; it is too new. But based on the number of briefs alone, there is no doubt that it is a significant case. From the beginning, the contraception mandate was controversial, and *Hobby Lobby* evidences a coordinated attack against it. Over 80 briefs were filed in *Hobby Lobby*, and over 100 amici joined in these briefs.¹²⁸ (See Tables 6.2 and 6.3.) The vast majority of these amicus briefs were filed on behalf of Hobby Lobby. The majority of the amici are on the briefs filed in support of Hobby Lobby.

A review of amici filing briefs in *Hobby Lobby* reveals that only eight groups filed briefs in *Hobby Lobby* and *Planned Parenthood v. Casey*. (See Table 6.4) This is somewhat surprising given that public statements by some religious traditionalists viewed both cases as critical battles in the culture war. *Casey* was the first real opportunity to overrule *Roe* and *Hobby Lobby* was viewed as a rear-guard action to prevent moral modernist views regarding abortion from supplanting moral traditional ones. Of the eight groups filing briefs in both, the majority are

¹²⁸ Seventy-seven amici are represented on briefs in support of the parties. An additional 29 amici were parties to briefs that supported neither party.

moral traditionalist organizations and a majority of these are either Catholic or Evangelical related organizations. Demonstrating once again that culture war groups are specialized, only one group—the American Center for Law and Justice (ACLJ)—filed briefs in these cases and in *DC v. Heller* (gun rights) and *Lawrence v. Texas* (gay rights). As noted in chapter 2, ACLJ has fashioned itself as a conservative ACLU and it has one of the highest success rates of any group regularly involved in Supreme Court litigation. The Family Research council, an evangelical group, filed briefs in these cases and in *Lawrence*, opposing abortion and homosexuality. The Rutherford Institute filed briefs in these cases and *Heller*. Its positions may appropriately be described as libertarian. In *Casey*, it addressed on spousal notification, arguing for the rights of potential fathers. In *Heller* and *Hobby Lobby*, it argued against government regulation of guns and health plans, respectively. The Rutherford Institute’s briefs stand as evidence that cultural battles are not fought only by religious traditionalists and religious modernists.

Table 6.2
Respondent Amici

67 Catholic Theologians and Ethicists	Pacific Legal Foundation
9 Academic Institutions	Professor Emeritus of Law Charles E. Rice
38 Protestant Theologians	Reproductive Research Audit
ACLJ	Rutherford Institute
American Freedom Law Center	John A. Ryan Institute for Catholic Social Thought
Association of American Physicians and Surgeons	Pennsylvania State Senators
Beverly LaHaye Institute	State of Oklahoma
Breast Cancer Prevention Institute	States of Michigan, Ohio, and 18 Other States
C12 Group	Texas Black Americans for Life
Catholic Medical Association	Thomas More Law Center
Cato Institute	United States Conference of Catholic Bishops
Center for Constitutional Jurisprudence	Various US Democratic Senators
Christian Booksellers Association	Various US Republican Senators and Representatives
Christian Legal Society	Westminster Theological Seminary
Church of the Lukumi Babalu Aye	Women Speak for Themselves
Constitutional Law Scholars	Women's Public Policy Groups
Council for Christian Colleges & Universities	
David Boyle	
Democrats for Life of America	
Drury Development Corporation	
Eagle Forum Education & Legal Defense Fund	
Electric Mirror	
Ethics and Public Policy Center	
Family Research Council	
Foundation for Moral Law	
Freedom X	
Hon. Daniel H. Branch	
Independent Women's Forum	
International Conference of Evangelical Chaplain Endorsers	
J.E. Dunn Construction Group	
Judicial Education Project	
Judicial Watch	
Knights of Columbus	
Liberty Institute	
Liberty University	
Liberty, Life, and Law Foundation	
Massachusetts Citizens for Life	
Members of Congress	
National Association of Evangelicals	

Table 6.3
Petitioner Amici

91 US House Members
American College of Obstetricians and Gynecologists
American Jewish Committee
Julian Bond/ACLU
Brennan Center for Justice
Center for Inquiry
Church-State Scholars
Constitutional Accountability Center
Corporate and Criminal Law Professors
Foreign and Comparative Law Experts
Freedom from Religion Foundation
Guttmacher Institute
Jewish Social Policy Action Network
Lambda Legal Defense and Education Fund
National Health Law Program
National League of Cities
National Women's Law Center and Sixty-Eight Other Organizations
Ovarian Cancer National Alliance and its Partner Members
Religious Organizations
U.S. Women's Chamber of Commerce
Various States
Various Senators

Table 6.4
Organizations Filing Briefs in *Hobby Lobby* and *Casey*

American Center for Law and Justice
American College of Obstetricians and Gynecologists
Family Research Council
Guttmacher Institute
Knights of Columbus
National Association of Evangelicals
Rutherford Institute
Texas Black Americans for Life

With respect to the nature of arguments advanced, and as noted in the preceding discussion, the parties' briefs focused on a straightforward application of the RFRA standards to the contraception mandate. The arguments of the parties are primarily doctrinal. Constrained by a doctrinal "test," the parties do not employ the full range of argument modalities. The same is not true for amici. While still constrained by the RFRA standards and while most (but not all) address the key doctrinal concepts (i.e. personhood, substantial burdens, compelling interests, least restrictive alternatives), amici, and especially respondent amici, rely much more on other argument modalities than the parties.

As charts 6.1 and 6.2 demonstrate, amici for the respondent rely upon all eight forms of argument. Amici supporting the government rely on only six. Noticeably absent from petitioner amici arguments are moral ones. This replicates the pattern identified in the previous chapter. Those supporting abortion rights do not tend to employ moral arguments.

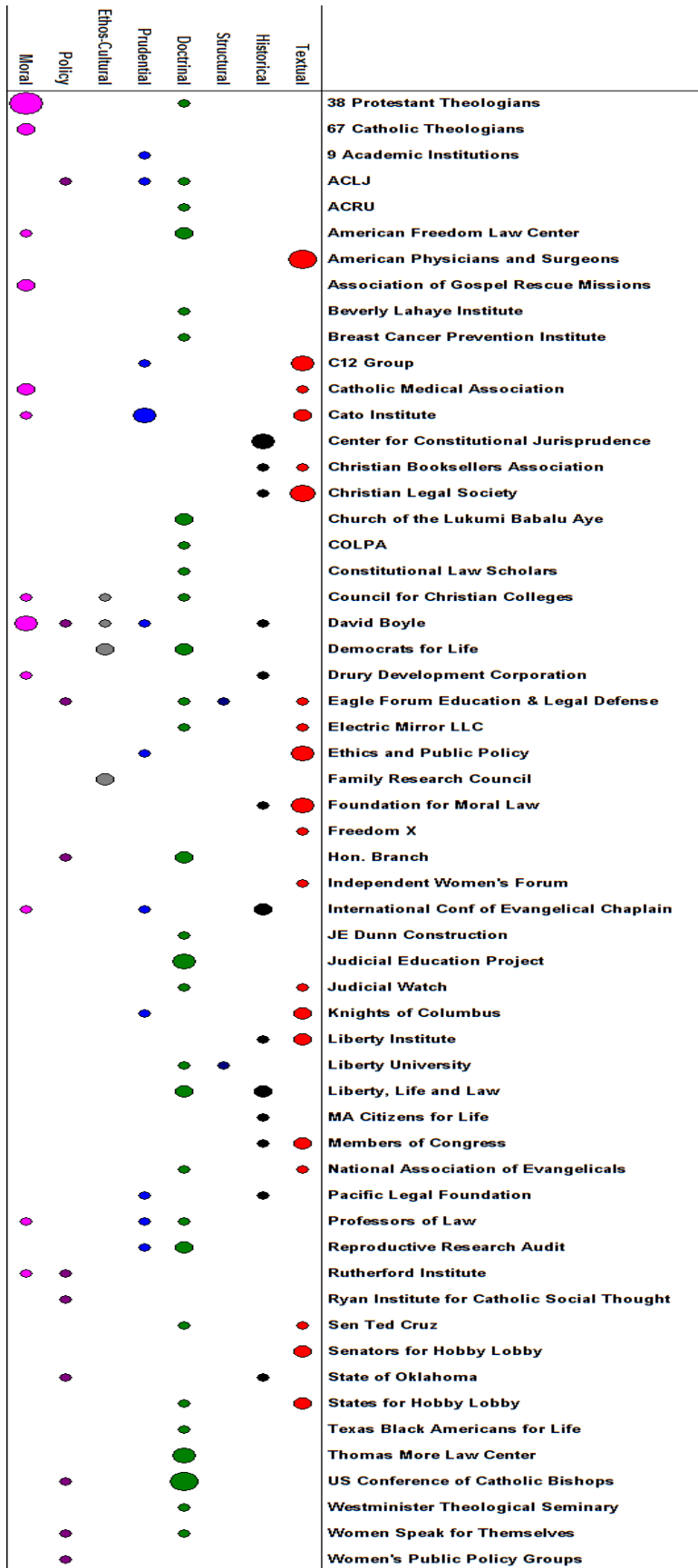
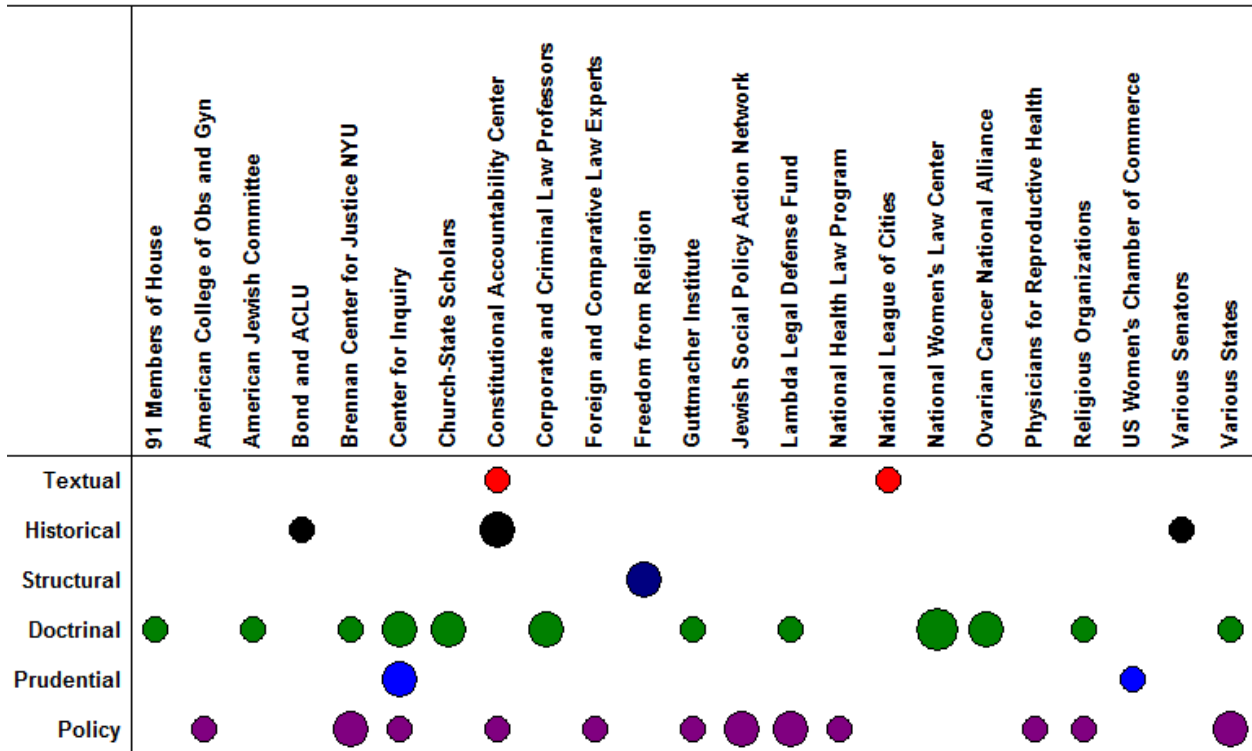


Chart 6.1
Respondent Amici - Modalities

**Chart 6.2
Petitioner Amici - Modalities**



The smaller number of amici supporting the government reinforce the arguments made by the government arguing that Hobby Lobby and the Greens do not fall within the protections afforded by RFRA, and in the alternative, that even if they do, the government has met its burden in defending the mandate. Various petitioner amici argue that corporations are not “persons” for purposes of the Free Exercise Clause. The concept of “personhood” for corporations is a “legal fiction” appropriate in certain circumstances (e.g. for determining whether a corporation can sue or be sued), it is not appropriate in free exercise analysis. According to these amici, personhood has always been a personal liberty and not a corporate one. Moreover, they point out that in the history of free exercise jurisprudence, the Court has never determined that corporations can “exercise” religion. (Constitutional Accountability Center (CAC); US Women’s Chamber of

Commerce (USWCC)) As the CAC puts it, businesses “lack the basic human capacities—reason, dignity, and conscience—at the core of religious belief and the free exercise right.”

(CAC Brief at 2.)¹²⁹

Petitioner amici respond with a variety of doctrinal, historical, and ethno-cultural arguments. The Center for Constitutional Jurisprudence (CCJ) writes:

People of faith do not leave their religion at the worship-house door. As the Founders understood, they live their religion in their daily civic life including in the manner in which they run their business. Historical practice demonstrates that the First Amendment’s protection of religious liberty was not intended to be confined to individual activities inside a house of worship. It was meant to protect individuals and groups in all aspects of their daily lives. (CCJ Brief at 9.)

This same point is echoed by Christian Booksellers, Eagle Forum, Family Research Council, the International Conference of Chaplains, Liberty Institute and the Liberty, Life and Law Foundation. The brief by 38 Protestant Theologians (“Theologians”) asserts that an individual’s vocation is “ordained by God” and thus, one must practice one’s vocation in accordance with the commands of God. (Theologians brief at x)

¹²⁹ Religion is often defined in terms of the three “B’s”: believing, belonging and behaving. See Modercai M. Kaplan, *The Future of the American Jew* (New York: Macmillan, 1948). See also, Richard Rice, *Believing, Behaving, Belonging: Finding New Love for the Church* (Roseville, CA: The Association of Adventist Forum, 2002.) As numerous amici point out, it is not easy to conceptualize how a corporation would “believe.” How is a court to determine a corporation’s beliefs? By polling the managers? Through a vote of the shareholders? Even in a closely held corporation, the “owners” might have different sincerely held beliefs (or differ in their degree of “sincerity.” Hobby Lobby and Mardel may be exceptional cases of uniformity of owners’ beliefs. Respondent amici respond by noting that the Court has found that corporations can “speak” and such speech is protected under the First Amendment. If a corporation can speak, then it must also be able to believe, otherwise how would it determine what to say? The other B’s are no less problematic or contentious. Petitioner amici define behaving in terms of participation in religious rituals. Respondents counter that this is too narrow. Religious behaving doesn’t just occur in religious settings. True religious behavior is a 24 hour, seven day a week requirement. Finally, there is the question of belonging. Neither petitioner nor respondent amici directly address this point, but it is possible to infer their positions from their positions on the other “B’s.” While petitioner amici would point out that a corporation can’t belong to a church, synagogue or other religious organization, respondent amici no doubt would argue that the belonging occurs within the corporation. The corporation is the religious entity. Of course, this may prove too much. May a corporation legally condition employment on religious belief in the same way that a church can?

The Council for Christian Colleges and Universities (“Council”) takes the historical argument and spins it into a larger ethno-cultural argument:

The American experience demonstrates that for-profit corporations act based on a variety of motives, including the desire to maximize profits, to advance social issues, to exercise the creativity of the entrepreneur and employees, to promote political causes, and to follow religious conviction. The Court has never conditioned a corporation’s constitutional rights on whether the entity seeks profits. (Council Brief at 10.)

Lambda Legal Defense (“Lambda”), writing in support of the government takes the argument one step further. Assuming *arguendo* that corporations act on a variety of motives (or at least that the owners or managers do), Lambda notes that corporate entities do not hold religious beliefs and do not engage in worship. Hobby Lobby might be a corporate “person” but it does not “exercise” religion.¹³⁰ Since it does not and cannot exercise religion, there is nothing to be “burdened.”

The parties also joust on the issue of what constitutes a “substantial” burden. Some petitioner amici even suggest that Hobby Lobby is not burdened at all. In its brief, respondent argued in a rather conclusory fashion that abandoning a sincerely held religious belief is “substantial and that the alternative, paying a multi-million dollar fine is no less “substantial.” As noted earlier, respondent pointed only to the absolute amount of the fine and did not place the fine in context—either in the context of the amount paid for health insurance, the amount of tax benefit enjoyed by the corporation as a result of providing insurance or the amount of corporate profits. Somewhat surprisingly, respondent amici spend almost no time on this issue. Like the respondent, the American Freedom Law Center (AFLC) argues that the mandate presents Hobby Lobby with a “Hobson’s choice:” Hobby Lobby can violate its religious principles or suffer

¹³⁰ Lambda writes: “the religious exercise claims here must fail because the payment of money by a business for employee health insurance in compliance with a public health rule is not exercise of religion.” (Lambda Brief at 5.) But this seems to miss the point. Hobby Lobby is not arguing that the payment of the insurance premium is an exercise of religion, but rather that it is a burden on the corporation’s sincerely held religious beliefs.

“crippling financial penalties.” (AFLC Brief at 6-7) It does not explain how or why the penalties would be “crippling.”¹³¹ The brief by 67 Catholic Theologians does not even address the penalty issue. It states starkly that the mandate requires cooperation is “grave moral wrongs” requiring employers to “cooperate in the destruction of human life.” (Catholic Theologians brief at 3.) The AFLC state that the mandate “directly and materially affect[s] a person’s soul and thus eternal salvation. (AFLC brief at 3.)

For their part, petitioner amici respond by arguing that the mandate is not a “burden” on Hobby Lobby as well as by honing the government’s argument that the burden is too attenuated to be substantial. The Coalition of Religious Organizations argues that there is no burden on Hobby Lobby since the mandate applies to an employee benefit. In their view, providing insurance is like paying an employee a salary. The employee decides how to utilize his or her salary and how to utilize his or her insurance benefit. Hobby Lobby had conceded that it did not attempt to restrict employee’s choice of birth control provided that they employee used her own money to pay for the birth control. The Religious Organizations say the same principle should apply to an insurance benefit. The mandate does not require Hobby Lobby to purchase the contested birth control methods themselves only to assure that its insurance covers certain benefits. Thus, there is no burden on the corporation because it is the employee that is making the relevant decision. In this view, the mandate is similar to a minimum wage requirement. It requires no “decision” by an employer. It simply regulates the nature of an employee benefit.

Similarly, the Center for Inquiry argues that any burden is also “contingent.” The thing that Hobby Lobby complains of—paying for birth control methods that it disagrees with—may

¹³¹ As will be seen *infra*, the Court also fails to put the amount of penalties in any kind of financial context. This is in stark contrast to the Court’s analysis in striking down the ACA’s Medicaid “mandate”—the requirement that states expand Medicaid eligibility or lose federal funds. (*See NFIB v. Sebelius* at 29-30) There the Court looked not only at the amount of federal funds at issue but also how these compared to overall state expenditures.

never happen. If no female employee of Hobby Lobby chooses to use one of the four contested birth control methods, Hobby Lobby has not been burdened in any way. Similarly, if only a few use one of the four contraceptive methods—a more likely alternative—the burden on Hobby Lobby is still insubstantial, even if one grants that Hobby Lobby has somehow paid for the contraceptives rather than just insurance coverage. In short, there is a fundamental disagreement between the parties and their respective amici as to the nature of insurance. Is Hobby Lobby, in paying for insurance, paying for birth control or not?¹³² In the end, there is probably no way to know the answer to this question. Insurance premiums are based upon “loss ratios” which include claims for products and services under the plan, including covered birth control products. But that said, there is almost no way to know whether, in the case of Hobby Lobby, inclusion or exclusion of the birth control methods would increase or decrease their premiums.

One final matter of contention: RFRA requires that a belief be sincerely held but it does not permit the Court to look behind the sincerity of that belief. In most issues of belief or behavior, this command is not problematic and in fact of no import. Most beliefs are in fact just that—beliefs and not factual assertions. For example, some Catholics believe that through the miracle of transubstantiation¹³³ they are actually eating and drinking the blood of Christ when they take communion. Some may assert this as a matter of fact, but most probably assert that this belief is a question of faith and not subject to scientific evaluation. Moreover, this is not the

¹³² Writing on behalf of respondents, the Professors of Law state that the employer is required “to provide a fund for covered employees to pay specifically for abortifacients.” (Professors brief at 7.) As a factual matter, this seems incorrect. Employers are not paying into a “contraceptive fund.” They are paying for insurance that provides whatever covered services are requested by beneficiaries. Nonetheless, the Professors analogize the mandate to paying into a “Hitman Compensation Fund” that allows employees to withdraw money specifically to pay hired killers. (*Id.*) To restate the point, insurance does not allow a beneficiary to “withdraw” any funds from the insurer. The Professors’ analogy would be correct only if “hitman services” were a covered benefit of the employee’s insurance policy. The analogy is nonetheless telling in its equation of hitmen and abortion physicians.

¹³³ According to the doctrine of transubstantiation, the communion host and wine actually become the body and blood of Christ even though they do not change in appearance. (See Oxford Dictionary of the Christian Church, Third Edition Revised, 2005.) The doctrine is rejected by most Protestants and according to a 1993 Gallup Poll only 30% of Catholics believe the doctrine. (See Nichols, 2005.)

type of claim that even non-believers are likely to suggest the Court should evaluate factually in reviewing free exercise challenges. If a government were to prohibit the consumption of wine, a religious claim would not rise or fall on whether transubstantiation is factually accurate. Rather, it would depend simply upon whether the belief is sincerely held.

Similarly, in *Hobby Lobby*, respondents asserted a sincerely held belief that not only is abortion a sin (a claim that is not subject to scientific evaluation) but also that the four contraceptives are abortifacients. They further asserted that since this belief was “sincerely held” the Court could not, consistent with RFRA, evaluate the factual accuracy of the belief. Petitioner amici responded that whether drugs or devices are abortifacients is a scientific not a religious question. A sincere belief that a contraceptive is an abortifacient is irrelevant. A contraceptive is either an abortifacient or it is not. Believing that it is does not make it so. “Contraceptives that prevent fertilization from occurring, or even prevent implantation, are simply not abortifacients regardless of an individual’s personal or religious beliefs or mores.” (Physicians for Reproductive Health brief at 10.) Thus, according to Physicians for Reproductive Health, for a belief to be protected by RFRA, it must either be a view that cannot be factually evaluated or it must be factually “true.”¹³⁴ An untrue belief is not protected by RFRA. As we will see, the Court declined the invitation of petitioner amici to look at the factual accuracy of respondent’s beliefs.¹³⁵

¹³⁴ The issue of the nature of the contraceptive methods is not as clear-cut as the Physicians suggest. There are concessions in other briefs that the four methods “may” interfere with an implanted fertilized ovum.

¹³⁵ Respondent amici Professors of Law claim that the Court is “incompetent to decide whether the plaintiffs have correctly concluded that complying with the HHS mandate would violate their faith.” (Professors of Law brief at 4.) The professors do not explain why the Court would be “incompetent.” Courts regularly make factual determinations. If petitioner amici are correct, what is required is a factual determination not a judgment regarding the requirements of respondent’s faith.

The disagreement between the parties and amici with respect to the nature of the contraceptives is also revealed in the difference of opinion over when the interest advanced by the government is “compelling.” The arguments take some interesting twists and turns.

Just as the government did, petitioner amici assert that the availability of contraception at no cost to women serves a compelling government interest in promoting women’s health and the equality of women. For example, according to the National Women’s Law Center (NWLC), “[c]ontraception is highly effective at reducing unintended pregnancy, which, as countless studies have shown and experts agree, can have severe negative health consequences for both women and children.” (NWLC brief at 4.) Similarly, the Guttmacher Institute argues that “[r]emoving barriers to the full range of contraceptive options improves the health of women and families, reduces the need for abortion, and promotes the advancement of women and society.” (Guttmacher Institute brief at 3) The Ovarian Cancer National Alliance (OCNA) is even more specific. Contraception reduces cancer: “[c]ontraception] reduce[s] a woman’s right of developing ovarian and other gynecologic cancers.” (OCNA brief at 3.) Finally, respondent and respondent amici suggest that contraception is freely available and thus any government interest in making it more available cannot be compelling. The Guttmacher Institute responds by saying that such an assertion is flatly wrong: “It fails to recognize the vastly different effectiveness and cost of different forms of contraception, the substantial degree to which cost determines which contraceptive methods are actually used, the health and social factors that affect a woman’s method choice, and the resulting consequences for women’s health, family well-being, and risk of unintended pregnancy and abortion.” (Guttmacher brief at 4.)

Respondent amici reject all of these claims. They attack them in predictable but also imaginative ways. Like the respondent, they claim that the interest is too “general and

unparticularized.” The asserted interest is “limitless” that is to say, it would justify anything. (Judicial Education Project (JEC) at 3.) The Breast Cancer Prevention Institute (BCPI) challenges the evidence upon which the government interest relies. According to BCPI, the government relied upon “a biased and incomplete Institute of Medicine report.” (BCPI brief at 5.) They also deny the assertions of the Ovarian Cancer National Alliance. Contraception does not reduce cancer. In fact, BCPI says, contraceptive drugs and devices increase risks of cancer and other serious illnesses.” (*Id.*)¹³⁶

The Church of Lukumi Babalu¹³⁷ takes petitioner amici’s argument regarding burden and turns it back on petitioner. The Center for Inquiry and others had argued that the mandate could not be a burden on respondent because women might not actually choose to use any of the four contested contraceptives. Accepting this premise, Lukumi Babalu argues that “[i]f the services go unused, requiring employers to pay for these plans [i.e. plans that must include coverage of the unused contraceptives] does not further the purpose of improving women’s health.” (Lukumi brief at 36-7) In order words, if the burden is contingent so is the compelling interest.

¹³⁶ This is a common claim of opponents of abortion. Factually, it is dubious. According to the National Cancer Institute (NCI), “a number of studies suggest that current use of oral contraceptives (birth control pills) appears to slightly increase the risk of breast cancer, especially among younger women. However, the risk level goes back to normal 10 years or more after discontinuing oral contraceptive use.” In addition, NCI notes that “[w]omen who use oral contraceptives have reduced risks of ovarian and endometrial cancer. This protective effect increases with the length of time oral contraceptives are used.”

¹³⁷ *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, is a 1993 case involving the Church of Lukumi Babalu (“Church”), a religion that sometimes uses animal sacrifice in its rituals. After learning that the Church was planning to relocate to their community, the city council of Hialeah, Florida passed an ordinance forbidding the “unnecessar[y]” killing of “an animal in a public or private ritual or ceremony not for the primary purpose of food consumption”. The United States Supreme Court found the ordinance unconstitutional.

Finally, many of respondent amici argue that the mandate is not and cannot be compelling because the government has so generously granted exemptions.¹³⁸ Simply put, if the mandate is so important, everyone should be subject to it.

Unlike petitioner amici, respondent amici raise a variety of other types of objections to the mandate—including structural, policy, and moral ones. For example, the Eagle Forum argues that HHSC exceeded their authority under the ACA. Since the mandate is nowhere explicitly authorized by the ACA, HHS cannot create it: “[F]ederal agencies cannot make law in their view of the general welfare without congressional authorization and findings.” (Eagle Forum brief at 8.) The brief by the Women’s Public Policy Groups (WPPG) decries HHSC’s use of the ACA to promote its abortion agenda.¹³⁹ “The Mandate is a socially reckless policy that increases the national division surrounding abortion.” (WPPG brief at 2) The WPPG brief goes on: “By forcing conscientiously opposed individuals and organizations to participate in abortion, the Mandate transforms abortion culture wars into abortion conscience wars. . . .” (*Id.*)¹⁴⁰

Not surprisingly the petitioner and respondent amici also differ in their prudential conclusions. Petitioner amici charge that a decision in favor of Hobby Lobby will lead to a flood of litigation. In their view, all laws of general applicability are subject to challenge.

¹³⁸ The Church of Lukumi Babalu takes this argument a step further. It claims that the mandate is not “generally applicable” but is in fact directed at religious entities because there are so many secular exemptions (e.g. for small businesses.) According to Lukumi Babalu, the mandate “accomplishes a religious gerrymander.” (Brief at 36) While the Church is correct that there are numerous exemptions for secular businesses, they fail to take cognizance of the numerous exemptions for religious organizations.

¹³⁹ See also, Alvare’ (2013). Alvare’ describes HHSC’s action even more broadly as the “contraception project” and says that the mandate is designed to “render less visible the last and still visible objectors” to that project. (Alvare’ at 435.)

¹⁴⁰ The brief borrows this terminology from an article by Thomas M. Messner, “From Culture Wars to Conscience Wars: Emerging Threats to Conscience,” Heritage Foundation (Apr. 13, 2011), <http://www.heritage.org/research/reports/2011/04/from-culture-wars-to-conscience-wars-emerging-threats-to-conscience>. However, neither the brief nor the article explain the difference between a culture war and a conscience war. Presumably a culture war is based upon differing dictates of conscience, thus a culture war *is* a conscience war. Hunter, of course, would go further and say that differing dictates of conscience are based upon differing understanding of “authority” and so a culture war is not just a conscience war but something more.

Respondents of course disagree. As the Ethics and Public Policy Center (EPPC) says:

“Upholding the claims in this case will not result in widespread corporate immunity from federal laws, because the number of for-profit corporations that will be able to demonstrate a corporate adherence to a religious belief that is sincerely held is limited and because various laws, even as applied to such corporations, will survive RFRA’s scrutiny.” (EPPC brief at 4-5.)

One final point regarding the disagreement between the parties and their amici. Members of Congress filed briefs on behalf of both petitioners and respondents. They also reached disparate conclusions—as to the intent of Congress in passing RFRA and the ACA. For the respondent amici members of Congress:

“RFRA was enacted with virtually universal support from across the political and ideological spectrum. Consistent with its tradition of protecting religious liberty, Congress intentionally drafted the statute to have broad and sweeping effect.” (Members brief at 3)

Not surprisingly, the briefs by Members of Congress in support of the government¹⁴¹ reach a very different conclusion. In their view, Congress did not intend RFRA to extend free-exercise rights to secular, for-profit corporations and Congress did not intend to subject the ACA to RFRA.¹⁴²

¹⁴¹ There are two briefs by Members of the House, one in support of the government and the other in support of Hobby Lobby. There is also a brief by Senators supporting the government. Demonstrating the partisan divide over abortion, all but one of the Senators supporting the government are Democrats. The one lone Republican is former Senator Brown from the very Democratic state of Massachusetts. All the House members supporting the government are Democrats. Similarly, of the approximately 90 House members supporting Hobby Lobby, only two are Democrats.

¹⁴² Several parties also raise constitutional objections to RFRA. The Freedom from Religion Foundation (FFR) argues that RFRA violates separation of powers principles. RFRA is an “overt attempt to takeover (sic.) this Court’s role in interpreting the Constitution.” (FFR brief at 10.) FFR also believes that the Act violates the principle of neutrality between religion and non-religion: “Congress shoved the Court aside and handed believers the most extreme religious liberty regime ever in place in the United States.” (*Id.* at 10-11.) Others argue that granting Hobby Lobby’s request for an exemption would itself be a constitutional violation. Exempting Hobby Lobby and for-profit corporations would constitute an “establishment” of religion in violation of the Establishment Clause. (*See* briefs for Center for Inquiry, Church-State Scholars, and Lambda Legal Foundation.) The amici do not explain

Having disagreed about virtually everything in their briefs, the parties do not disagree about whether there is a “least restrictive means” of the government furthering its interest. They do not disagree, however, only because no amici raises this issue. Either amici thought that the answer to this question was obvious or they were content to rely on the arguments of the parties.

The Court’s Decision

In a 5-4 decision, Justice Alito writing for a divided Court concludes that a closely-held for-profit company can assert rights under RFRA and in the case at hand, Hobby Lobby’s free exercise rights were impermissibly burdened by the mandate.

With respect to the issue of RFRA’s applicability to for-profit corporations, Justice Alito writes: “The plain terms of RFRA make it *perfectly clear* that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.” (*Hobby Lobby* at 5 (emphasis added))¹⁴³ Justice Alito takes as a given respondents’ assertion that they have a “sincerely held belief that the contested contraceptives violate their religious beliefs.” (*Id.*) “The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients.” (*Id.*) The majority thus not only concedes that respondents believe that abortion is religiously “wrong” (a rather unremarkable concession), the

why all religious exemptions do not run afoul of the Establishment Clause. *See also*, Gedicks and Van Tassell (2014), “RFRA Exemption from the Constitution Mandate: An Unconstitutional Accommodation of Religion.”

¹⁴³ A first principle of legal analysis is that when someone, be it lawyer or judge, says that something is “perfectly clear,” it is in fact not clear at all. The Court notes that these cases (i.e. *Hobby Lobby* and *Conestoga*) do not involve public traded corporations, “and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims.” (*Id.* at 18.) This may be true but it does not address the question of corporations that are not closely held but are also not “corporate giants.” There is certainly the possibility that a publicly traded corporation could be under the majority control of a single stockholder who wished to assert a RFRA claim in defiance of minority stockholders.

majority also grants respondent's claims that their religious beliefs inform their specific views as to which forms of contraception constitute abortion. As noted earlier, the majority rejects the invitation to determine whether specific beliefs regarding specific contraception methods are scientifically sound; it is enough that a claimant sincerely believes that the contraceptives are abortifacients.

Having determined that the religious beliefs regarding the four contraceptive methods are sincere, Justice Alito next concludes that the consequences of non-compliance with the mandate is substantial. Noting that the fines on Hobby Lobby could be \$475 million, Justice Alito writes: "If these consequences do not amount to a substantial burden, it is hard to see what would." (*Id.* at 6.) To state the obvious, this is not an argument, it is a conclusion. The amount of potential fines is clearly significant--\$475 million dollars is a large amount—but Justice Alito does not put this amount into any kind of context. The Court does not discuss how this amount compares to the overall tax benefit Hobby Lobby receives from providing insurance coverage. And the Court dismisses the suggestion that this amount is less than the amount Hobby Lobby actually spends on health care coverage for its employees. Justice Alito says that the government had failed to adequately enter information on this point into the record and so the Court would not consider the issue.¹⁴⁴ Needless to say, the failure to actually understand the impact of the fines on Hobby Lobby undermines its claim that the burden on Hobby Lobby is obvious.

The Court next turns to the issue of "compelling state interest." Ignoring the complaints of respondents and respondent amici, it "assume[s] that the HHS regulations satisfy this requirement." (*Id.* at 6.) But Justice Alito only briefly pauses on this point, because he then

¹⁴⁴ This argument is actually raised by petitioner amici Religious Organizations. The Court notes that the government could have developed this argument but did not so, and the Court notes, "[w]e do not generally entertain argument that were not raised below and are not advanced . . . by either party." (*Id.* at 20, cites omitted.)

quickly concludes that the government had “a least restrictive alternative” to the mandate. Justice Alito says that this conclusion is “plain.” (*Id.*) “There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.” (*Id.*) Indeed, HHS has implemented such a system. Justice Alito’s argument is worth quoting at length:

HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. . . . Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit companies have similar objections. (*Id.*)

The mandate fails under RFRA because Congress, or at least HHS, could have accommodated closely-held for profit companies in the same way that it accommodated religious nonprofit corporations. The crux of the matter thus seems to be that since HHS created accommodations for some, it must accommodate all who claim a religious objection to the mandate.

In the Court’s analysis, the question of the scope of RFRA (*i.e.* does it cover for-profit corporations) and the “sincerely held beliefs” test become of paramount importance. If there is any accommodation of religious entities (as there arguably must be under RFRA), and if a closely-held for-profit corporation is also guaranteed protection under RFRA, as the Court says they are, then the determinative legal issue is the question of “sincerely held belief.” If a protected entity asserts a sincerely held religious belief, even if that belief is factually unsound, that would seem to be the end of any analysis. The claimant wins.¹⁴⁵

¹⁴⁵ The Court says that the Court “has no business addressing . . . whether the religious belief asserted in a RFRA case is reasonable. . . .” (*Id.* at 21) The unwillingness to look behind the nature of the “sincerely held belief” raises interesting future hypothetical cases What if a for-profit company complained that the mandate to provide any

Notwithstanding the apparent broad implications of the Court’s decision, Justice Alito attempts to cabin and confine it. According to Justice Alito and in response to complaints by Justice Ginsberg in dissent, the decision does not allow for-profit corporations to opt out of any law they deem incompatible with their sincerely held beliefs, nor do corporations have “free rein to take steps that impose ‘disadvantages . . . on others. . .’” (*Id.*) If this is true, it is only true because future cases may find the burden on claimants less plain and less restrictive alternatives less “obvious.”

In dissent, Justice Ginsberg takes the majority to task for almost the entirety of their analysis. (She does believe that the mandate serves a compelling state interest and so she takes no issue with the majority assumption of such an interest.) Saying that the decision is “of startling breadth,” she suggests that the Court’s decision allows commercial enterprises to opt out of any law save only tax laws. (*Id.* at 30) She describes the Court’s interpretation of RFRA as “radical” and predicts that it will introduce “havoc” into free exercise jurisprudence.

The dissent’s major disagreement is with respect to the scope and application of RFRA. The majority and dissent look at the same statute and the same legislative histories and then reach diametrically opposed conclusions as to how RFRA is to be interpreted and applied. While Justice Alito concluded that the “plain language” of RFRA makes it “perfectly clear” that RFRA applies to for-profit corporations, Justice Ginsberg reasons that this conclusion is not only not clear but wrong. Noting that Congress in adopting RFRA meant to restore pre-Smith jurisprudence and that prior to Smith the Court had never granted free exercise protection to

contraceptive violated their sincerely held beliefs? Further assume that HHS had made no accommodation for the refusal to cover any contraceptives. Does *Hobby Lobby* require HHS to do so? Or suppose that state law prohibited carrying a gun into a place of worship, the type of law that would seem to be constitutional under *Heller*? Could a member of a church object on the grounds that he or she sincerely believes that God wants each person to be armed at all times? What if church leadership or the congregation rejects this view?

corporations, Justice Ginsberg finds it clear that Congress did not intend “to expand the class of entities qualified to mount religious accommodation claims. . .” (*Id.* at 34.) In the view of the dissenting justices, there is no need to apply the RFRA test since Hobby Lobby and the other companies cannot claim the protection of RFRA.

The dissent and the majority also tussle over the meaning and proper application of the least restrictive means test. The majority suggest that the RFRA least restrictive means test is more stringent than the version of the test that the Court used pre-Smith. The dissent disagrees and argues that Congress simply restored the pre-Smith version of the test. Imbedded in this disagreement over legislative history is a disagreement over the nature of the test itself. The majority describes the test as “exceptionally demanding.” (*Id.* at 24) The majority applies it in this manner, easily finding that Congress and HHS had a variety of alternatives to the mandate that would still adequately serve the government’s interest. Justice Ginsberg and the dissenting Justices disagree. In their view, the majority’s “let the government pay” approach does not promote the government’s compelling interests to the same extent as does the mandate. The majority’s approach impedes women’s access to contraceptives because it would require women to “take steps to learn about, and to sign up for” a new government program. Similarly, the dissent rejects the majority’s suggestion that existing accommodations of religious nonprofit organizations simply be expanded to cover for-profit religious organizations. While not directly addressing the argument that this would be a “least restrictive alternative,” Justice Ginsberg rejects such “special solicitude” for “commercial enterprises comprising employees of diverse faith.” (*Id.* at 42.) Justice Ginsberg concludes: “In sum, in view of what Congress sought to accomplish, i.e. comprehensive preventive care for women furnished through employer-based

health plans, none of the proffered alternatives would satisfactorily serve the compelling interest to which Congress responded.” (*Id.* at 43.)

Putting to the side the merits of the majority and dissenting opinions’ RFRA analysis, there is no small irony in their concluding positions. The more liberal members of the Court, the ones most often accused of judicial activism, defer to Congress and defend a free-market based approach to make contraceptives more widely available. The conservatives, defending a position that the conservatives on the Court had rejected in *Smith*, suggest that a “new” government program is necessary to protect religious freedom.

One final point with respect to *Hobby Lobby*—the dissent describes a descent down a “slippery slope” launched by the majority’ decision. The dissent lists what it views as a number of problematic cases—the refusal of a restaurant to serve black patrons based upon religious reasons; the refusal on religious grounds of a health club to hire unmarried, co-habiting adults, fornicators and homosexuals; the refusal of a for-profit photography business to photograph a lesbian couple’s commitment ceremony. (*Id.* at 44.) What about religious objections to blood transfusions, antidepressants, anesthesia, vaccinations, etc.? How is the Court to evaluate such claims and would each claim have to be evaluated on its own applying the compelling interest-least restrictive analysis test? Justice Ginsberg clearly believes that the answer to the preceding question is yes and that because it is yes, the Court “has ventured into a minefield.” (*Id.* at 45.) Unspoken in Justice Ginsberg’s analysis is that in all or at least almost all of the examples listed, there would be a “least restrictive” government alternative that would necessitate constant judicial tinkering in the operation of government programs.

In response, Justice Alito assures everyone that the Court’s holding is “very specific.”

We do not hold . . . that for-profit corporations and other commercial enterprises can ‘opt out of any law . . .’ Nor do we hold . . . that such corporations have free rein to take steps that impose ‘disadvantages . . . on others’ . . . And we certainly do not hold or suggest that “RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have . . . (Id. at 6)

“[O]ur decision . . . is concerned solely with the contraceptive mandate.” (*Id.* at 26.) In short, the decision deals with abortion. Nothing more.¹⁴⁶

The Shape of Cultural Battles to Come

It seems clear that *Hobby Lobby* reflects significant cultural conflict, but what is less clear is what kind of conflict does it represent? The fact that the parties, their amici and the differing factions on the Court are battling over the meaning of a statute somewhat obscures what is exactly at issue. But wrapped up in the legal concepts of compelling governmental interests and least restrictive alternative are cultural disagreements about the proper place of religion in a diverse, multi-cultural society, the importance of contraception, and of course, abortion.

As noted at the beginning of this chapter, Hunter argues that “the definition of religion and the debate over church and state are the principal battlegrounds over which the *procedural dimension* of the culture war is fought” (Hunter 1991, 269, emphasis added) According to Hunter, “what is ultimately at stake [in the culture wars] is the ability to define the rules by which moral conflict of this kind is to be resolved.” (*Id.* at 271.) *Hobby Lobby* appears to be proof of this assertion.

¹⁴⁶ Justice Alito also rejects the dissent’s suggestion that the Court’s decision might protect racial discrimination. Deciding a case not before the Court, Justice Alito writes that “[t]he government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.” (*Id.* at 26.) Interestingly, Justice Alito does not address Justice Ginsberg’s example of discrimination against homosexuals.

The central question posed by *Hobby Lobby* but more specifically, RFRA is that of the role and place of religion in contemporary society. The First Amendment seems to give religion pride of place, that is to say, religion is special. While there are ongoing debates about what exactly the Founders mean in restricting government’s ability to interfere with the free exercise of religion, this much is clear—the Founders singled out religion (as opposed) to conscience for special treatment. *Hobby Lobby* and RFRA wrestle with the nature and scope of that special treatment.

In *Employment Division v. Smith*, the Court downplayed the “special” nature of religion and limited its special treatment. *Smith* and a subsequent case, *Church of Lukumi Babalu, Inc. v. Hialeah*,¹⁴⁷ make clear that government cannot single out religion for special “mistreatment.” Hostility to religion or attempts to regulate religion in the guise of generally applicable statutes do not comport with the First Amendment and will not be allowed. But at the same time, religion will not get special dispensation from generally applicable statutes. This attempt at even handed treatment of religion and non-religion has been characterized as “formal neutrality” and in *Smith* was the result of an evolution in post-WWII First Amendment religion jurisprudence.

As the Court wrestled with how to understand religion, and as the types of religious (and irreligious) belief mushroomed after WWII, the Court sought to establish neutrality between religions and between religion and irreligion. The Free Exercise Clause morphed into a more general conscience clause and objections to government action on both specifically religious grounds and religion-like conscience grounds were treated the same by the Court.¹⁴⁸ In neutrality’s first incarnation, what Gedicks (1998) refers to as “separationism,” government

¹⁴⁷ 508 U.S. 520 (1993).

¹⁴⁸ See *United States v. Seeger*, 380 U.S. 163 (1965), which involved exemption claims under § 6(j) of the Universal Military Training and Service Act of conscientious objectors who did not belong to an orthodox religious sect..

could not burden religious or non-religious Objections based upon a sincerely held belief that is similar in nature to a religious belief will receive the same kind of treatment as specifically religious objections. For example, a person objecting to military service on the basis of conscience will receive the same treatment as a Quaker who objects based upon religious beliefs. This type of evenhandedness, even though it arguably reduces the prominent role of religion, has historically been rather uncontroversial. The Court was also solicitous towards religious minorities. It essentially exempted them from generally applicable laws where it viewed those laws as particularly burdensome on religion. *Yoder* and *Sherbert* are both examples of the Court's protection of religious minorities.

It was the second aspect of separationism that was controversial. At the same time that the Court was protecting religion from "burdens" under the Free Exercise Clause, it interpreted the Establishment Clause broadly to prevent government assistance to religion. For example, government could not provide free textbooks, bus services or other services to religious schools. Government led or sponsored school prayer was an impermissible "establishment. It was this aspect of First Amendment jurisprudence that was controversial—at least among conservatives. The common complaint was that government was hostile to religion.

According to Gedicks, separation neutrality morphed into a second type of neutrality, what he refers to as "benevolent neutrality." (Gedicks 1998, 569) Unlike separationism, under benevolent neutrality, religion must be relieved of burdens, even those that are generally applicable but, in addition, religion may not be deprived of benefits generally available. This form of neutrality has a "heads I win, tails you lose" quality. Benefits and burdens are not treated in like manner for the religious and the irreligious. It is this type of neutrality that is rejected in *Smith*.

Smith replaces “benevolent neutrality” with a more “formal” neutrality. Now burdens and benefits must be shared equitably by the religious and the irreligious. Government can benefit religion at least to the degree that it benefits irreligion. In other words, religious programs cannot be made ineligible for government grant or subsidy programs just because they are religious. But similarly, government actions that “burden” all will not be deemed unconstitutional because they burden religion or the religious along with others. Government action that does not single out religion for mistreatment will be presumed to be valid. As *Smith* demonstrated, under this approach to the First Amendment, government regulation need not even stop at the church door. Impacts on practices that arguably at the core of religious beliefs are constitutional as long as government did not single these out for special mistreatment.

This type of neutrality has more in common with separationism than benevolent neutrality. In a benevolent neutrality regime, religion occupies a special place, allowing special treatment. In a formal neutrality regime, religion is arguably no better and no worse than irreligion. Moreover, under separationism, the complaint was that religion was deprived of benefits received by others. Now the complaint takes a sharper tone—government is now actively burdening religion.

RFRA rejects this formally neutral approach to religion and non-religion and attempts to restore religion to a primary place in the constitutional system. It is not enough that government tolerate and not interfere with religious practice, now religious belief can trump governmental action even if the government action is not directed at religious belief. Under RFRA, those with religious beliefs are in a better position to challenge governmental actions than those who simply disagree with the governmental action on secular grounds. Stated differently, Hobby Lobby can

object to the mandate only because RFRA (or at least the majority's interpretation of RFRA) gives religious objections special status.

In this sense then, *Hobby Lobby* represent a major victory for cultural conservatives in “defining the rules” as to how moral conflict will be constitutionally resolved. Religion is restored to special status. *Hobby Lobby* is a significant symbolic victory, but how significant will it be in practice? Stated differently, is Justice Alito correct that *Hobby Lobby* applies only to a small number of companies and is relevant only to claims regarding abortion? Or is Justice Ginsberg correct? *Hobby Lobby* gives anyone with religious beliefs a green light to attack government programs that they don't like. Does *Hobby Lobby* take one cultural dispute off the table or does it set the table for an expansion of cultural battles?

The answer likely lies somewhere in the middle. As Justice Alito suggests, the issue of race or more precisely the issue of discrimination based upon race is socially and constitutionally settled. It seems more than unlikely that a plaintiff could (or perhaps even would) raise religious objections to statutes preventing racial discrimination.

Similarly, challenges to other health care insurance mandates and regulations—those dealing with vaccines, transfusions, etc.—seem unlikely. They could occur but Justice Alito's opinion suggests that such challenges would get short shrift by the Court.

The big and lurking unsettled question is that of the role of religion vis-à-vis changing cultural views regarding homosexuality. As discussed in chapter 4, the public's views and the Court's views regarding homosexuality and gay marriage have evolved substantially and dramatically over the last ten years. *Bowers v. Hardwick* has been thoroughly rejected and replaced, and the Court has now let stand a variety of Court of Appeals opinions striking down

state laws banning gay marriage. But while it is true that the cultural tide has shifted with respect to gay marriage, it would be premature to say that the issue has been culturally settled in the same way that race has been. Many conservatives, of both religious and more secular varieties, still oppose gay marriage and some also defend discrimination based upon sexual preference. While Justice Ginsberg’s “parade of horrors” may be too long, the case she poses regarding the ability of a for-profit photographer to decline to photograph a lesbian commitment ceremony is not hypothetical.¹⁴⁹

As some conservatives have argued, gays and lesbians are not simply seeking constitutional rights. They are also seeking cultural acceptance. Does *Hobby Lobby* allow those with sincerely held religious beliefs to deny gays and lesbians both constitutional rights and cultural recognition? It is likely that a future case will have to address this question.

Hobby Lobby also supports Hunter’s claim regarding the general positions of moral modernists and moral traditionalists. As noted earlier, amici supporting the mandate fail to make moral arguments. They focus on the text of the statute, legislative history and the reasonableness of government action. Only in passing do any of these amici even raise equality of justice arguments. By contrast, opponents of the mandate regularly assert moral objections to the mandate, objections based in religious belief.¹⁵⁰ Here are Hunter’s moral traditionalists. There is no moral relativism here. Respondent amici ground their objections to the mandate in an objection to abortion that for many is in turn grounded in an “external, definable, and

¹⁴⁹ *Elane Photography v. Vanessa Willock*, 2013, NMSC Docket No. 33,687.

¹⁵⁰ In discussing the mandate Alvarez’ (2013) reveals that the Churches opposing the mandate oppose not just contraception and abortion, but also the secular view of sexuality. “[T]he churches opposing the Mandate hold, and teach women and men to maintain, an understanding of the sacredness of sexual intercourse, and its intrinsic connection with the procreating of new, vulnerable, human life.” She also remarks on the social benefits of this understanding: “[A]mong practicing Catholics and Christians generally, data shows that there is less nonmarital sex (a chief indicator of unintended pregnancy, more marriage, less cohabitation (thus less domestic abuse), and less excess drinking and depression.” (Alvarez’ at 435.)

transcendent authority.” In *Hobby Lobby*, even a cursory review of the amici reveals that moral modernists support strict separation and moral traditionalists support more rather than less accommodation (as Hunter suggests). One of the amicus briefs supporting the mandate goes so far as to argue that accommodation in this case would amount to an “establishment” of religion.

In conclusion, Hunter’s culture war is on full display in *Hobby Lobby*. Religious traditionalists use the First Amendment and freedom of religion to achieve freedom from a government mandate. Religious modernists (and the irreligious) argue that religion should not be a trump card allowing avoidance of generally applicable law. The Court itself is divided along these lines and while the opinion is written in traditional legal terms and girded with traditional legal concepts, it is apparent that there is a divide on the Court as to the proper role of religion in the modern state. Finally, and notwithstanding this divide, the Court (as usual) seems to be striving to not take sides in cultural battles. It expressly limits the scope of its decision and it grounds its decision on legislative judgments. But despite the Court’s cautiousness and its attempt to cabin its decision, there is no reason to believe that this will be the last time that religion will be used to fight this type of cultural battle. *Hobby Lobby* may well be the shape of cultural battles to come.

Chapter 7: The Least Polarized Branch?

In 1991, Hunter posited that a culture war was being waged between moral traditionalists and moral modernists. The moral traditionalists, certain of transcendent truth, were fighting to protect cultural norms under attack by relativistic moral modernists. While Hunter did not say that this was the only form of political warfare, he did suggest that it was central to political conflict. Today, even as some battles seem to be losing cultural predominance (*e.g.* the battle over gay marriage), other cultural battles continue (*e.g.* the battle over abortion).

Of critical import to Hunter's theory was the starring role of the Supreme Court in the culture war. Hunter suggested that the Court was a prominent forum for culture war battles and affected, through its decisions, the size, form, and outcomes of cultural battles. Indeed, he suggested that the Court set the rules for the culture war.

In Chapter 1, I advanced the argument that Hunter's epistemological dichotomy was too simplistic and that as a result, he mischaracterized the nature of cultural warfare. Rather than a culture "war," I posited culture "wars" or perhaps more accurately, a series of interrelated but distinct cultural battles.¹⁵¹ The Court is indeed a site of cultural battles but not the only site and arguably, not the most important one. There is cultural warfare between and among the justices but these stem not just from differing cultural values but also from differing jurisprudential ones. However, these battles do not seem to stem from the kind of epistemological dichotomy suggested by Hunter. No justice on the Court writes with the type of moralistic certainty that characterizes Hunter's moral traditionalists. As noted earlier, this may be an artifact of the nature of legal argument. Appeal to transcendent authority is not an acceptable means of legal

¹⁵¹ In fairness to Hunter, his book is titled *Culture Wars* not *Culture War*. It was reduced to the singular "war" by the popular press.

argumentation. Even appeals to “nature’s law” or “reason rightly understood” are no longer in fashion. For good or ill, everyone, including moral traditionalists, live in a relativistic world. To say this is not to say that every belief or position is as justified as any other, but it does recognize that appeals to transcendent authority to resolve policy disputes tend to be unconvincing.

In Chapter One, I argued for a nuanced understanding of cultural warfare, one that is not simply a contest between moral traditionalists on one side and moral modernists on the other. I urged that an understanding of cultural warriors and their arguments in culture war cases would shed light on the nature of cultural warfare itself. In reaction to Hunter, I offered several propositions:

- There is a culture war at the Court. This is evidenced by the dramatic increase in the number of amici filing briefs in culture war cases over the last fifty years.
- The last fifty years has witnessed a splintering of elite opinion with respect to culture war issues. Among legal elites, this is reflected in the number of briefs filed in culture war cases, the number of organizations filing briefs in these cases and in the rise of the conservative legal movement. There is also a splintering of opinion among the justices themselves. As the outcomes in recent cases make clear, the days of 7-2 decisions (as was the vote in *Roe v. Wade*) are gone.
- Hunter’s typology is too simplistic. The culture war is not simply a war between moral traditionalists and moral modernists. Groups with these perspectives do exist and they do attempt to advance their agenda with the Court. However, most groups filing briefs before the Court do not write in the extreme terms suggested by Hunter. They are not fighting battles over moral certainty versus moral relativity. Rather, they are simply trying to win a case about a specific issue. Moreover, the overwhelming number of organizations are not fighting all cultural battles; they do not file briefs across multiple issue areas. They care about one cultural issue.
- At the same time, many cultural warriors, especially conservative ones, do advance arguments about the “meaning of America.” As the analysis of the briefs

revealed, they do not make only one type of constitutional argument. They use a variety of argument types. Moreover, they tell constitutional stories, stories that place their positions regarding the constitutional issue at hand within the larger context of the meaning of America.

- Finally, the Court has treaded cautiously with respect to culture war issues. Notwithstanding Justice Scalia’s suggestion (on more than one occasion) that the Court has taken sides in the culture war, the Court for the most part has moved slowly, relegating culture war disputes to other arenas and allowing public opinion to resolve culture war disputes.

In this concluding chapter, I will expand upon each of these four points synthesizing the analysis that occurred in the preceding chapters.

Is Cultural Warfare Increasing?

It is important to remember that the title of Hunter’s book is *Culture Wars*—plural, not singular. He does suggest that the major combatants are mono-dimensional—moral traditionalists and moral modernists—but he does not argue that all cultural battles are the same. As discussed in Chapter 2, there are a variety of cultural battles and they are being fought by a variety of cultural warriors.

Most cultural battles occur in state legislatures; some in local legislative bodies and only a few find their way to the Supreme Court. But when they do make their way to the Supreme Court, a growing list of cultural warriors are prepared to engage in battle. As discussed in Chapter 2, there has been an ongoing and significant escalation in the number of groups that file briefs in culture war cases and in the number of briefs filed. (The former number is always larger than the latter since numerous groups join a single brief.) In *Roe*, only twenty-six briefs were filed. By contrast, 80 briefs were filed in *Webster v. Reproductive Health Services* and a

similar number were filed in *Hobby Lobby*. In the first gay rights case, *Bowers v. Hardwick* (1986), only 13 amicus briefs were filed. In *Lawrence v. Texas*, the number of briefs had almost tripled.

The increasing number of briefs is not hard to explain. It reflects the increasing number of interest groups pressing their positions upon the Court. In the cases reviewed in this work, over 600 organizations filed briefs. (See Appendix 2 for a complete list of amici.) Some have existed for the entire period under review. Some are newer. Some organizations filing briefs with the Court during this period no longer exist or have been coopted by other groups. A full mapping of the relationships among amici is beyond the scope of this work, but suffice it to say that the number of groups watching the Supreme Court and filing briefs on behalf of the parties has risen dramatically over the last fifty years.

Teles (2008) has well documented the rise of the conservative legal movement. Reacting to Warren Court decisions (which conservative groups concluded were the product of a liberal legal culture supported by liberal legal organizations and a liberal Court), cultural conservatives consciously set out to develop and fund a coalition of conservative legal organizations. Their goal was nothing short of overturning Warren Court decisions and ushering in a more conservative legal age.

This strategy did not go unnoticed, however. Liberals reacted in kind, and a variety of new liberal legal organizations were founded. While these have not garnered the same attention as the new conservative organizations and they have not had the same success as the new conservative legal organizations, they have bolstered traditional liberal legal organizations such as the ACLU and the Anti-Defamation League.

Recognition in the growth of legal advocacy groups should not be taken as evidence that these groups are fighting one monolithic culture war. As chart 7.1 shows, there is specialization and little overlap among groups fighting cultural battles. To make this point, I have chosen the most significant case in each of the four issue areas under review—*D.C. v. Heller* since it established a constitutional right to own firearms; *Lawrence v. Texas* since it established constitutional protections for homosexuals; *Planned Parenthood v. Casey* since it attracted broad attention from groups seeking to alternatively overturn or bolster *Roe v. Wade*; and finally, *Hobby Lobby*, the face of future cultural court warfare. I initially sorted to identify those groups that filed briefs in both *Casey* and *Hobby Lobby*. Only eight groups filed briefs in both cases. More significantly, only one group—the American Center for Law and Justice—filed briefs in each of the four cases and only two other groups—the Family Research Council and the Rutherford Institute filed briefs in three of the four. Cross-comparisons of other cases (*D.C. v. Heller* and *Hobby Lobby*; *Lawrence v. Texas* and *Casey*; etc.) lead to similar results. The vast majority of amici are specialists. They are not fighting a culture war. They are fighting defined cultural battles.

Chart 7.1
Culture War Specialists

ORGANIZATIONS FILING BRIEFS in <i>HOBBY LOBBY</i> and <i>PLANNED PARENTHOOD v. CASEY</i>	<i>D.C. v. HELLER</i>	LAWRENCE v. TEXAS
American Center for Law and Justice	√	√
American College of OBGYNS		
Family Research Council		√
Guttmacher Institute		
Knights of Columbus		
National Association of Evangelicals		
Rutherford Institute	√	
Texas Black Americans for Life		

In short, a review of the number of briefs and the number of organizations filing amicus briefs leads to one obvious conclusion—there has been a continuous escalation of cultural warfare at the Supreme Court.¹⁵² But these increasing cultural conflagrations do not translate into a monolithic culture war.

¹⁵² This is not to suggest that the expansion has occurred only with respect to cultural issues. While a review of Supreme Court filings in all cases is beyond the scope of this work, it is reasonable to believe that there has been a general proliferation of amicus briefs and numerous legal issues have become more contested (*e.g.* affirmative action, campaign finance, *etc.*) Moreover, if the theory of disintegration of elite opinion is correct, such an expansion of conflict would not be limited to the judicial branch. Indeed, the number of registered lobbyists has mushroomed in recent decades. According to Jeffrey H. Birnbaum, the number of registered lobbyists in Washington more than doubled between 2000 and 2005 alone – from approximately 16,000 in 2000 to more than 34,750. See *The Road to Riches Is Called K Street*, Washington Post Business, June 22, 2005 at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/21/AR2005062101632.html/> accessed January 22, 2015. See also *By the Numbers: Lobbying in America* at <http://thinkprogress.org/politics/2006/01/09/3106/lobbying-in-america/>, which found that amount spent on federal lobbying went from \$1.5 billion in 1999 to \$2.1 billion in just five years. In short, every issue is becoming more contentious.

Cultural Fault Lines

But what is the nature of this cultural warfare? The usual explanation is that Americans are divided by religion. Feldman (2011) has observed that Americans are divided by God into two camps: values evangelicals and legal secularists. Smith (2003) sees a division between those who subscribe to a "Providential" vision of America and those who believe in a "Secular Order" in the country. Bork (2003) argues that ethical relativism will destroy America and only religion can save it. All of these theories of cultural divide are variations on the same theme: it is religion (or the lack of religion) that lies at the heart of cultural divides.

But recall that Hunter saw not just a religiously driven competition over policy issues such as abortion, school prayer, homosexuality and the meaning of Columbus' discovery of America, but also a fight between different moral visions. The differing moral visions do not map neatly onto to the religion-no religion dichotomy. Rather, in Hunter's view they stem from different worldviews regarding moral authority. Moral traditionalists believe in a God-given, transcendent truth. Moral modernists do not. Thus, to take one example, it is not simply that moral traditionalists oppose abortion and cultural progressives support access to abortion. Rather, it is that the warring parties have different views about the nature of truth and authority, differing views that translate into different understandings regarding the meaning of America itself. To moral traditionalists, in order for America to be one nation, it must be "under God" and since (in their view) God has decreed that abortion is wrong, indeed akin to murder, America may not sanction abortion. To cultural progressives, the very phrase "under God" is exclusionary and has no place in a multi-cultural society. Moral modernists often contend that arguments against abortion that rely upon God are not only wrong (*i.e.* there is no clear

prohibition against abortion in the Bible), they are invalid, that is to say, they have no place in political or legal discourse.

Thus, moral traditionalists accuse modern moralists of being “relativists” where “anything goes” and any one view about what is right is as good as any other. In turn, moral modernists accuse moral traditionalists of being stubbornly (and perhaps maliciously) old-fashioned, clinging to a transcendent truth that unsurprisingly favors traditional moral views and traditional power structures. Thus, it is not simply that moral traditionalists believe in conservative moral positions and modernists do not. Rather, it is that cultural traditionalists believe that there are correct, God-given positions regarding such issues as contraception, abortion and gay marriage and modernists do not. (Of course modernists do not need to be cultural relativists; they can (and some do) believe that there are “correct” positions regarding these issues but these positions are not dictated by God.)

No doubt, there are culture warriors of these stereotypical types contesting issues of “God, guns and gays” (and abortion) in Supreme Court filings. But to reduce the culture wars to a battle between the religious and the irreligious or moral modernists versus moral traditionalists is to overly simplify and thus, obscure much of the fighting that attends culture war issues.

As noted earlier, over 600 groups filed briefs in the 38 CQ culture war cases under review. No doubt, members of some of these groups believe in transcendent, God-given truth. Members of other groups are avowedly secular and believe just the opposite. But the more important point is that a larger number have probably not given the issue of “truth” much thought. They are not Hunter’s culture warriors. They are simply culture warriors in a battle over an issue which they define as meaningful to their vision of America. To take but one example (and the easiest one), warriors over gun rights need not appeal to God or a transcendent

view of authority. They need only make the case that guns rights are central to how Americans from the Founding until now define America. If they establish this case, it follows that the right to possess a firearm should be constitutionally protected.

To say this is also to recognize that the question of “transcendent truth” has differing levels of import with respect to different issues. Even moral traditionalists are unlikely to make God-based arguments for the right to own firearms (though this might make such an argument at the more general level—namely, the question of self-defense.) Such God-based, transcendent truth arguments become much more important and frequent, however, when discussing abortion and gay marriage. But even granting this point, there is little evidence of such “transcendent truth” arguments in the briefs reviewed in this work. Only a handful of briefs opposing abortion allude to the moral wrongness of abortion, but the overwhelming majority of briefs rely on precedent, law and tradition as the foundation for their positions. As noted earlier, this may be an artifact of the nature of legal argumentation, but it is interesting that moral traditionalism in the Hunter sense is not on greater display if it is indeed as important as Hunter suggests it is.

A review of the Court’s opinions results in the same conclusion. A review of the decisions discussed in the preceding chapters (and indeed a review of all 38 CQ culture war cases) does not reveal a single “moral traditionalist” decision. There are no appeals to God, transcendent truth or even natural law. Again, this may be a result of what is viewed as “acceptable” legal argumentation. “Legal” decisions are different from religious and moral ones. The entire legal architecture is built on the notion (myth) that justices make decisions based upon “neutral” legal principles¹⁵³ and not their own views regarding morality, religion or justice.¹⁵⁴ In

¹⁵³ See Wechsler cite.

¹⁵⁴ As discussed in Chapter 1, legal realism and critical legal studies have had a profound effect on the legal academy. Thus, Wechsler’s concept of “neutral principles” has not held up well. The overwhelming number of lawyers, legal academics and judges would likely reject the existence of such principles. Notwithstanding this, there

fact, it is conservative legal critics that chastise the Warren Court for inappropriately seeking to determine what was “fair” as opposed to what was constitutional.

The Quest for Constitutional Certainty

At the same time, justices (or at least some of them) are concerned that the Court is not properly constrained, that justices’ preferences too often influence or dictate case outcomes. This is the conservative complaint about the Warren Court and liberal jurisprudence more generally. Judges are “out of control.” They are “making law” instead of interpreting it. Instead of judicial activism, judges should return to a model of “strict construction” of statutes and the Constitution. In the guise of discovering heretofore unknown rights (such as the right to abortion and a right to gay marriage), judges should not legislate their own liberal views.

In seeking to restrain judges and judging, however, conservatives do not appeal to transcendent truth. While undoubtedly some cultural conservatives believe in transcendent truth and also that the Constitution is based upon such self-evident transcendent truths, their solution to the “problem” of judicial activism does not rest upon an appeal to transcendent authority. Theirs are not the claims of moral traditionalists. Rather, their solution is to appeal to a more immediate authority—the authority of the Founders. Enter, Originalism.

Originalism seeks to find constitutional certainty in history and tradition not transcendent morality. Judges may not be able to determine what God thinks with respect to particular constitutional issues but for originalists, judges can determine what the Founders thought about such questions (or alternatively, per originalism 2.0, they can decide what “the People” thought about such questions at the time of the Founding. Originalism provides moral traditionalists the

is still broad agreement that judges should not explicitly ground their opinions on their own moral or religious beliefs.

outcomes they want and the constitutional certainty they crave, without adopting a transcendent moral epistemology that would be a non-starter in constitutional debate.

Of course, the quest for constitutional certainty is not limited to originalists or even to conservatives. Plenty of liberals have attempted to develop grand interpretative theories that limit judicial discretion and promise certainty in constitutional interpretation. Akhil Amar suggests that “intratextualism” or “documentarianism” are the paths to constitutional certainty.¹⁵⁵ Bruce Ackerman grounds his interpretive theory in constitutional “moments,” unique historical events where “We the People” make their will known and ratify judicial changes to the Constitution.¹⁵⁶ Thus, judicial interpretations of the Constitution, even those that depart from historical understandings or precedent, are ratified. Ronald Dworkin’s approach might be called liberal originalism.¹⁵⁷ He also looks at constitutional history but at a more generalized level than conservative originalists. Unlike originalists, he doesn’t ask what the Founders or the People thought about a particular constitutional provision, but rather what principles were they trying to enshrine in their Constitution. At this level of abstraction, his constitutional analysis reads like a philosophical treatise, but according to Dworkin, still provides constitutional “answers.” Of course, it should come as no surprise that the constitutional answers derived from these various constitutional theories look much like the policy preferences of the theorists—be they liberal or conservative.

In their book, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations*,¹⁵⁸ Daniel Farber and Suzanna Sherry argue, as the title suggests, that grand theories

¹⁵⁵ For examples of Amar’s approach, see “Intratextualism”, 112 *Harv. L. Rev.* 747-792 (1999) and “A Few Thoughts on Constitutionalism, Textualism, and Populism,” 65 *Fordham L Rev.* 1657-1662 (1997).

¹⁵⁶ See Ackerman’s two volume work: *We the People: Foundations* (1991) and *We the People: Transformations* (1998).

¹⁵⁷ See Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (1996).

¹⁵⁸ Farber, Daniel A. and Suzanna Sherry (2002).

that attempt to provide constitutional certainty are misguided at best and harmful at worst (though they do concede that such theories “can be useful in helping us to understand overlooked aspects of constitutional law.”)¹⁵⁹ They survey both liberal and conservative foundational theories and find them wanting. Their critique is convincing and also leads to another insight—the dichotomy that Hunter suggests, between traditionalists and modernists, also seems inappropriate. The liberal foundationalists are no less after constitutional certainty than are conservative foundationalists. They simply seek a different type of certainty or more accurately, different constitutional conclusions that can be supported as “certain.” Hunter’s dichotomy begins to look much less accurate. Rather than two warring groups—one with transcendent truth and the other moral relativists—there are a variety of jurisprudential approaches to culture war issues with both liberal and conservative interpretative theories promising certainty at one end of the jurisprudential spectrum and constitutional pragmatists at the other end of the spectrum. The constitutional pragmatists reject grand theory, are comfortable with a “living Constitution,” and conclude that the best they can do is simply make explicit the assumptions and worldviews that inform their constitutional interpretation. But constitutional pragmatism need not assume a living Constitution. Rather, it can simply be the result of a refusal to adopt any interpretive theory wholeheartedly. Stated differently, constitutional pragmatists refuse to follow any theory wherever it leads. Rather, they recognize the need to “balance” competing constitutional claims.

¹⁵⁹ Farber and Sherry at 163.

“Balancing” (Or Not Taking Sides in the Culture War)

While majority and dissenting opinions in culture war cases often read as dueling grand theories (or often the dissent reads as a critique of the grand theory adopted by the majority), in reality culture war opinions are highly pragmatic. The Court rarely adopts a grand theory wholesale. Rather, and even though some justices regularly complain, the Court often “balances” competing jurisprudential claims with attention to the possible real-world implications of its decisions. Thus, contrary to Justice Scalia’s protestations, the Supreme Court has rarely taken sides in cultural battles, and even when it has, it has not given an unqualified victory to the prevailing side.

Justice Scalia’s complaint that the Court had taken sides in the *Kulturrekampf* came in *Romer v. Evans* when he argued that the Court had championed the losing, minority faction in a democratic contest, overruling the will of the democratic majority. But the Court took great pains to assure the protagonists in the case that to the extent that it was taking sides, it was doing so only because it concluded that the prevailing majority had not fought fairly. Justice Scalia’s complaint suggests that the Court leads cultural change and he has been explicit that he believes that judges too often adopt the position of the liberal elite lawyer class. But a review of culture war cases reveals that this complaint is misplaced. Rarely does the Court get ahead of public opinion in culture war cases; rather it tends to be cautious and plodding (even though some of Justice Kennedy’s opinion have grand rhetorical flourishes). The Court has generally responded to cultural changes rather than led them. In its decisions, even as one side prevails, the Court has regularly circumscribed the scope of the victory. Every decision comes with caveats. Let’s look at each of the culture issues in turn.

First, guns. In *District of Columbia v. Heller* a majority of five members of the Court, over the strenuous objections of four dissenting justices, concluded that the Second Amendment guarantees an individual right to own a firearm. In doing so, the majority struck down a democratically approved local ordinance outlawing the possession of an operable firearm. In its next step, the Court then “incorporated” this right into the Fourteenth Amendment, thus applying the Second Amendment to the states. But the Court did not overturn the vast majority of gun regulations then in effect. As noted in Chapter 3, the practical effects of *Heller* are minimal. In its concluding discussion, the Court made clear that the decision was not meant to call into question state regulations involving gun possessions by felons or the mentally ill, gun possession in sensitive public places, or regulation of the commercial sale of arms (*Heller* at 626). Since the decision in *Heller*, over 75 cases have been filed challenging gun regulations. The only regulation to be found unconstitutional per *Heller* is a regulation promulgated by the District of Columbia in response to *Heller*. In *Palmer v. District of Columbia*,¹⁶⁰ the lower court found that the District rule sought to evade the Court’s determination in *Heller*. At any rate, the Supreme Court in *Heller* “split the difference.” In holding that the Second Amendment protects an individual right to own a firearm, it echoed the view of a significant majority of Americans. But the public also believes that the right to own guns is not unlimited and should be subject to reasonable government regulation. *Heller* permits such regulation. Indeed, it seems to invite such regulation.

A similar point can be made with respect to the issue of abortion. *Roe* is often criticized as creating a right to abortion on demand. But a careful reading of *Roe* reveals that it does no such thing. Yes, the Court does find (somewhere) in the Constitution a right to privacy that

¹⁶⁰ The District of Columbia has appealed this decision and the case is pending. The Court of Appeals docket # is: **1:09-cv-01482-FJS**.

includes the right to terminate a pregnancy. But it does not hold that this right is without limits. Indeed, the Court grants states broad leeway to regulate abortion. Following the point of viability a state may criminalize abortion. Prior to the point of viability, states may still regulate abortion—to ensure proper medical standards, to protect maternal health and to protect potential human life. Subsequent cases have further reinforced the ability of states to regulate abortion. The Court has struck down certain regulations—spousal notification and parental notification by minors without judicial bypass—but it has let stand more regulations than it has invalidated. Again, the Court has followed public opinion. A majority of Americans support abortion in specific and limited circumstances but they do not support abortion on demand. The Court’s jurisprudence, while anything but clear and predictable, balances the rights of women and the state. (This is, of course, not to say that the Court has gotten the balance right or that competing interests in the cultural battle over abortion are happy with the balance struck by the Court. Indeed, opponents of abortion continue to push the jurisprudential boundaries in the hopes of either overturning *Roe* or simply making abortion unavailable.)

While not as obvious as with the previous two issues, the Court has also sought a balance (of a sort) in the area of gay rights. *Lawrence* stands as a powerful statement of the right of all people to liberty, privacy and dignity. Individual decisions regarding physical intimacies, whether or not such intimacies are intended to produce offspring are a form of “liberty” and such liberty can be justified based upon tradition moral values (*Lawrence* at 560). But as in the case of Second Amendment rights and privacy rights protecting abortion, the right to make individual decisions regarding physical intimacy is not without its boundaries. The Court does not hold that there is a right to sexual autonomy, indeed the decision is rather conservative in its treatment and understanding of sex. Further, the Court specifically reserves the issue of gay marriage for

future cases (Justice Scalia believes disingenuously so) and further limits the reach of the decision. The decision does not involve minors, situations where sex might be coerced, public conduct or prostitution. In short, it explicitly protects myriad laws regulating sex.

At the end of 2014, the Court had still not directly addressed the issue of gay marriage even though numerous Courts of Appeals had struck down gay marriage bans.¹⁶¹ The Supreme Court has, without explanation, refused to stay these decisions, allowing gay marriage to proceed in the jurisdictions covered by the decisions. No doubt Justice Scalia would argue that the Court has now taken sides in this cultural battle (and as he suggested in *Lawrence*, legitimization of gay marriage was the natural extension of the Court's logic) but, if the Court has taken sides, it has taken sides in a very quiet way. Public opinion on the issue of gay rights and more specifically gay marriage has changed dramatically over the last ten years, with a majority of Americans now favoring gay marriage. Perhaps no other issue has witnessed such a rapid change in opinion. The Court of Appeals decisions have been implemented with little opposition or fanfare. Gay marriage is now legal in a majority of states. So the Court may have taken side in this culture war issue, but it did so only implicitly and after public opinion had significantly evolved.

Finally, turning to the issue of religion in public life, the Court's decisions have been even more balanced. (Some would say confused.) The Court has required that some religious symbols be removed from the public square or alternatively that these symbols be joined by other secular symbols (*e.g.* a crèche is an allowable decoration for the Christmas season as long as it is accompanied by Frosty the Snowman.) Where the Court has allowed public displays of

¹⁶¹ In November, 2014, the Court of Appeals for the Six Circuit upheld bans on gay marriage, the first circuit court to do so. Given that a split now exists among the Circuits, it is highly, almost certainly, likely that the Court will be forced to take up the issue.

religion, usually the Ten Commandments, it has drained the religious symbols of their religiosity. Notwithstanding that the First Commandment intones—“Thou shall have no other gods before me”¹⁶²—the Court has concluded that the Ten Commandments are “historical” and thus not purely religious. As long as they are displayed for historical and not religious purposes or displayed in places where they could be construed as a religious endorsement, they are acceptable. Proponents of more religion in public life thus achieve symbolic victories but arguably the victories are little more than Pyrrhic. The symbols stay but they stay as something other than religious symbols.

Balancing can also be seen in the Court’s recent decision in *Hobby Lobby*. As discussed in Chapter 6, the Court handed a significant victory to religious opponents of the Obamacare birth control mandate. On its face, the decision seems to give preferential treatment to religious believers, opening the door to challenges to a range of welfare state requirements. But as in other issue areas, the Court is careful to limit the scope of its decision. First, it explains that the decision is limited to “closely-held” corporations and that its analysis would be different if the corporate entity was controlled by a large number of shareholders. Second and even more significantly, the Court seem to limit the reasoning of its opinion to abortion, suggesting that other types of regulations and mandates would promote “significant government interests” in a least restrictive manner not present in the case at hand. While only time will reveal the actual

¹⁶² As plaintiffs who have challenged the public display of the Ten Commandments have regularly but unsuccessfully noted, whatever one’s view of other commandments proscribing certain immoral behavior, the First Commandment seems to be a strictly religious one. There is also some irony in the efforts of religious traditionalist to promote not just the display but also adherence to the Ten Commandments. It often goes unnoticed that the First Commandment suggest polytheism. The Commandment does not outlaw other gods; it simply says that no other shall be more important than the Old Testament God.

scope and import of the Court's decision, it is clear that the Court was not handing an unqualified victory to religious believers.¹⁶³

In short, at the Court, the immediate cultural battle is won or lost, but the larger cultural issue war is not definitely resolved.

A Sexual Revolution Not a Culture War

I have argued that there is not something called a "Culture War" but rather there are interrelated but distinct cultural battles. It is now time to put a finer point on this argument.

With respect to guns, as I argued in Chapter 2, there is really not much of a cultural battle. The vast majority of Americans support gun rights and reasonable gun restrictions. The Court's decision in *Heller* essentially ratifies this view. It recognizes a constitutional right to own a firearm but then concedes vast discretion to government to regulate the exercise of this right. Indeed, the opinion implies that any regulation less than absolute prohibition of ownership will be constitutionally permissible. No gun regulation other than the prohibitive ones in *Heller* and *McDonald* have been struck down and it is highly unlikely that another Second Amendment case will find its way to the Supreme Court. In short, to the extent that there is a cultural battle over guns, it is being fought in state legislatures between a minority of gun rights absolutists and the silent majority in favor of gun regulation.¹⁶⁴

¹⁶³ Interestingly, in *Hobby Lobby*, Justice Scalia does not argue that the Court has taken sides in the culture war.

¹⁶⁴ The silent majority may now be a little less silent. Recently, Washington voters approved a ballot initiative to strengthen background checks. Initiative 594 mandates background checks on all gun sales and transfers, including at gun shows and online (although exceptions are made for weapons transferred within families and for the purchase of antique guns.) The initiative passed with 60 percent of the vote. See http://www.huffingtonpost.com/2014/11/05/washington-state-background-checks_n_6103282.html, accessed January 22, 2015. Similar initiatives are on the ballot in other states. For example, an initiative seeking stricter background checks for certain buyers has qualified for the 2016 ballot in Nevada, where such a law was passed last

A similar point can be made about the issue of religion in public life. Skirmishes still occur. Recently, the Court heard a challenge to prayers at local government board meetings. In *Town of Greece v. Galloway*, the Court held that the town's practice of opening its board meetings with a prayer offered by members of the clergy does not violate the Establishment Clause. Critical to the Court's decision was the fact that the town did not discriminate against minority faiths in determining who may offer a prayer, and the prayer did not coerce participation with non-adherents. While the 5-4 decision did evoke a strong response from secularists, it seems consistent with the views of a majority of Americans. Americans are not anti-religion and most do not want all religion removed from the public square. Rather, they simply want evenhandedness embodied in the Court's requirement that any practice not discriminate against minority faiths. This is not to suggest that battles over religion in the public square will disappear from the Court's agenda, but it is likely that as America becomes more secular and more religiously diverse, battles over religion in public life will be less frequent.¹⁶⁵ This brings us to gay rights and abortion.

Perhaps no development has been as socially significant in the last fifty years as the invention of the pill. The pill launched a sexual revolution. For the first time, women could control their procreative lives and also for the first time, the connection between sex and procreation was severed (or could be). Women could enjoy sex with a significantly reduced fear of becoming pregnant. At the same time, advances in health care reduced the risks of abortion. By 1973, the Court could say that the risks of abortion were less to a woman than carrying a

year by the Legislature and then vetoed by the governor. Advocates are also seeking lines on ballots in Arizona, Maine and Oregon. See Steinhauer, Jennifer. *Fight on Guns Is Being Taken to State Ballots*, The New York Times, January 2, 2015 at http://www.nytimes.com/2015/01/03/us/gun-control-groups-blocked-in-washington-turn-attention-to-states.html?_r=0, accessed January 22, 2015.

¹⁶⁵ This conclusion is heavily dependent upon increasingly secularization. Increasing religious diversity along could actually lead to more constitutional conflict given.

fetus to term. And even if abortion was not yet widely available in the 1960s, it was becoming more so. Through both contraception and abortion, women now had much greater control over their sexual lives and with these developments, sex escaped the confines of the marital bedroom.

These changes in turn led to changes in the law and changes in the understanding of the Constitution. In Connecticut, the Catholic Church enshrined its views regarding contraception in state law. Connecticut law banned contraception and made it a crime for a physician to even discuss contraception with a patient. In *Griswold v. Connecticut*, the Court struck down these prohibitions though only within the context of the marital relationship. Two years later, the Court extended the logic of *Griswold* to non-married women and in *Roe v. Wade*, the Court held that the same concept of constitutional privacy protected a woman's choice to have an abortion.

Flash forward then thirty years and the logic of *Griswold* is applied to law criminalizing homosexual behavior. In *Lawrence v. Texas*, in grand rhetorical style, the Court strikes down Texas' statute criminalizing homosexual behavior. In doing so, it positions the Court to ultimately sanction gay marriage. To some—supporters and critics, *Lawrence* was the culmination of the sexual revolution. As one critic put it,

“*Lawrence* pretty strongly suggests that the Court has concluded that a wide variety of unregulated sexual activity is at the very least central to the meaning of human liberty. This resembles nothing so much as the Playboy Philosophy articulated by Hugu Hefner during the 1960s . . .” (Lund 2004, 1582.)

Thus, to many critics of *Griswold* and its progeny, the Court even if it has not taken sides in the culture war, has taken sides in the sexual revolution. It has inappropriately sanctioned the “if it feels good, do it” philosophy of the 1960s.¹⁶⁶ The revolutionaries have won.

¹⁶⁶ As discussed in Chapter 4, there are supporters of *Lawrence* that believe that the Court did not go far enough in its decision since it did not liberate sex from the heterosexual, committed relationship paradigm. For an excellent discussion of “sex-positive” law, see Kaplan (2014).

While this brief history is an obvious oversimplification, it nonetheless seems reasonable to conclude that the sexual revolution lies at the center of the culture wars. The fight over gun rights is a small part of the culture war. The issue did not even make it to the Court's agenda until the 2000s. Similarly, the fight over God in the public square, while an early and continuing culture war issue, does not have the resonance of abortion and gay rights. Arguably, it began the culture wars and every holiday season, there is a discussion of the "war on Christmas," but battles over civil religion simply do not have the same intensity as battles over sex and abortion.

It must also be recognized that the battle over gay rights is also largely over. *Lawrence* not only struck down criminal statutes, it also put the Court's imprimatur on homosexual relationships. It said that homosexuals and homosexual relationships were worthy of dignity and respect. Now, a majority of the public agrees. Support for gay rights and gay marriage by those under thirty is overwhelming.¹⁶⁷ Gay marriage proceeds at an accelerating pace as courts have struck down state statutes and constitutional amendments outlawing it, and the Supreme Court has declined to intervene. In short, the sexual revolution (at least with respect to gay rights) came and the revolutionaries won.

The same cannot be said regarding the issue of abortion. Abortion arguably remains the most contentious cultural issue in American politics. Each year in state legislatures more bills are introduced regarding abortion than any other subject. While a majority of Americans support abortion at least in some circumstances, public opinion on the subject remains deeply divided. Unlike gay rights, where homosexuals have come out of the closet, abortion remains

¹⁶⁷ See Cohen, Jon. *Gay Marriage Support Hits New High in Post-ABC Poll*. The Washington Post, March 18, 2013 at <http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/18/gay-marriage-support-hits-new-high-in-post-abc-poll/>. Accessed January 23, 2015. "[A]mong young adults age 18 to 29, support for gay marriage is overwhelming, hitting a record high of 81 percent"

largely hidden in the shadows.¹⁶⁸ Abortion, unlike homosexual behavior, is stigmatized. *Roe v. Wade* was arguably the high water mark for judicial protection of abortion rights and abortion supporters have remained on the defensive ever since.

Thus, the cultural battle over abortion is likely to continue with no end in sight. Public opinion is simply too indefinite to give the Court cover and direction. Unlike gun rights, the Court cannot follow public opinion and unlike gay rights, it cannot wait for public opinion to coalesce around a dominant policy position. This is also not a case where the Court could intervene to rein in a few “outlier” states with legislative restrictions outside the constitutional mainstream. There are restrictive abortion laws in a lot of states.¹⁶⁹

In addition, *Casey*’s “undue burden” test is too amorphous to bring any clarity to the debate. As Justice Scalia has correctly pointed out, what is a burden to one person may not be a burden to another and what one Justice views as burdensome may not be seen as burdensome to another Justice. The test also creates opportunities and incentives for opponents of abortion to push the constitutional boundaries of abortion restrictions. As noted in Chapter 5, opponents of abortion have continued to refine their legislative strategies to restrict the scope of *Roe*. TRAP laws seek to reduce access to abortion by reducing the number of abortion providers through increased regulation. Indeed, one state has argued that even if there are no abortion providers within the state, this is not an undue burden on women because they can travel to other states. It

¹⁶⁸ There are some recent efforts to put a public face on abortion. While controversial, one woman filmed her abortion procedure and posted it on the web. In, several recent books, the authors also candidly discussed their abortions.

¹⁶⁹ See Clark, Korey. *Red State-Blue State Divide on Abortion Widening*, “[LexisNexis Legal Newsroom Public Policy](http://www.lexisnexis.com/legalnewsroom/public-policy/b/public-policy-law-blog/archive/2013/08/06/red-state-blue-state-divide-on-abortion-widening.aspx),” at <http://www.lexisnexis.com/legalnewsroom/public-policy/b/public-policy-law-blog/archive/2013/08/06/red-state-blue-state-divide-on-abortion-widening.aspx>. “In the mid-1990s 55 percent of those living in the Midwest and 52 percent of those living in the South Central United States said abortion should be legal in all or most cases. Now those numbers are down to 47 percent and 40 percent, respectively. In New England, meanwhile, the percentage of those supporting abortion has risen from 70 percent to 75 percent, widening the gap between it and the Midwest by 13 points and the South Central region by 17 points.”

is all but certain that the Court will be forced to deal with these types of restrictions in the near future.

So what does this mean for the future of the culture wars in the courts? It is always dangerous to prognosticate but a reasoned conclusion is that the battles over God, guns and gays are largely over. What remains is the battle over abortion.

Constitutional Stories

In the preceding chapters, I have argued that cultural battles are not just about “law.” Rather, they are battles over who controls constitutional narratives. In a broad sense, they are about defining the “meaning” of America. Understood this way, constitutional litigation is not simply about the meaning of due process, equal protection, free exercise, establishment, the right to bear arms or any of other ambiguous phrases in the Constitution. It is instead about how Americans are to define and understand themselves. It is also about *who* gets to do the defining.

In *Constitutional Law as Fiction*, L. H. LaRue argues that “the proud towers of the law are not built on the level bedrock of ‘fact’ but on the perplexed terrain of ‘fiction’ . . .” (1995, 8) He goes on: “judicial opinions are filled with ‘stories’ that purport to be ‘factual’ but that instead are ‘fictional,’ and furthermore . . . these ‘fictions’ could not be eliminated without crippling the legal enterprise.” (*Id.*) He might have also added that arguments of litigants and amici are also full of “fictions.”

It is important to be clear about what LaRue means by “fictions.” He does not mean that either the facts or the law are “made up” out of whole cloth. Instead, he means that everyone—parties, lawyers and judges—tell stories or narratives and that these stories are necessary to make

sense of both facts and law. Facts and law do not stand in isolation. They exist in context and the definition of this context becomes important, in fact critical, for understanding law and facts.

La Rue argues that constitutional cases typically embody three distinct types of stories: the story of limits, the story of growth and the story of equality. The first type of story is exemplified by *Marbury v. Madison*. *Marbury* is about a political controversy. In 1800, the new Democratic-Republican President, Thomas Jefferson, refused to deliver a commission to a Federalist justice of the peace, William Marbury, appointed in the waning hours of the previous Federalist administration. Marbury sued asking the Court to direct the President to deliver the commission. The Court declined to do so. Justice Marshall concluded that the Constitution did not give the Court this power and that Congress could not expand the Court's power beyond that which existed in the Constitution. The powers of the Congress and the Court were constitutionally limited.

In contrast, in *McCulloch v. Maryland*, Justice Marshall concludes that the power of Congress were broad and expansive. The question in the case was the constitutionality of a Congressionally-created national bank. The Constitution says nothing about a national bank so does Congress have the constitutional power to create one? Marshall reasons that since Congress has the power to regulate commerce and since it may enact legislation "necessary and proper" to fulfill its explicitly enumerated powers, it may constitutionally create a national bank. Sounding like a post-modernist philosopher, Marshall says that "necessary" doesn't mean "absolutely necessary," that something that is convenient or helpful is "necessary," and thus the bank is constitutional. In this instance, the Constitution is not one of limits, but one designed to foster growth.

Finally, the story of equality is really not a constitutional story at all. It is a story that obviously derives from the Declaration of Independence. “All men are created equal, endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.” There is not sufficient space for exegesis of this statement. Suffice it to say that the statement is limited in who is deemed to be equal (*i.e.* men), not limited in terms of rights (*i.e.* “among these”), and not self-executing (*i.e.* the Constitution also protected slavery so that some presumably endowed with rights nonetheless were powerless to exercise them). LaRue argues that the narrative of equality is a common and continuing constitutional one but that it exists in tension with the other two narratives. A constitution of limits in turn limits the ability of the courts to enforce equality while a constitution of growth allows Congress and the courts to promote equality.

To these narratives, it is also possible to add other narratives. I would suggest four: the narrative of divine providence, the narrative of individual reliance, the narrative of order, and the narrative of progress. These may most appropriately be thought of as pairs of narratives with the second and fourth being the (somewhat) mirror image of the preceding argument. Unlike LaRue, my narratives are not properly speaking, constitutional ones. They are better described as extra-constitutional ones, but there is nonetheless ample evidence that these narratives inform constitutional decision-making.

In the divine providence narrative, America is an exceptional nation and its people “chosen.” America is the new Israel, endowed with special blessings by God. It is an exemplar nation, spreading its democratic light to other nations. God’s blessings accrue to America, however, only when America serves God and obeys holy commands. When America strays from holy laws, it is forgotten by God or punished and must reconcile itself with God. As is

obvious, this is an Old Testament story, with America taking the place of Israel. As such, it is the most religious of the stories and is consistent with a moral traditionalist viewpoint. Its implications are clear: God must be honored with a place of prominence in the public square and homosexuality and abortion are morally wrong and must not be constitutionally countenanced. (The implications of this view for gun rights are less obvious.)

The second narrative focuses on the rugged individual. It is not inconsistent with the first narrative, but it does place the emphasis on the individual and not God. In this narrative, brave pioneers came to a wild land, and through grit and determination tamed it, controlled it and improved it. In this narrative, national success comes less from providence than from individual striving. This narrative also implies a government of limits. It is at heart a libertarian narrative. It is citizens individually, not citizens collectively that achieve great things. In fact, this narrative often sets government off and against individuals. In this narrative, the “sin” is not a rejection of divine protection, but rather, a failure of government to remember that it is “of the people, by the people, for the people.” This narrative is on display in the majority opinion in *D.C. v. Heller*. It does not play a starring role (although it could) in cases dealing with gay rights or abortion.

In cases involving substantive due process and privacy rights, the Court has looked to history and tradition to determine the scope of rights. Rejecting a broad interpretation of the Tenth Amendment, liberty is “ordered liberty.” Not surprising, the Court rejected many liberty claims on the groups that they were not part of American history and tradition. This analysis is front and center in *Bowers v. Hardwick*, the dissent in *Roe* and in subsequent cases limiting abortion rights. In this narrative, stability is the cardinal constitutional virtue. Change, if it is to come, must come from the democratic process.

Finally, there is the Whiggish narrative of progress. In this narrative, the primary goal of government is to provide for a “more perfect union.” The story of constitutional history is thus one of constitutional progress. While the Declaration of Independence said that “all men are created equal,” we now understand this to mean all men (including those of color) and women are created equal. The Constitution is a “living” document in which more progressive views displace more narrow or retrograde ones. This narrative is intertwined with the narrative of equality. In fact, it spares the narrative of equality from being hamstrung by the narrative of limits. The Constitution may say nothing about the rights of homosexuals, but the ideal of equality and our evolving progressive understanding of that concept drives constitutional understanding forward.

Much more could be said about these narratives, in fact, a worthwhile project would be to deconstruct culture war (and other) cases to identify the competing narratives at work and how the narratives intersect. (For example, are certain narratives favored by conservative justices and others by liberal justices? Almost certainly. Order is a conservative narrative and progress a liberal one.) But my real point here is to relate these narratives back to the types of arguments used by the amici in the cases reviewed in the previous chapters. To do so, it is necessary to focus on the coding of argument types that appear in Chapters 3-6. While the amici in all of the cases discussed almost always utilized all argument types, some types of arguments were more common than others and their frequency differed based upon the ideological persuasion of the amici. The differences, I contend, relate back to the constitutional stories being told.

First, *D.C. v. Heller*. Both petitioner and respondent amici utilize all seven modalities of argument, but respondent amici, the more liberal ideological position, rely primary on three types: textual, doctrinal, and policy. Their briefs may appropriately be characterized as “legal”

briefs with the addition of policy arguments in support of gun control that would be made to a legislature. Only one amicus brief raises an ethos-cultural argument. In short, the defenders of the D.C. gun control ordinance fail to tell a constitutional story.

By comparison, those opposing the statute rely heavily on ethos-cultural arguments. Of course, they also make textual, doctrinal and policy arguments and a large number make historical arguments, but most are in service to the cultural narrative they develop regarding the role of guns in American society. It is a story of both individualism and order, or more properly, the importance of guns in allowing individuals to ensure social order.

In the cases of *Bowers v. Hardwick* and *Lawrence v. Taylor*, opponents of the criminalization of homosexual behavior, the more liberal ideological position, again rely heavily on “legal” arguments. Almost all the amici opposing the Texas statute make doctrinal arguments. (Of course, almost all of the respondent amicus briefs do as well since the scope of the constitutional doctrine is the key to the case.) But they make no moral arguments and no prudential arguments. Interestingly, they do make extensive use of ethos-cultural arguments. Indeed a higher proportion of petitioner amicus briefs utilize this modality than do respondent amicus briefs. In examining the briefs, the reason becomes clear. Those opposing the Texas statute tell a story of equality and progress. Their narrative is that America is a nation of expanding equality and dignity and such rights and dignity must be awarded to homosexuals. By contrast, the respondent amici briefs (those supporting Texas) assert a different narrative—one of order and limits. The courts must not intervene in this issue because it is not appropriate to do so and doing so will disrupt the political order.

Finally, these differences also appear in the competing briefs in *Roe v. Wade* and *Planned Parenthood v. Casey*. In *Roe*, the opponents of abortion utilize all modalities with a heavy

reliance on moral arguments. Each of the six appellee amici briefs makes moral arguments. By contrast, briefs in support of *Roe* rely heavily on textual and doctrinal arguments. In *Casey*, the differences are even more pronounced, though somewhat surprisingly, most of the defenders of the Pennsylvania statute do not make moral arguments. Opponents of the statute make doctrinal and prudential arguments. Supporters of the statute rely heavily on doctrinal arguments. This can be explained in large part because by *Casey*, arguments over abortion have become about precedent. Should *Roe* stand or be overruled? At any rate, it is apparent from looking at the briefs filed in these cases, that defenders of abortion rights do not tell a constitutional story. This is in large part a function of the difficulty of fashioning a constitutional narrative. Abortion rights do not fit comfortably into any of the narratives discussed above. While the story could be told in terms of expanding liberty or perhaps governmental limits, opponents of abortion can easily utilize a similar counter-narrative. Once they define the fetus as a person, they too can make liberty arguments but in this case on the part of the fetus. And if abortion is murder, the argument for governmental limits is unconvincing.

The variety of modalities of argument and the crafting of narratives and counter-narratives are not just fights about the law or even about the meaning of ambiguous constitutional principles. In the end, they are arguments about the meaning of America, about what are or should be America's core values.

The Future of the Culture Wars

I have suggested that the culture wars are primarily a function of the sexual revolution. If that is true, then cultural warfare will at some point play itself out or at least cultural issues will recede in their salience. No one is going to repeal the sexual revolution. It is highly unlikely

that any state will again attempt to restrict access to contraception or make sex between unmarried adults a crime, criminalize adultery or in any other way roll back the sexual revolution. The issue of gay marriage is largely resolved. In the next ten years, it will become a cultural given (and in many places it is already). Cultural battles over abortion will continue. Perhaps technology (a male birth control pill or semi-permanent birth control “patches” for women) will reduce the need for abortion so that it drops from the issue agenda, but unlike issues of gay rights, access to contraception and thus a reduction in the need for abortion is in significant part a function of economics not values and as long as there continues to be institutional opposition to contraception (*e.g.* the Catholic Church) it is unlikely that it will be widely available to poor women who want it. The abortion wars are likely to continue.

It is hard to see how there could be future court battles over gun ownership. The issue of a basic right to firearms has been settled, and barring a dramatic change in the membership of the Supreme Court, it is unlikely that the Court would revisit this issue. In addition, should gun safety advocates prevail at the state level in restricting access to firearms, it is unlikely, given the language in *Heller*, that the Court would entertain a constitutional challenge.

Similarly, the growing secularization of America and its increasing religious pluralization suggests that there are likely to be few constitutional cases involving God in public life. Christianity will continue to have pride of constitutional place but not at the expense of other religions.

Again prognostication is a tricky business, but it is certainly very possible that fifty years from now, the culture wars will look as quaint as the battle over slavery in the 1800s.

APPENDIX 1
Number of Briefs filed in the 38 CQ Culture War Cases

CASE	Number of Briefs for Petitioner/ Appellant	Number of Briefs for Respondent/ Appellee	Number of Briefs for Neither Party	Total Number of Briefs
Abortion				
<i>Roe v. Wade (1973)</i>	13	13	0	26
<i>Doe v. Bolton (1973)</i>	2	1	0	3
<i>H.L. v. Matheson (1981)</i>	3	2	0	5
<i>Akron v. Akron Center (1983)</i>	0	0	0	0
<i>Planned Parenthood v. Ashcroft (1983)</i>	0	0	0	0
<i>Thornburgh v. American College of Obstetricians and Gynecologists (1986)</i>	8	21	0	29
<i>Webster v. Reproductive Health Services (1989)</i>	47	33	0	80
<i>Hodgson v. Minnesota (1990)</i>	6	11	0	17
<i>Ohio v. Akron Center for Reproductive Health (1990)</i>	10	3	0	13
<i>Planned Parenthood v. Casey (1992)</i>	9	20	0	29
<i>Stenberg v. Carhart (2000)</i>	23	11	1	35
<i>Gonzales v. Carhart (2007)</i>	30	8	1	40
Establishment				
Public Funding				
<i>Lemon v. Kurtzman (1971)</i>	0	0	0	0
<i>Aguilar v. Felton (1985)</i>	4	3	0	7
<i>Zobrest v. Catalina Foothills School District (1993)</i>	0	0	0	0
<i>Board of Education v. Grumet (1994)</i>	0	0	0	0
<i>Rosenberger v. University of Virginia (1995)</i>	0	0	0	0
<i>Agostini v. Felton (1997)</i>	8	4	1	13
<i>Zelman v. Simmons-Harris (2002)</i>	29	8	0	37
Public Displays				
<i>Lynch v. Donnelly (1984)</i>	0	0	0	0
<i>County of Allegheny v. ACLU (1989)</i>	4	2	0	6
<i>McCreary County v. ACLU (2004)</i>	0	0	0	0
<i>Van Orden v. Perry (2005)</i>	8	19	0	27
<i>Pleasant Grove City v. Sumnum (2009)</i>	16	2	4	22

APPENDIX 2

Organizations Filing Amicus Briefs in CQ Culture War Cases

Academics for the Second Amendment
Adolescent Pregnancy and Childbearing
Affirmation: United Methodists for Gay, Lesbian and Bisexual Concerns
AFL-CIO
Agudath Israel of America
AIDS Action
Alabama Lawyers for Unborn Children
Alan Guttmacher Institute
Alliance Defense Fund
Alliance of Baptists
American Academy of Child and Adolescent Psychiatry
American Academy of Child Psychiatry
American Academy of Family Physicians
American Academy of Medical Ethics
American Academy of Pediatrics
American Association of Planned Parenthood Physicians
American Association of Pro Life Obstetricians and Gynecologists (AAPLOG)
American Association of Pro-Life Pediatricians (AAPLP)
American Association of School Administrators
American Association of Sex Educators, Counselors and Therapists
American Association of Suicidology
American Association of University Professors
American Association of University Women
American Association on Mental Retardation
American Atheists
American Baptist Friends of Life
American Bar Association
American Catholic Lawyers Association
American Center for Law & Justice Family Life Project
American Center for Law and Justice
American Civil Liberties Union
American Civil Rights Union
American College of Obstetricians and Gynecologists
American College of Preventive Medicine
American Collegians for Life
American Council on Education
American Counseling Association

American Ethical Union
American Ex-Prisoners of War
American Family Association
American Family Association Center for Law & Policy
American Family Association Law Center
American Federation of State, County and Municipal Employees
American Federation of Teachers
American Federation of Teachers
American Fertility Society
American Friends Service Committee
American Humanist Association
American Hunters and Shooters Association
American Indian Affairs
American Indian Health Care Association
American Jewish Committee
American Jewish Congress
American Legion
American Legislative Exchange Council
American Library Association and Freedom to Read Foundation
American Life League
American Medical Association
American Medical Women's Association
American Network of Community Options and Resources
American Nurses Association
American Orthopsychiatric Association
American Psychiatric Association
American Psychological Association
American Public Health Association
American Society of Biological Chemists
American Society of Human Genetics
American Society of Zoologists
American Trauma Society
Americans for Democratic Action
Americans for Religious Liberty
Americans United for Life
Americans United For Separation Of Church And State
Amnesty International U.S.A
Anti-Defamation League
ARC
Arms Keepers
Asian American Legal Defense and Education Fund
Association for Public Justice
Association for Supervision and Curriculum Development
Association for Women in Psychology

Association of American Medical Colleges
Association of American Physicians and Surgeons (AAPS)
Association of Catholic Colleges & Universities
Association Of Christian Schools International
Association of Humanistic Rabbis
Association of Nurses in Aids Care
Association of Planned Parenthood Physicians
Association of Planned Parenthood Professionals
Association of Prosecuting Attorneys and District Attorneys
Association of Reproductive Health Professionals
Association of Southern Baptist Colleges & Schools
Association of the Bar of the City of New York by Its Committee on Sex and Law
Atheist Alliance International
Axios USA
Azusa Pacific University
Baptist Joint Committee for Religious Liberty
Baptist Joint Committee on Public Affairs
Baptist Peace Fellowship of North America
Baptists for Life
Bar Association for Human Rights of Greater New York
Basic Life
Bay Area Lawyers for Individual Freedom (BALIF)
Becket Fund for Religious Liberty
Bioethicists for Privacy
Birthright
Black Alliance for Educational Options
Board of Christian Social Concerns of the United Methodist Church
Board of Homeland Ministries, United Church of Christ
Boy Scouts of America
Brady Center to Prevent Gun Violence
Brethren Mennonite Council for Lesbian and Gay Concerns
Brigham Young University
Buckeye Firearms Foundation
Calguns Foundation
California Lawyers for Individual Freedom
California Women Lawyers
Canadian Women's Organizations
Catholic Center the Free Methodist Church of North America
Catholic Health Association
Catholic Lawyers Guild of the Archdiocese of Boston
Catholic League for Religious and Civil Rights
Catholic League for Religious and Civil Rights
Catholic Medical Association
Catholic University of America

Catholics for a Free Choice
Catholics United for Life
Cato Institute
Ceasefire NJ
Center for Arizona Policy and Pro-Family
Center for Christian-Jewish Learning at Boston College Freedom from Religion Foundation
Center for Constitutional Jurisprudence
Center for Constitutional Rights
Center for Education Reform
Center for Individual Freedom
Center for Individual Rights
Center for Inquiry and the Council for Secular Humanism
Center for Judicial Studies
Center for Law and Justice
Center for Marriage Law
Center for Population Options
Center for Public Justice
Center for the Original Intent of the Constitution
Center for Women Policy Studies
Central Conference of American Rabbis
Chester County Historic Preservation Network
Chicago Catholic Women
Children First America
Children's Defense Fund
Chinatown-North Beach Family Planning Services
Choices Women's Medical Center
Christian Action Council
Christian Advocates Serving Evangelism
Christian Legal Society
Christian Life Commission
Christian Life Commission of the Southern Baptist Convention
Christian Medical and Dental Associations
Christian Medical and Dental Society
Christian Medical Association
Church Of Jesus Christ of Latter Day Saints and the Lutheran Church-Missouri Synod
Church of Jesus Christ of Latter-Day Saints
Citizens for Educational Freedom
Citizens United
Claremont Institute
Clifton Kirkpatrick, as Stated Clerk of the Presbyterian Church
Coalition For Local Sovereignty
Coalition for the Medical Rights of Women
Coalition of Labor Union Women
Colorado for Family Values

Commission on Social Action of Reform Judaism
Committee for Abortion Rights and against Sterilization Abuse
Committee for Hispanic Children and Families
Committee for Justice
Committee of Concerned Citizens
Committee of Interns and Residents
Committee on Child Development
Committee on Civil Rights
Committee to Defend Reproductive Rights
Committee To Protect The Family Foundation
Common Good Legal Defense Fund
Concerned Women for America
Congress of Racial Equality
Conservative Legal Defense and Education
Council for Christian Colleges & Universities
Council for Secular Humanism
Council of the Great City Schools
Council On Religious Freedom
Covenant House
Covenant of Unitarian Universalist Pagans
Crusade for Life
Daughters of Liberty Republican Women
DC Rape Crisis Center
Deans Of Divinity Schools And Rabbinical Institutions
Dignity USA
Diocesan Council of the Episcopal Diocese of Newark
Disability Rights Education and Defense Fund
Disabled Veterans for Self-Defense
Disciples for Life
Doctors for Life, Missouri Doctors for Life
Eagle Forum Education & Legal Defense
Educational Fund To Stop Gun Violence
Elliot Institute for Social Sciences Research
EMW Women's Surgical Center
Equal Partners in Faith
Equal Rights Advocates
Equal Rights, not Special Rights
Ethics & Religious Liberty Commission Of The Southern Baptist Convention
Ethics and Public Policy Center
Ethics and Religious Liberty Commission of the Southern Baptist Convention
Evangelicals Concerned
Fairness Foundation
Faith and Action
Family Defense Council

Family First
Family Research Council
Family Violence Prevention Fund
Federally Employed Women
Federation of American Societies for Experimental Biology
Federation of Reconstructionist Congregations
Feminist Majority Foundation
Feminists for Life of America
Florida Association of Women Lawyers
Florida Association of Women Lawyers, Dade County Chapter
Focus on the Family
Former Department of Justice Officials
Former Senior Officials of the Department of Justice
Foundation for Free Expression
Foundation for Moral Law
Fraternal Order of Eagles
Free Speech Advocates
Freedom Council
Freedom States Alliance
Freedom Village, USA
Fresno Free College Foundation
Friends Committee On National Legislation
Gay & Lesbian Advocates & Defenders
Gay and Lesbian Advocates and Defenders
Gay, Lesbian, And Straight Education Network
Gaylaw
Gays And Lesbians For Individual Liberty
General Board of Church and Society Of The United Methodist Church
General Commission On United Methodist Men of The United Methodist Church
General Conference Of Seventh-Day Adventists
General Convention of Swedenborgian Churches
General Synod of the United Church of Christ
GeorgiaCarry.Org
Girls Clubs of America
Goldwater Institute
Good Counsel
Grass Roots of South Carolina
Greek Orthodox Archdiocese of America
Gun Owners Foundation
Gun Owners of America
Hadassah
Hanna Perkins School
Havurot Interfaith Impact for Justice and Peace
Heartland Institute

Help and Caring Ministries
Hindu American Foundation
Hispanic American Police Commissioners and Officers Association
Hispanic Health Council
Historians and Legal Scholars
Holy Orthodox Church
Hope Clinic
Hope For Cleveland's Children
Horace Mann League
Horatio R. Storer Foundation
Human Life International
Human Rights Campaign Fund
Human Rights for Women
Human Rights Watch
Humanist Institute
Humanist Society
Independent Voices For Better Education
Independent Women's Forum
Individual Freedom
Individual Rights Foundation
Institute for Humanist Studies
Institute For Justice
Institute For Public Affairs Of The Union Of Orthodox Jewish Congregations of America
Institute for Reproductive Health Access
Institute in Basic Life Principles
Integrity
Interfaith Alliance
Interfaith Religious Liberty Foundation
Interights
International Association of Chiefs of Police
International Association of Law Enforcement Firearms Instructors (IALEFI)
International Brotherhood of Police Officers
International Humanist and Ethical Union
International Institute for Humanist Studies
International Law Enforcement Educators and Trainers Association (ILEETA)
International Municipal Lawyers Association
International Reapers Foundation
International Right to Life Federation
International Scholars
International Women's Health Organizations
Internet Infidels
J.M. Dawson Institute Of Church-State Studies
James Madison Center for Free Speech
James Madison Institute

Japanese American Citizens League
Jessie Smith Noyes Foundation
Jewish Alliance For Law And Social Action
Jewish Council on Public Affairs
Jews for the Preservation of Firearms Ownership
Judicial Consent for Minors
Judicial Watch
Juvenile Law Center
Juvenile Law Section of the National Legal Aid and Defender
Knights Of Columbus
L.E.A.R.N. (the Life Education And Resource Network)
Lambda Legal Defense and Education Fund
Landmark Legal
Law Enforcement Alliance of America
Lawyer Referral Panel
Lawyer Referral Panel Mobilization for Youth Health Services
Lawyers Committee for Human Rights
Lawyers for Life
League of Women Voters for the United States
Legal Action for Women
Legal Community Against Violence
Legal Defense Fund for Unborn Children
Legal Foundation of America
Lesbian Rights Project
Let Freedom Ring
Let me Live
Libertarian National Committee
Liberty Alliance
Liberty Counsel
Liberty Education Forum
Liberty Legal Institute
Life Issues Institute
Lincoln Institute For Research And Education
Log Cabin Republicans
Loma Linda University
Lutheran Church-Missouri Synod
Lutherans Concerned North America
Lutherans for Life
Madison Society
Major American Cities
Major Cities Chiefs
Maricopa County Attorney's Office and Other Prosecutor Agencies
Maryland State Lodge, Fraternal Order of Police
Massachusetts Judicial Consent for Minors

Massachusetts Lesbian and Gay Bar Association
Matercare
Matthew Shepard Foundation
Medicine and Law, and Sex and Law of the Association of the Bar of the City of New York
Members of Congress
Methodist Federation for Social Action
Methodist Federation For Social Action
Mexican American Legal Defense & Education Fund
Military Order of the Purple Heart
Milton and Rose D. Friedman Foundation
Minnesota Advocates for Human
Missouri Catholic Conference
Missouri Citizens for Life
Missouri Nurses for Life
Mobilization for Youth Health Services
Moral Law
Moral Majority
Moravians for Life
More Light Presbyterians
Most Rev. Frank T. Griswold, III, Presiding Bishop of the Episcopal Church
Most Reverend Edmond L. Browning, Presiding Bishop of the Episcopal Church
Mountain States Legal Foundation
NAACP Legal Defense and Educational Fund
NARAL Foundation
National 4-H Council
National Abortion Action Coalition
National Abortion Federation
National Abortion Rights Action League
National Academy of Sciences
National Alliance of State and Territorial Aids Directors
National Asian Pacific Legal Consortium
National Association for Chicana and Chicano Studies
National Association for Gun Rights
National Association for Multicultural Ural Education
National Association for Rights Protection and Advocacy
National Association for the Advancement of Colored People
National Association for the Protection of Unborn Children
National Association of Evangelicals
National Association of Independent Schools
National Association of Nurse Practitioners in Family Planning
National Association of Pro-Life Nurses
National Association of Protection and Advocacy Systems
National Association of Public Hospitals
National Association of Secondary School Principals

National Association of Social Workers
National Association of Women Lawyers
National Bar Association
National Black Police Association
National Black Women's Health Project
National Board of the Young Women's Christian Association of the U.S.A.
National Campaign to Restore Abortion Funding
National Catholic Committee On Scouting
National Center for Lesbian Rights
National Center for Science Education
National Clergy Council
National Club Association
National Coalition Against Domestic Violence
National Coalition for Public Education
National Coalition of American Nuns
National Committee for Public Education And Religious Liberty
National Community Relations Advisory Council
National Conference of Women's Bar
National Council for Investigation and Security Services
National Council of Jewish Women
National Council of La Raza
National Council of Negro Women
National Council of the Churches of Christ
National Council Of Young Israel
National Criminal Justice Council
National Education Association
National Emergency Civil Liberties Committee
National Family Planning and Reproductive Health Association
National Federation of Business and Professional Women's Clubs, Inc. of the United States of America
National Gay & Lesbian Task Force
National Gay Rights Advocates
National Institute for Women of Color
National Jewish Commission On Law And Public Affairs ("COLPA")
National Jewish Community Relations Advisory Council
National Latino Peace Officers Association
National Lawyers Guild
National League for Nursing
National Legal Foundation
National Legal Program on Health Problems of the Poor
National Lesbian and Gay Law Association
National Medical Association
National Mental Health Association
National Minority AIDS Council

National Network to End Domestic Violence
National Organization for Women
National Organization of Black Law Enforcement Executives
National Organization of Episcopalians for Life
National Partnership for Women & Families
National Pearl
National Pro-Life Alliance
National Rainbow Coalition
National Rifle Association of America
National Right to Life Committee
National School Boards Association
National Shooting Sports Foundation, Inc.
National Tay-Sachs and Allied Disease s Association
National Urban League
National Women's Conference Committee
National Women's Health Network
National Women's Law Center
National Writers Union
National Youth Advocacy Coalition
Native American Church of North America
Nazarenes for Life
New England Christian Action Council
New Jersey Catholic Conference
New Women Lawyers
Newspaper Guild
Non Commissioned Officers Association of the USA
North Park Theological Seminary
Northstar Legal
Northwest Religious Liberty Association
Northwest Women's Law Center
Now Legal Defense and Education Fund
NRA Civil Rights Defense Fund Foundation for Free Expression
Nurses' Association of the American College of Obstetricians and Gynecologists
Oak Park Citizens Committee for Handgun Control
Office for Church and Society of the United Church of Christ
Organizacion Nacional de la Salud de la Mujer Latina
Organization of Asian Women
Organizations and Scholars Correcting Myths and Misrepresentations Commonly Deployed
by Opponents of an Individual Rights-Based Interpretation of the Second
Orthodox Christians for Life
Pacific Justice Institute
Pacific Legal Foundation
Pacific Research Institute
Panel on Adolescent Pregnancy and Childbearing

Paragon Foundation
Parents for School Choice
Parents Rights
Parents, Families & Friends of Lesbians & Gays
Partisan Defense Committee
Pennsylvania Civil Liberties Union
People for the American Way
People for the American Way
Pepperdine
Philadelphia Yearly Meeting of Friends the American Friends Service Committee
Physicians' Ad hoc Coalition for Truth
Physicians for Choice
Physicians for Reproduction Choice and Health
Physicians Resource Council of Focus on the Family
Pink Pistols and Gays and Lesbians for Individual Liberty
Planned Parenthood Federation of America
Planned Parenthood League of Massachusetts
Police Executive Research Forum
Population Communication
Population-Environment Balance
Presbyterian Church (U.S.A.)
Presbyterians for Lesbian and Gay Concerns
Presbyterians Pro-Life
Pride at Work, AFL-CIO
Pro Family Law Center
Professional Women's Network
Professors and Fellows of the American College of Obstetrics and Gynecology
Pro-Life Legal Defense Fund
Public Advocate of The United States
Public Education Network
Public Employee Department, AFL-CIO
Puerto Rican Legal Defense & Education Fund
Rabbinical Alliance of America
Reach Alliance
Reconstructionist Rabbinical Association
Religious Action Center of Reform Judaism
Religious Coalition for Abortion Rights
Religious Coalition for Reproductive Choice
Religious Liberty
Republican Unity Coalition
Retired Military Officers
Right to Life Advocates
Right to Life League of Southern California
Rocky Mountain Gun Owners

Rutherford Institute
Safari Club International
Save America's Youth
Scharf-Norton Center for Constitutional Government
School Safety Advocacy Council
Second Amendment Foundation
Second Amendment Sisters
Secular Coalition for America
Secular Student Alliance
Seventh-Day Adventist Church State Council
Seventy-Seven Organizations Committed to Women's Equality
Sierra Club
Skeptics Society
Society for Adolescent Medicine
Society for Humanistic Judaism
Society Of American Law Teachers
Soka Gakkai International-USA
Solidarity Center for Law And Justice
Soulforce
South Boston Allied War Veterans Council
Southeastern Legal Foundation
Southern Baptist Convention
Southern Baptists for Life
Southern Center for Law & Ethics
Southern States Police Benevolent Association
Southwest Life and Law Center
Spartacist League
Spirit of Freedom Republican Women's Club
St. Louis Catholics for Choice
State Communities Aid Association
State Firearm Associations
States United to Prevent Gun Violence
Stonewall Law Association
Stop Special Rights-PAC
Student Press Law Center
Synagogue Council of America
Task Force of United Methodists on Abortion and Sexuality
Teachers for Better Education
Texas Black Americans for Life
Texas Eagle Forum
Thomas More Center for Law & Justice
Thomas More Society
Traditional Values Coalition
Traditional Values Education & Legal Institute

U. S. Border Control Foundation
Union for Reform Judaism
Union of American Hebrew Congregations
Unitarian Universalist Association
United Church Board for Homeland Ministries
United Church Coalition for Lesbian and Gay Concerns
United Church of Christ
United Church of Christ Friends for Life
United Church of Christ Office for Church in Society
United Families International
United States Catholic Conference
United States Concealed Carry Association
United States Conference of Catholic Bishops
United States Conference of Mayors
United States Justice Foundation
United States Student Association
United Synagogue of Conservative Judaism
University Faculty for Life
Urging Reversal ?????
Utah Association of Women and United Families Foundation
Value of Life Committee
Veterans of Foreign Wars of the United States
Veterans of the Vietnam Wall & the Veterans Coalition
Violence Policy Center
Virginia1774.Org
Wallbuilders
WELS Lutherans for Life
Whitman-Walker Clinic
Women Against Gun Control
Women Exploited by Abortion of Greater Kansas City
Women for the Unborn
Women in Spirit of Colorado Task Force
Women Lawyers' Association of Los Angeles, California
Women Who Have Had Abortions and Friends
Women's Bar Association of Illinois
Women's Commission
Women's Health and Abortion Project
Women's Law Project
Women's Legal Defense Fund
Women's Zionist Organization of America
World Congress of Gay and Lesbian Jewish Organizations
World Population Society
Worldwatch Institute
Worldwide Church of God

Your Catholic Voice Foundation
Youth Against Racism
Youth Alive!
YWCA of Brooklyn Students
Zero Population Growth
167 Distinguished Scientists and Physicians
60 Plus Association

BIBLIOGRAPHY

- Abramowitz, Alan I. and Kyle L. Saunders. 2008. "Is Polarization a Myth?" *The Journal of Politics* 70(2): 542-55.
- Adams, Greg D. 1997. "Abortion: Evidence of Issue Evolution." *American Journal of Political Science* 41 (3): 718-737.
- Alexander, Larry. 1998. "Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions." *Drake L. Rev.* 47: 35-43.
- Aliotta, Jilda M. 1988. "Social Backgrounds, Social Motives and Participation on the Supreme Court." *Political Behavior* 10(3): 267-284.
- Almond, Gabriel A., and Sidney Verba. 1963. *The Civic Culture: Political Attitudes and Democracy in Five Nations*. Princeton: Princeton University Press.
- Alvare', Helen M. "No Compelling Interest: The 'Birth Control' Mandate and Religious Freedom." *Vill. L. Rev.* 58: 379-436.
- Amar, Akhil Reed. 2001. "The Second Amendment: A Case Study in Constitutional Interpretation." *Utah Law Review* 4:889-914.
- Amar, Akhil Reed. 2008. "*Heller*, *HLR*, and Holistic Legal Reasoning." *Harvard Law Review* 122(14): 145-190.
- Anderson IV, Robert and Alexander M. Tahk. 2007. "Institutions and Equilibrium in the United States Supreme Court." *American Political Science Review* 101(4): 811-825.
- Arkes, Hadley. 2008. "The Role of Government in Shaping Culture." *Northwestern Law Review* 102: 499-502.
- Bailey, Michael A. and Forrest Maltzman. 2008. "Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U. S. Supreme Court." *American Political Science Review* 102 (3): 369-84.
- Baird, Robert M. and Stuart E. Rosenbaum, eds. 2001. *The Ethics of Abortion: Pro-Life v. Pro-Choice*. Amherst: Prometheus Books.
- Baker, Wayne. 2005. *America's Crisis of Values: Reality and Perception*. Princeton: Princeton University Press.

- Balkin, Jack L. ed. 2005. *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision*. New York: New York University Press.
- Balmer, Randall. 1993. "Culture Wars: Views from the Ivory Tower." *Evangelical Studies Bulletin* 10(1): 1-2.
- Baranetsky, Victoria. 2013. "Aborting Dignity: "The Abortion Doctrine after *Gonzales v. Carhart*." *Harv. J.L. & Gender* 36: 123 - 170.
- Barker, Lucius J. 1967. "Third Parties in Litigation: A Systemic View of the Judicial Function." *The Journal of Politics* 29: 41-69.
- Barnett, Randy E. 2003. "Justice Kennedy's Libertarian Revolution: *Lawrence v. Texas*." *Boston University School of Law Working Paper Series*, No. 03-13, 1- 19. Available at SSRN: <http://ssrn.com/abstract=422564>.
- Barnett, Randy E. and Don B. Kates. 1996. "Under Fire: The New Consensus On The Second Amendment." *Emory Law Journal* 45(4): 1139-1259.
- Bartels, Brandon L. 2011. "Choices in Context: How Case-Level Factors Influence the Magnitude of Ideological Voting on the U.S. Supreme Court." *American Politics Research* 39(1): 142-75.
- Baum, Lawrence and Neal Devins. 2010. "Why the Supreme Court Cares About Elites, Not the American People." *The Georgetown Law Journal* 98: 1515-81.
- Baum, Lawrence. 1992. "Membership Change and Collective Voting Change in the United State Supreme Court." *Journal of Politics* 54(1): 3-24.
- Baum, Lawrence. 2013. "Linking Issues to Ideology in the Supreme Court." *Journal of Law and Courts* 1(1): 89-138.
- Beck, Randy. 2013. "State Interests and the Duration of Abortion Rights." *McGeorge Law Review* 44: 31-60.
- Beck, Randy. 2007. "The Essential Holding of *Casey*: Rethinking Viability." *UMKC L. Rev.* 75: 713-740.
- Beck, Randy. 2009. "*Gonzales, Casey* and the Viability Rule." *Nw. U. L. Rev.* 103: 249-80.
- Beck, Randy. 2011. "Self-Conscious Dicta: The Origin of *Roe v. Wade*'s Trimester Framework." *Am. J. of Legal Hist.* 51: 505-29.
- Behuniak-Long, Susan. 1990. "Friendly fire: amici curiae and *Webster v. Reproductive Health Services*." *Judicature* 74: 261-70.

Berg, Thomas C. 2007. *The Free Exercise of Religion Clause: The First Amendment*. Amherst, New York: Prometheus Books.

Berg, Thomas C. 2010. "What Same-Sex Marriage and Religious-Liberty Claims Have in Common." *Nw. J.L. & Soc. Pol'y* 5: 206-35.

Berry, John. 2011. "D.C v. *Heller* and the Death of Consistent Constitutional Jurisprudence." *Barry University - Dwayne O. Andreas School of Law Working Papers Series*, 1-17. Available at SSRN: <http://ssrn.com/abstract=1943719>.

Beschle, Donald. L. 2012. "Does a Broad Free Exercise Right Require a Narrow Definition of 'Religion'?" *Hasting Const. L. Q.* 39: 357-90.

Biskupic, Joan and Elder Witt. 1999. *Congressional Quarterly's Guide to the U.S. Supreme Court*. Washington D.C.: Congressional Quarterly Press.

Black, Jonathan M. 2009. "Sexual Privacy after *Lawrence v. Texas*." *Georgetown Journal of Gender & Law*. 10: 297-332.

Blackman, Josh. 2008. "Originalism for Dummies, Pragmatic Unoriginalism, and Passive Liberty: An Originalist Critique of the *Heller* Dissents and Judges Posner's and Wilkinson's Unoriginalist Assault on the Liberty to Keep and Bear Arms." *South Texas College of Law Working Papers Series*, 1-40. Available at SSRN: <http://ssrn.com/abstract=1318387>.

Blackman, Josh. 2012. "The Supreme Court's New Battlefield." *Texas Law Review* 90(5): 1207-31.

Blake, William. 2012. "Umpires as Legal Realists." *PS: Political Science and Politics* 45(2): 271-76.

Blasi, V., ed. 1983. *The Burger Court: The Counter-Revolution that Wasn't*. New Haven: Yale University Press.

Blocher, Joseph. 2012. "The Right Not to Keep or Bear Arms." *Stanford Law Review* 64(1): 1-54.

Bogus, Carl T. 1998. "The Hidden History of the Second Amendment." *U.C. Davis Law Review* 31(2): 309-410.

Bogus, Carl T. 2000. "The History and Politics of Second Amendment Scholarship: A Primer." *Chicago-Kent Law Review* 76(1): 3-25.

Bogus, Carl T. 2008. "*Heller* and Insurrectionism." *Syracuse Law Review*, 59(1): 253-67.

Bogus, Carl T. and Michael A Bellesiles. 2002. *The Second Amendment in Law and History: Historians and Constitutional Scholars on the Right to Bear Arms*. New York, NY: The New Press.

- Bopp, Jr., James and Richard E. Coleson. 1989. "The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal." *BYUJ Pub. L.* 3: 181 – 355.
- Bork, Robert H. *Coercing Virtue: The Worldwide Rule of Judges*. Washington D.C.: AEI Press.
- Box-Steffensmeier, Janet M., Dino P. Christenson and Matthew P. Hitt. 2013. "Quality over Quantity: Amici Influence and Judicial Decision-Making." *The American Political Science Review* 107(3): 446- 460.
- Brace, P. and M.G. Hall. 1993. "Integrated Models of Judicial Dissent." *The Journal of Politics* 55: 914-935.
- Brader, Ted. 2006. *Campaigning for Hearts and Minds*. Chicago: University of Chicago Press.
- Bradley, Gerard V. 1991. "Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism." *Hofstra L. Rev.* 20: 245-306.
- Braman, Eileen, and Thomas E. Nelson. 2007. "Mechanism of Motivated Reasoning: Analogical Perception in Discrimination Disputes." *American Journal of Political Science* 51(4) 940-56.
- Braman, Eileen. 2006. "Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision Making." *Journal of Politics* 68(2): 308-21.
- Brenner, Saul and M. Stier. 1996. "Retesting Segal and Spaeth's Stare Decisis Model." *Am. J. Pol. Science* 40(4): 1036-1048.
- Brenner, Saul, and Joseph M. Whitmeyer. 2009. *Strategy on the United States Supreme Court*. Cambridge: Cambridge University Press.
- Brenner, Saul, and Theodore S. Arrington. 2000. "Measuring Salience on the Supreme Court: A Research Note." *Jurimetrics* 43: 99-113.
- Brint, Steven. 1992. "What If They Gave a War . . .?" *Contemporary Sociology* 21(4): 438-40.
- Burkett, Maxine. 2008. "Much Ado About...Something Else: *D.C. v. Heller*, the Racialized Mythology of the Second Amendment, and Gun Policy Reform." *University of Colorado Law Legal Studies Research Paper* No. 08-11:1-38. Available at: <http://ssrn.com/abstract=1111768>.
- Burt, Robert A. 2011. "Belonging in America: How to Understand Same-Sex Marriage." *BYU J.* 25:351–360.
- Caldeira, Gregory, and Christopher J. W. Zorn. 1998. "Of Time and Consensual Norms in the Supreme Court." *American Journal of Political Science* 42(3): 874-902.
- Caldeira, Gregory, and John R. Wright. 1988. "Organized Interests and Agenda Setting in the U.S. Supreme Court." *American Political Science Review* 82(4): 1109-1127.

- Caldeira, Gregory, and John R. Wright. 1990. "Amici Curiae before the Supreme Court: Who Participates, When and How Much?" *Journal of Politics* 52(3): 782-806.
- Carmines, Edward G., and James A. Stimson. 1989. *Issue Evolution: Race and the Transformation of American Politics*. Princeton, NJ: Princeton University Press.
- Carpenter, Dale. 2004. "Is *Lawrence* Libertarian?" *Minnesota Law Review* 88: 1140-1170.
- Carpenter, Dale. 2004. "The Unknown Past of *Lawrence v. Texas*." *Michigan Law Review* 102: 1464-1527.
- Carpenter, Dale. 2012. *Flagrant Conduct, The Story of Lawrence v. Texas*. New York: W.W. Norton and Company.
- Case, Mary Anne. 2003. "Of "This" And "That" in *Lawrence v Texas*." *Supreme Court Review*. 55:75-144.
- Charles, Patrick J. 2011. "The Constitutional Significance of a 'Well-Regulated Militia' Asserted and Proven with Commentary on the Future of Second Amendment Jurisprudence." *Northeastern University Law Journal* 3(1):1-104.
- Chauncey, George. 2004. "What Gay Studies Taught the Court: The Historians' Amicus Brief in *Lawrence v. Texas*." *GLQ: A Journal of Lesbian and Gay Studies* 10(3):509-538.
- Chemerinsky, Erwin. 2004. "Putting the Gun Control Debate in Social Perspective." *Fordham Law Review* 73(2): 477-485.
- Chirelstein, Marvin A. 2013. "Bork, Dworkin, and the Constitution." *Green Bag 2d* 17(1): 17-28.
- Clark, Tom C. 1969. "Religion, Morality and Abortion: A Constitutional Appraisal." *Loyola of Law Angeles Law Rev* 2:1-11.
- Clark, Tom S. 2009. "Measuring Ideological Polarization on the United States Supreme Court." *Political Research Quarterly* 62(1): 146-57.
- Cohen, David S. 2010. "The Paradox of *McDonald v. City of Chicago*." *George Washington Law Review Arguendo* 79(1):1-22.
- Colker, Ruth. 1994. *Pregnant Men: Practice, Theory, and the Law*. Bloomington: Indiana University Press.
- Collins Jr., Paul M. 2008. *Friends of the Supreme Court: Interest Groups and Judicial Decision Making*. New York: Oxford University Press.
- Collins Jr., Paul M. 2004. "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation." *Law and Society Review* 38(4): 807-32.

- Collins Jr., Paul M. 2007. "Lobbyists before the U.S. Supreme Court." *Political Research Quarterly* 60(1): 55-70.
- Collins Jr., Paul M. 2011. "Cognitive Dissonance on the U.S. Supreme Court." *Political Research Quarterly* 64(2): 362-76.
- Collins, Jr. Paul M. 2008. "Amici Curiae and Dissensus on the U.S. Supreme Court." *Journal of Empirical Legal Studies* 5(1): 143-170.
- Collins, Jr., Paul M., Pamela C. Corley, and Jesse Hamner. 2013. "The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content." Unpublished paper presented at APSA Annual Meeting, Chicago, August 2013.
- Conkle, Daniel O. 2014. "Evolving Values, Animus and Same-Sex Marriage." *Ind. L. J.* 89: 27-42.
- Conkle, Daniel O. 2007. "The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future." *Ind. L.J.* 75: 1-36.
- Cook, Beverly B. 1993. "Measuring the Significance of U.S. Supreme Court Decisions." *The Journal of Politics* 55(4): 1127-39.
- Cookson, Catharine. 2001. *Regulating Religion: The Courts and the Free Exercise Clause*. Oxford: Oxford University Press.
- Cooper, Phillip J. 1995. *Battles on the Bench: Conflict Inside the Supreme Court*. Lawrence: University of Kansas Press.
- Corley, Pamela C. 2008. "The Supreme Court and Opinion Content—The Influence of Parties' Briefs." *Political Research Quarterly* 61 (3): 468-78.
- Cornell, Saul and Nathan DeDino. 2004. "A Well Regulated Right: The Early American Origins of Gun Control." *Fordham Law Review* 73(2): 487-528.
- Cornell, Saul and Nathan Kozuskanich. 2013. *The Second Amendment on Trial: Critical Essays on District of Columbia v. Heller*. Amherst, MA: University of Massachusetts Press.
- Cornell, Saul, ed. 2000. *Whose Right to Bear Arms Did the Second Amendment Protect?* Boston: Bedford/St. Martin's.
- Cornell, Saul. 2002. "'Don't Know Much About History': The Current Crisis in Second Amendment Scholarship." *Northern Kentucky Law Review* 29(4): 657-681.
- Cornell, Saul. 2004. "A New Paradigm for the Second Amendment." *Law and History Review*, 22(1): 161-167.

- Cottrol, Robert J. and Raymond T. Diamond. 1995. "The Fifth Auxiliary Right Book Review: To Keep and Bear Arms: The Origins of an Anglo-American Right" by Joyce Lee Malcolm. (Jan., 1995). *Yale Law Journal* 104(4): 995-1026.
- Cottrol, Robert J., ed. 1994. *Gun Control and the Constitution: Sources and Explorations on the Second Amendment*. Westport: Garland Publishing.
- Craig, Barbara Hinkson and David M. O'Brien. 1993. *Abortion and American Politics*. Chatham, N.J.: Chatham House.
- Cress, Lawrence Delbert. 1984. "An Armed Community: The Origins and Meaning of the Right to Bear Arms." *The Journal of American History* 71(1): 22-42.
- David, Gregory B. 2004. "Dworkin, Precedent, Confidence, and *Roe V. Wade*." *University of Pennsylvania Law Review* 152(3): 1221-1253.
- Davis, Nancy J., and Robert V. Robinson. 1996. "Rejoinder to Hunter: Religious Orthodoxy—An Army Without Foot Soldiers?" *Journal for the Scientific Study of Religion* 35: 249-251.
- Davis, Nancy J., and Robert V. Robinson. 1996. "Religious Orthodoxy in Society: The Myth of a Monolithic Camp." *Journal for the Scientific Study of Religion* 35: 229-245.
- Davis, Nancy J., and Robert V. Robinson. 1996. "Are the Rumors of War Exaggerated? Religious Orthodoxy and Moral Progressivism in America." *American Journal of Sociology* 102: 756-787.
- De Leeuw, Michael B., Dale E. Ho, Jennifer K. Kim, and Daniel S. Kotler. 2009. "Ready, Aim, Fire? *District of Columbia v. Heller* and Communities of Color." *Harvard Blackletter Law Journal* 25:133-179.
- Dellinger, Walter and Gene B. Sperling. 1989. "Abortion and the Supreme Court: The Retreat from *Roe v. Wade*." *University of Pennsylvania Law Review* 138(1): 83-118.
- Denning, Brannon P. 2008. "The New Doctrinalism in Constitutional Scholarship and *Heller v. District of Columbia*." *Tennessee Law Review* 75(4): 1-8.
- Denning, Brannon P. and Glenn H. Reynolds. 2008. "Five Takes on *District of Columbia v. Heller*." *Ohio State Law Journal* 69(4): 671-699.
- Denning, Brannon P. and Reynolds, Glenn Harlan, 2009. "*Heller*, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms." *Hastings Law Journal* 60(6): 1245-1268.
- Denning, Brannon P. and Reynolds, Glenn Harlan. 2011. "Five Takes on *McDonald v. Chicago*." *Lewis & Clark L. Rev.* 9(4): 915-934.
- DiMaggio, Paul, John Evans, and Bethany Bryson. 1996. "Have Americans' Social Attitudes Become More Polarized?" *American Journal of Sociology* 102: 690-755.

Dimaggio, Paul. "The Myth of Culture War" in *The Fractious Nation?* Jonathan Rieder and Stephen Steinlight, ed. Berkeley: University of California Press, 79-97.

Doan, Alesha E. 2007. *Opposition & Intimidation: the Abortion Wars & Strategies of Political Harassment*. Anne Arbor: University of Michigan Press.

Dorf, Michael C. 2000. "What Does the Second Amendment Mean Today?" *Chicago-Kent Law Review* 76(1): 291-347.

Dorf, Michael C. 2004. "Identity Politics and the Second Amendment." *Fordham Law Review* 73(2): 549-572.

Dreisbach, Daniel L. and Mark David Hall, eds. 2009. *The Sacred Rights of Conscience: Selected Readings on Liberty and Church-State Relations in the American Founding*. Indianapolis: Liberty Fund.

Eastman, John C. 2005. "Judicial Review of Unenumerated Rights: Does Marbury's Holding Apply in a Post-Warren Court World?" *Harvard Journal of Law & Public Policy* 28(3): 713-740

Ehrman, Keith A. and Dennis A. Henigan. 1989. "The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?" *University of Dayton Law Review* 15(1):1-58.

Eisgruber, Christopher L., and Lawrence G. Sager. 1994. "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct." *U. Chi. L. Rev.* 61: 1245-1315.

Ely, John Hart. 1973. "The Wages of Crying Wolf: A Comment on *Roe v. Wade*." *Yale Law Journal* 82: 920-949.

Epstein, Lee and Andrew D. Martin. 2010. "Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)." *University of Pennsylvania Journal of Constitutional Law* 13: 263-281.

Epstein, Lee and Jack Knight. 1998. *The Choices Justices Make*. Washington, D.C.: CQ Press.

Epstein, Lee and Jack Knight. 2000. "Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead." *Political Research Quarterly*. 53 (3): 625-661.

Epstein, Lee and Jeffrey A. Segal. 2000. "Measuring Issue Saliency." *American Journal of Political Science* 44 (1): 66-83.

Epstein, Lee and Joseph F. Kobylka. 1992. *The Supreme Court and Legal Change*. Chapel Hill: The University of North Carolina Press.

Epstein, Lee, Andrew D. Martin, Kevin M. Quinn and Jeffrey Segal. 2007. "Ideological Drift Among Supreme Court Justices: Who, When and How Important?" *Northwestern University Law Review* 101(4): 1483-1542.

- Epstein, Lee, Jeffrey A. Segal, and Harold J. Spaeth. 2001. "The Norm of Consensus on the U.S. Supreme Court." *American Journal of Political Science* 45 (2): 362-377.
- Epstein, Lee, Valerie Hoekstra, Jeffrey A. Segal and Harold J. Spaeth. 1998. "Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices." *Journal of Politics*, 60 (3): 801-818.
- Epstein, Richard A. 1973. "Substantive Due Process By Any Other Name: The Abortion Cases." *Supreme Court Review*. 1973: 159-185.
- Eskridge, Jr., William N. 1997. "Democracy, Kulturkampf, and the Apartheid of the Closet." *Vanderbilt Law Review*. 50: 419-443.
- Eskridge, Jr., William N. 2003-2004. "Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics." *Minnesota Law Review*. 88: 1021-1102.
- Eskridge, Jr., William N. 2008. "How Government Unintentionally Influences Culture: The Case of Same Sex Marriage." *Northwestern University Law Review* 102:495-498.
- Esteban, Joan, and Debra Ray. 1994. "On the Measurement of Polarization." *Econometrica* 62(4): 819-51.
- Estrich, Susan R. and Kathleen M. Sullivan. 1989. "Abortion Politics: Writing for an Audience of One." *U. Pa. L. Rev.* 138: 119-155.
- Evans, Bette Novit. 1998. *Interpreting the Free Exercise of Religion: The Constitution and American Pluralism*. Chapel Hill, NC: The University of North Carolina Press.
- Evans, John H. 1997. "Worldviews or Social Groups as the Source of Moral Value Attitudes: Implications for the Culture War Thesis." *Sociological Forum* 12 (3): 371-404.
- Evans, Michael, Wayne McIntosh, Jimmy Lin, and Cynthia Cates. 2007. "Recounting the Courts? Applying Automated Content Analysis to Enhance Empirical Legal Research." *Journal of Empirical Legal Studies* 4(4): 1007-1039.
- Farber, Daniel A. 2000. "Disarmed by Time: The Second Amendment And The Failure of Originalism." *Chicago-Kent Law Review* 76(1): 167-194.
- Farber, Daniel A. and Suzanna Sherry. 2002. *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations*. Chicago: University of Chicago Press.
- Farganis, Dion. 2012. "Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy." *Political Research Quarterly* 65(1): 206-216.
- Feldman, Noah. 2002. "From Liberty to Equality: The Transformation of the Establishment Clause." *Cal. Law Rev.* 90(3): 673-732.

Feldman, Noah. 2002. "The Intellectual Origins of the Establishment Clause." *N.Y.U. L. Rev.* 77: 346-428.

Feldman, Stephen M. 2011. "Conservative Eras in Supreme Court Decision-Making: *Employment Division v. Smith*, Judicial Restraint, and Neoconservatism." *Cardozo Law Review* 32(5): 1791-1814.

Findelman, Paul. 2000. "A Well Regulated Militia": The Second Amendment in Historical Perspective." *Chicago-Kent Law Review* 76 (1): 195-236.

Finkelman, Paul. 2008. "It Really Was About a Well Regulated Militia." *Syracuse Law Review* 59(1): 267-282.

Fiorina, Morris P., Samuel J. Abrams, and Jeremy Pope. 2005. *Culture War? The Myth of a Polarized America*. New York: Pearson Longman.

Flango, Victor E., Donald C. Bross and Sarah Corbally. 2006. "Amicus Curiae Briefs: The Court's Perspective." *The Justice System Journal* 27(2): 180-90.

Flemming, Roy B. and B. Dan Wood. 1997. "The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods." *American Journal of Political Science* 41 (1): 468-94.

Flemming, Roy B.; John Bohte and B. Dan Wood. 1997. "One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947-92." *American Journal of Political Science* 41 (4): 1224-50.

Forsythe, Clarke D. 2013. *Abuse of Discretion: The Inside Story of Roe v. Wade*. New York: Encounter Books.

Frank, Nathaniel. 2013. "What's Wrong with Homosexuality?" by John Corvino. *The Washington Post, WP Opinions*, March 22, 2013.

Franke, Katherine M. 2004. "The Domesticated Liberty of *Lawrence v. Texas*." *Columbia Law Review* 104: 101-28.

Franklin, Charles H. and Liane C. Kosaki. 1989. "Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion." *The American Political Science Review* 83(3): 751-71.

Friedman, Barry. 2006. "Taking Law Seriously." *Perspectives on Politics* 4(2): 261-76.

Friedman, Barry. 2009. *The Will of the People. How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*. New York: Farrar, Straus and Giroux.

Garnett, Richard W. 2011. "The Political (and Other) Safeguards of Religious Freedom." *Cardozo L. Rev.* 32(5): 1815-29.

- Garrow, David J. 1999. "Abortion Before and After *Roe v. Wade*: An Historical Perspective." *Albany Law Review* 62: 833-52.
- Garvey, John H. 1996. "An Anti-Liberal Argument for Religious Freedom." *J. Contemporary Legal Issues* 7: 275-91.
- Gedicks, Frederick Mark and Rebecca G. Van Tassell. 2014. "RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion." *Harv. C.R.-C.L. L. Rev.* 49: 343-84.
- Gedicks, Frederick Mark. 1998. "An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions." *U. Ark. Little Rock L.J.* 20: 555-74.
- George, Tracey E. and Lee Epstein. 1992. "On the Nature of Supreme Court Decision Making." *American Political Science Review* 86(2): 323-37.
- Gerken, Heather. 2008. "Larry and *Lawrence*." *Tulsa Law Review* 20: 101-113.
- Gibson, James L. 1983. "From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior." *Political Behavior* 5(1): 7-49.
- Gibson, James L. 2007. "The Legitimacy of the U.S. Supreme Court in a Polarized Polity." *Journal of Empirical Legal Studies* 4(3): 507-38.
- Gillman, Howard. 2001. "What's Law Got to Do with It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making." *Law and Social Inquiry* 26: 465-504.
- Ginsberg, Ruth Bader. 1985. "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*." *North Carolina Law Review* 63: 375-86.
- Goldberg, Suzanne B. 2004. "Morals-Based Justifications for Lawmaking: Before and After *Lawrence v. Texas*." *Minnesota Law Review* 88: 1233-1311.
- Golden, Reid. 2012. "Loaded Questions: A Suggested Constitutional Framework for the Right to Keep and Bear Arms." *Minnesota Law Review* 96(6):101-41.
- Goldstein, Anne B. 1988. "History, Homosexuality, and Political Values: Searching for the Hidden Determinants of *Bowers v. Hardwick*." *Yale Law Journal* 7: 1073-1103.
- Gong, Lijia and Rachel Shapiro (eds.) 2012. "Sexual Privacy After *Lawrence v. Texas*." *Georgetown Journal of Gender & Law* 13:487-521.
- Gorney, Cynthia. 1998. *Articles of Faith: A Frontline History of the Abortion Wars*. New York: Simon and Schuster.

- Gould, Andrew R. 2009. "The Hidden Second Amendment Framework within *District of Columbia v. Heller*." *Vanderbilt Law Review* 62(5):1535-1576.
- Graber, Mark A. 1999. "Law and Sports Officiating: A Misunderstood and Justly Neglected Relationship." *Constitutional Commentary* 16: 293-314.
- Graber, Mark A. 1996. *Rethinking Abortion: Equal Choice, the Constitution and Reproductive Politics*. Princeton: Princeton University Press.
- Graber, Mark A. 2013. "The Coming Constitutional Yo-Yo?" *Howard Law Journal* 56(3): 661-719.
- Grantmore, Gil. 2003. "The Phages of American Law." *University of California, Davis Law Review* 36(?): 455-504.
- Greenawalt, Kent. 2006. *Religion and the Constitution: Free Exercise and Fairness*. Princeton, N.J.: Princeton University Press.
- Greenawalt, Kent. 1995. "Quo Vadis: The Status and Prospects of 'Tests' under the Religion Clauses." *Sup.Ct. Rev.* 1995: 323-91.
- Greene, Jamal. 2006. "Beyond Lawrence: Metaprivacy and Punishment." *Yale Law Journal* 115: 1862-1928.
- Greene, Jamal. 2009. "Heller High Water? The Future of Originalism." *Harvard Law & Policy Review* 3(2): 325-347.
- Greenhouse, Linda and Reva B. Siegel. 2011. "Before (and After) *Roe v. Wade*: New Questions About Backlash." *The Yale Law Journal* 120: 2028-2087.
- Greenhouse, Linda and Reva B. Siegel. 2012. *Before Roe v. Wade: Voices that Shaped the Abortion Debate Before the Supreme Court's Ruling*. New Haven, Connecticut: Yale Law School.
- Greenhouse, Linda. 2012. "Public Opinion and the Supreme Court: The Puzzling Case of Abortion." *Daedalus* Fall 2012: 69-82.
- Grey, Thomas C. 1980. "Eros, Civilization and the Burger Court." *Law and Contemporary Problems* 43(3): 83-100.
- Guitton, Stephanie and Peter Irons, eds. 1995. *May It Please the Court: Arguments on Abortion*. New York: The New Press.
- Gura, Alan. 2009. "Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvey Wilkinson." *UCLA Law Review* 56(5): 1129-1169.
- Habib, Michael J. 2012. "The Future of Gun Control Laws Post-*McDonald* and *Heller* and the Death of One-Gun-Per-Month Legislation." *Connecticut Law Review* 44(4): 1339-1382.

Haidt, Jonathan. 2012. *The Righteous Mind: Why Good People Are Divided By Politics and Religion*. New York: Pantheon.

Hamburger, Philip A. 1992. "A Constitutional Right of Religious Exemption: An Historical Perspective." *Geo. Wash. L. Rev.* 60: 915-948.

Hanley, John, Michael Salamone, and Matthew Wright. 2012. "Reviving the Schoolmaster: Reevaluating Public Opinion in the Wake of *Roe v. Wade*." *Political Research Quarterly* 65(2): 408-421.

Hanna, Cheryl. 2009. "Rethinking Consent in a 'Big Love' Way." *Vermont Law School Legal Studies Research Paper Series*, 10-20:1-46. Available at SSRN: <http://ssrn.com/abstract=1502760>.

Hansforth, Thomas G. 2004. "Information Provision, Organizational Constraints, and the Decision to Submit an Amicus Curiae Brief in a U.S. Supreme Court Case." *Political Research Quarterly* 57(2): 219-230.

Haque, Adil Ahmad. 2007. "*Lawrence v. Texas* and the Limits of the Criminal Law." *Harvard Civil Rights-Civil Liberties Law Review* 42:1-43.

Harcourt, Bernard E. 2004. "On Gun Registration, The NRA, Adolf Hitler, and Nazi Gun Laws: Exploding The Gun Culture Wars (A Call to Historians)." *Fordham Law Review* 73(2): 653-680.

Harcourt, Bernard E. 2004. "You are Entering a Gay- and Lesbian-Free Zone on the Radical Dissents of Justice Scalia and Other (Post-) Queers." *Chicago Public Law and Legal Theory Working Paper*, No. 59:1-44. Available at SSRN: http://ssrn.com/abstract_id=508942.

Hardy, David T. 2011. "The Recent Rise, and More Recent Demise, of the 'Collective Right' Interpretation of the Second Amendment." 1-49. Available at SSRN: <http://ssrn.com/abstract=1865946>.

Hardy, David T. 2012. "*McDonald v. Chicago*: Fourteenth Amendment Incorporation and Judicial Role Reversals." 1-41. Available at SSRN: <http://ssrn.com/abstract=2061920>.

Harper, Fowler V. and Edwin D. Etherington. 1953. "Lobbyists Before the Court." *University of Pennsylvania Law Review* 101(8): 1172-7.

Hassel, Diana. 2004. "*Lawrence v. Texas*: Evolution of Constitutional Doctrine." *Roger Williams University Law Review* 9:565-577.

Hatemi, Peter and Rose McDermott. 2012. "Policing the Perimeter: Disgust and Purity in Democratic Debate." *Political Science and Politics* 45(4): 675-687.

Hein, William S. 2008-2009. "*District of Columbia v. Heller*: The Individual Right to Bear Arms." *Harvard Law Review*. 122(1): 139-144.

Heinz, John P., Ann Southworth, and Anthony Paik. 2003. "Lawyers for Conservative Causes: Clients, Ideology and Social Distance." *Law and Society* 37(1): 5-33.

Herald, Marybeth. 2004. "A Bedroom of One's Own: Law and Sexual Morality after *Lawrence v. Texas*." *Yale Journal of Law & Feminism* 16:1-40.

Hertzke, Allen D. 1988. *Representing God in Washington: The Role of Religious Liberty in the American Polity*. Knoxville: University of Tennessee Press.

Heyman, Steven J. "Natural Rights and the Second Amendment." *Chicago-Kent Law Review* 76(1): 237-283.

Heymann, Philip B. and Douglas E. Barzeley. 1973. "The Forest and the Trees: *Roe v. Wade* and Its Critics." *Boston University Law Review* 53: 765-784.

Himmelfarb, Gertrude. 1999. *One Nation, Two Cultures: A Searching Examination of American Society in the Aftermath of Our Cultural Revolution*. New York: Vintage Books.

Ho, Dale. 2010. "Dodging a Bullet: *McDonald v. City of Chicago* and the Limits of Progressive Originalism." *William & Mary Bill of Rights Journal* 19(2): 369-417.

Hull, N.E.H. and Peter Charles Hoffer. 2010. *Roe v. Wade: The Abortion Rights Controversy in American History*. Lawrence: University Press of Kansas.

Hunter, James Davison and Alan Wolfe. 2006. *Is There a Culture War?* Washington, D.C.: Brookings Institution Press.

Hunter, James Davison. 1991. *Culture Wars: The Struggle to Define America*. New York: Basic Books.

Hunter, James Davison. 1994. *Before the Shooting Begins: Searching for Democracy in America's Culture War*. New York: Free Press.

Hunter, James Davison. 1996. Response to Davis and Robinson: Remembering Durkheim." *Journal for the Scientific Study of Religion* 35: 246-48.

Hunter, Nan. 2003-2004. "Living with Lawrence." *Minnesota Law Review* 88: 1103-1139.

Inglehart, Ronald. 1997. *Modernization and Postmodernization: Cultural, Economic, and Political Change in 43 Societies*. Princeton: Princeton University Press.

Jacoby, William G. 2014. "Is there a Culture War? Conflicting Value Structures in American Public Opinion." *American Political Science Review* 108(1): 1-18.

Jelen, Ted G. 1997. "Culture Wars and the Party System: Religion and Realignment, 1972-1993," in *Cultural Wars in American Politics: Critical Reviews of a Popular Myth*, ed. Rhys Williams. New York: Aldine de Gruyter.

- Jelen, Ted. G, and Clyde Wilcox. 1997. "Conscientious Objectors in the Culture War? A Typology of Attitudes toward Church-State Relations." *Sociology of Religion* 58: 277-87.
- Jensen, Richard. 1995. "The Culture Wars, 1965-1995: A Historian's Perspective." *Journal of Social History*. 29: 17-37.
- Johnson, Nicholas James. 2009. "Supply Restrictions at the Margins of *Heller* and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique." *Hastings Law Journal* 60(6): 1285-1365.
- Johnson, Nicholas, David B. Kopel, George A. Mocsary, and Michael P. O'Shea. 2012. "Firearms, Law and the Second Amendment: Regulation, Rights, and Policy" Aspen Publishers.
- Johnson, Timothy R. And Andrew D. Martin. 1998. "The Public's Conditional Response to Supreme Court Decisions." *American Political Science Review* 92(2): 299-309.
- Jost, Kenneth. 2010. "Abortion Debates." *CQ Researcher* 20: 725-748, available at <http://library.cqpress.com/scc/cqresrre2010091000>.
- Jost, Kenneth and Timothy Stoltzfus. (2002) "Rights of Embryo and Foetus in Private Law," 50 *Am. J. Comp. L.* 633.
- Kahan, Dan M. 2003. "The Gun Control Debate: A Culture Theory Manifesto." *Washington and Lee Law Review* 60: 3-12.
- Kahan, Dan M. 2003. "The Gun Control Debate: A Culture-Theory Manifesto." *Washington & Lee Law Review*. 60(1): 3-12.
- Kahn, Ronald. 2007-2008. "Originalism, the Living Constitution, and Supreme Court Decision Making in the Twenty-First Century: Explaining *Lawrence v. Texas*." *Maryland Law Review* 67:25-35.
- Kapiszewski, Diana. 2011. "Tactical Balancing: High Court Decision Making on Politically Crucial Cases." *Law and Society* 45(2): 471-506.
- Karlan, Pamela. 2004. "Loving Lawrence." *Stanford Public Law and Legal Theory Working Paper Series*, Research Paper 85:1-21. Available at SSRN: <http://ssrn.com/abstract=512662>.
- Karst, Kenneth L. 1980. "The Freedom of Intimate Association." *Yale Law Journal* 89: 624-693.
- Kates, Jr., Don B. 1983. "Handgun Prohibition and the Original Meaning of the Second Amendment." *Michigan Law Review* 82(2): 204-273.
- Kates, Jr., Don B. 1986. "The Second Amendment: A Dialogue." *Law and Contemporary Problems, Duke University School of Law* 49(1): 143-150.

Kaufmann, Karen M., John R. Petrocik, and Daron R. Shaw. 2008. *Unconventional Wisdom: Facts and Myths about American Voters*. Oxford: Oxford University Press.

Kearney, Joseph D. and Thomas W. Merrill. 2000. "The Influence of Amicus Briefs on the Supreme Court." *University of Pennsylvania Law Review* 148: 743-855.

King, Patricia A. 1979. "The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn." *Michigan Law Review* 77(7): 1647-1687.

Knauer, Nancy J. 2004. "Lawrence v. Texas: When 'Profound and Deep Convictions' Collide with Liberty Interests." *Cardozo Women's Law Journal* 10:325-336.

Konig, David Thomas. 2004. "The Persistence of Resistance: Civic Rights, Natural Rights, and Property Rights in the Historical Debate Over "the Right of the People To Keep and Bear Arms." *Fordham Law Review* 73(2): 539-547.

Konig, David. 2012. "Heller, Guns, and History: The Judicial Invention of Tradition." *Northeastern University Law Journal* 3(1): 175-197.

Kopel, David B. 2009. "The Natural Right of Self-Defense: *Heller's* Lesson for the World." *Syracuse Law Review* 59(1): 999-1016.

Koppelman, Andrew. 2003-2004. "Lawrence's Penumbra." *Minnesota Law Review* 88: 1171-83.

Koppelman, Andrew. 1997. "Romer v. Evans and Invidious Intent," *William and Mary Bill of Rights Journal*. 6: 89-146.

Koppelman, Andrew. 2013. *Defending American Religious Neutrality*. Cambridge, MA: Harvard University Press.

Kritzer, H. M., J. Pickerill, and M. Richards. 1998. "Bringing the Law Back In: Finding a Role for law in Models of Supreme Court Decision-Making." Presented at the annual meeting of the Midwest Political Science Association, Chicago.

Kritzer, H. M. 2003. "Jurisprudential Regimes and Supreme Court Decision Making: The Lemon Regime and Establishment Clause Cases." *Law and Society Review* 37(4): 827-840

Larson, Carlton F. W. 2009. "Four Exceptions in Search of a Theory: *District of Columbia v. Heller* and Judicial *Ipse Dixit*." *Hastings Law Journal*, 60(6): 1371-86.

LaRue, L. H. 1995. *Constitutional Law as Fiction*. University Park: The Pennsylvania University Press.

Lash, Kurt. 1994. "The Second Adoption of the Free Exercise Clause: Religious Exemptions under the Fourteenth Amendment." *Nw. U. L. Rev.* 88: 1106-56.

Law, Sylvia A. 1984. "Rethinking Sex and the Constitution." *U. Pa. L. Rev.* 132: 955-1040.

- Lax, Jeffrey R. 2011. "The New Judicial Politics of Legal Doctrine." *Annual Review of Political Science* 14: 131-57.
- Laycock, Douglas. 2014. "Religious Liberty and the Culture Wars." *U. Ill. L. Rev.* 2014(3): 839-80.
- Laycock, Douglas. 2011. *Religious Liberty: The Free Exercise Clause, Volume 2*. Grand Rapids: William P. Eerdmans Publishing Co.
- Laycock, Douglas, Ed. 2008. *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*. Lanham, Maryland: Rowman & Littlefield Publishers.
- Laycock, Douglas. 1996. "Religious Liberty as Liberty." *J. Contemporary Legal Issues* 7: 313-56.
- Laycock, Douglas. 1994. "Free Exercise and the Religious Freedom Restoration Act." *Fordham L. Rev.* 62: 883-904.
- Laycock, Douglas and Oliver S. Thomas. 1994. "Interpreting the Religious Freedom Restoration Act." *Tex. L. Rev.* 73: 209-245.
- Laycock, Douglas. 1990. "The Remnants of Free Exercise." *Sup. Ct. Rev.* 1-68.
- Layman, Geoffrey C., and John C. Green. 2005. "Wars and Rumours of Wars: The Contexts of Cultural Conflict in American Political Behaviour." *British Journal of Political Science* 36: 61-89.
- Layman, Geoffrey C., Thomas M. Carsay, John C. Green, Richard Herrera and Rosalyn Cooperman. 2010. "Activists and Conflict Extension in American Party Politics." *American Political Science Review* 104(2): 324-346.
- Leider, Robert. 2012. "Our Non-Originalist Right to Bear Arms." *Indiana Law Journal* 89(4): 1-86.
- Levinson, Sanford. 1989. "The Embarrassing Second Amendment." *The Yale Law Journal* 99(3): 637-659.
- Levinson, Sanford. 2009. "For Whom is the *Heller* Decision Important and Why?" *Lewis & Clark Law Review*. 13(2): 315-333.
- Lindquist, Stephanie A. and David E. Klein. 2006. "The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases." *Law and Society Review* 40(1): 135-162.
- Lockhart, Ted. 1991. "A Decision-Theoretic Reconstruction of *Roe V. Wade*." *Public Affairs Quarterly* 5(3): 243-258.

- Loewentheil, Kara. 2014. "When Free Exercise is a Burden: Protecting 'Third Parties' in Religious Accommodation Law." *Drake L. Rev.* 62: 433-501.
- Luker, Kristin. 1984. *Abortion and the Politics of Motherhood*. Berkeley: University of California Press.
- Lund, Nelson Robert. 2009. "Heller and Second Amendment Precedent." *Lewis & Clark Law Review* 13(2): 335-347.
- Lund, Nelson Robert. 2009. "The Second Amendment, *Heller*, and Originalist Jurisprudence." *UCLA Law Review* 56(5): 1343-1376.
- Lund, Nelson Robert. 2010. "Two Faces of Judicial Restraint (Or Are There More?) in *McDonald v. Chicago*." *Florida Law Review* 63(3): 487-532.
- Lund, Nelson, and John O. McGinnis. 2004. "*Lawrence v. Texas* and Judicial Hubris." *Michigan Law Review* 102(7): 1555-1614.
- Lund, Nelson. 1996. "The Past and Future of the Individual's Right to Arms." *Georgia Law Review* 31(1): 1-76.
- Lupia, Arthur and Jesse Menning. 2009. "When Can Politicians Scare Citizens Into Supporting Bad Policies?" *American Journal of Political Science* 53: 90-106.
- Lupu, Ira C. 1998. "The Failure of RFRA." *U. Ark. Little Rock L. Rev.* 20: 575-617.
- Lupu, Ira C. 1996. "To Control Faction and Protect Liberty: A General Theory of the Religion Clauses." *J. Contemporary Legal Issues* 7: 357-84.
- Lupu, Ira. C. 1994. "The Lingering Death of Separationism." *Geo. Wash. L. Rev.* 62: 230-279.
- Lyke, Sheldon Bernard. 2009. "*Lawrence* as an Eight Amendment Case: Sodomy and the Evolving Standards of Decency." *William and Mary Journal of Women and the Law* 15: 633-661.
- Lynch, Kelly. 2004. "Best Friends?: Supreme Court Law Clerks on Effective Amicus Briefs." *Journal of Law and Policy* 20(33): 44-45.
- Lytton, Timothy D., ed. 2005. *Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts*. Ann Arbor: University of Michigan Press.
- MacKinnon, Catherine A. 2004. "The Road Not Taken: Sex Equality in *Lawrence v. Texas*." *Ohio State Law Journal* 65: 1081-95.
- Madeira, Jody. 2004. "Rebuilding the Closet: *Bowers v. Hardwick*, *Lawrence v. Texas*, and the Mismeasure of Homosexual Historiography." *Richmond Journal of Law and the Public Interest* 8: 1-38.

- Magarian, Gregory P. 2012. "Speaking Truth to Firepower: How the First Amendment Destabilizes the Second." *Legal Studies Research Paper Series, Washington University*: 1-52.
- Maier, Pauline. 2010. "Justice Breyer's Sharp Aim." *Democratic Underground.com* at http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=118x352142.
- Malbin, Michael J. 1978. *Religion and Politics*. Washington: AEI.
- Marcus, George, W. Russell Neuman, and Michael MacKuen. 2000. *Affective Intelligence and Political Judgment*. Chicago: University of Chicago Press.
- Marcus, George. 2002. *The Sentimental Citizen: Emotion in Democratic Politics*. University Park, PA: Penn State University Press.
- Marcus, Nancy C. 2006. "Beyond *Romer* and *Lawrence*: The Right to Privacy Comes Out of the Closet." *Columbia Journal of Gender and Law* 15(2): 355-436.
- Marshall, Thomas R. 2008. *Public Opinion and the Rehnquist Court*. Albany: Albany State University of New York Press.
- Marshall, William P. 1991. "In Defense of *Smith* and Free Exercise Revisionism." *U. Chi. L. Rev.* 58: 308-28.
- Martin, Andrew D., and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis* 10(2):134-53.
- Massey, Calvin. 2004. "Elites, Identity Politics, Guns, and The Manufacture of Legal Rights." *Fordham Law Review* 73(2): 573-88.
- McConkey, Dale. 2001. "Whither Hunter's Culture War? Shifts in Evangelical Morality, 1988-1998." *Sociology of Religion* 62: 149-74.
- McConnell, Michael W. 1992. "Accommodation of Religion: An Update and Response to the Critics." *Geo. Wash. L. Rev.* 60: 685-742.
- McConnell, Michael W. 1991. "How Not to Promote Serious Deliberation About Abortion." *U. of Chi. Law Review* 58: 1181-1201.
- McConnell, Michael. 1990. "Free Exercise Revisionism and the *Smith* Decision." *U. of Chi. L. Rev.* 57: 1109-1153.
- McConnell, Michael. 1990. "The Origins and Historical Understanding of Free Exercise of Religion." *Harvard Law Rev.* 103(7): 1416-1517.
- McConnell, Michael. 1997-98. "Freedom From Persecution or Protection of the Rights of Conscience: A Critique of Justice Scalia's Historical Arguments in *City of Boerne v. Flores*." *Wm. And Mary L. Rev.* 39: 819-47.

McGowan, Miranda Oshige, 2003-2004. "From Outlaws to Ingroup: *Romer*, *Lawrence* and the Inevitable Normativity of Group Recognition." *Minnesota Law Review* 88: 1312-1345.

McGuire, Kevin T. and James A. Stimson. 2004. "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences." *Journal of Politics* 66(4): 1018-35.

Merkel, William G. 2009. "The *District of Columbia v. Heller* and Antonin Scalia's Perverse Sense of Originalism." *Lewis & Clark Law Review* 13(2): 349-81.

Merkel, William G. 2006. "A Cultural Turn: Reflections On Recent Historical and Legal Writing on the Second Amendment." *Stanford Law and Policy Review* 17(3): 671-98.

Merkel, William G. 2010. "*Heller* as Hubris, and How *McDonald v. City of Chicago* May Well Change the Constitutional World as We Know It." *Santa Clara Law Review* 50(4): 1221-61.

Messner, Thomas M. 2011. "From Culture Wars to Conscience Wars: Emerging Threats to Conscience." *Backgrounder*, No. 2543, Heritage Institute.

Meyer, David. 2004. "Domesticating *Lawrence*." *Illinois Public Law and Legal Theory Research Papers Series*, Research Paper No. 04-23, 445-85. Available at SSRN: <http://ssrn.com/abstract=593902>.

Miller, Alan S., and John P. Hoffman. 1999. "*The Growing Divisiveness: Culture Wars or a War of Words?*" *Social Forces* 78: 721-45.

Miller, Gary, and Norman Schofield. 2003. "Activists and Partisan Realignment in the United States." *American Political Science Review* 97: 245-60.

Mishler, William and Reginald S. Sheehan. 1996. "Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective." *Journal of Politics* 58(1): 169-200.

Mondak, Jeffery J. and Shannon Ishiyama Smithey. 1997. "The Dynamics of Public Support for the Supreme Court." *The Journal of Politics* 59: 1114-42.

Morgan, Richard Gregory. 1979. "*Roe v. Wade* and the Lesson of the Pre-*Roe* Case Law." *Michigan Law Review* 77(7): 1724-48.

Mouw, Ted, and Michael E. Sobel. 2001. "Culture War and Opinion Polarization: The Case of Abortion." *American Journal of Sociology* 106: 913-43.

Murdoch, Joyce and Deb Price. 2002. *Courting Justice: Gay Men and Lesbians v. the Supreme Court*. New York: Basis Books.

Muste, Christopher P. 2014. "Reframing Polarization: Social Groups and 'Culture Wars.'" *PS: Political Science & Politics* 47(02): 432-42.

- Nelson, Lawrence J. 2009. "Of Persons and Prenatal Humans: Why the Constitution is not Silent on Abortion." *Lewis & Clark L. Rev.* 13: 155 – 207.
- Neumann, Russell, George E. Marcus, Ann Crigler, and Michael MacKuen. 2007. *The Affect Effect: Dynamics of Emotion in Political Thinking and Behavior*. Chicago: University of Chicago Press.
- Noonan, Jr., John T. 1984. "The Root and Branch of *Roe v. Wade*." *Nebraska Law Review* 63: 668-79.
- Norton, Patrick J. 1998. "Is Equality Foundation the Latest Chapter In America's Culture War?" *48 Case Western L.Rev.* 48: 903-930.
- Norton, Patrick M. 1998. "Is *Equality Foundation* the Latest Chapter in America's Culture War?" *Case Western L. Rev.* 49: 903-30.
- Nossiff, Rosemary. 2001. "Abortion Policy Before *Roe*: Grassroots and Interest-Group Mobilization." *Journal of Policy History* 13(4): 463-78.
- Nossiff, Rosemary. 2001. *Before Roe: Abortion Policy in the States*. Philadelphia: Temple University Press.
- O'Connor, Karen and Lee Epstein. 1981. "Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's 'Folklore'." *Law and Society Review* 16(2): 311-20.
- O'Connor, Karen and Lee Epstein. 1983. "The Rise of Conservative Interest Group Litigation." *Journal of Politics* 45(2): 479-89.
- O'Neill, Johnathan. 2005. *Originalism in American Law and Politics: A Constitutional History*. Baltimore: John Hopkins University Press.
- Oder, Broeck N. 1998. "Teaching the Meaning of the Second Amendment: A Brief Note on Recent Research." *OAH Magazine of History* 13(1): 64-66.
- O'Shea, Michael P. 2009. "The Right to Defensive Arms After *District of Columbia v. Heller*." *West Virginia Law Review* 111(2): 349-93.
- O'Shea, Michael P. 2011. "Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of 'Bearing Arms' for Self-Defense." *American University Law Review* 61(3): 1-102.
- Pacelle, Jr., Richard J. 2010. *The Role of the Supreme Court in American Politics: The Least Dangerous Branch?* Boulder: Westview Press.
- Perkinson, P. Landon. 2007. "Sexual Privacy after *Lawrence v. Texas*." *Georgetown Journal of Gender & Law* 8: 203-33.

Peterson, Steven A. 1981. "Dissent in American Courts." *The Journal of Politics* 43(2): 412 – 34.

Pojman, Louis P. and Francis J. Beckwith. 1998. *The Abortion Controversy: 25 Years After Roe v. Wade*. Belmont: Wadsworth Publishing Company.

Post, Robert and Reva Siegel. 2006. "Originalism as a Political Practice: The Right's Living Constitution." *Fordham Law Review* 75: 545-74.

Price, Deb. 1001. *Courting Justice: Gay Men and Lesbians v. the Supreme Court*. New York: Basic Books.

Pushaw Jr., Robert J. 2008. "Partial-Birth Abortion and the Perils of Constitutional Common Law." *Harv. J. L. & Pub. Pol'y* 31: 519-91.

Rabkin, Jeremy. 1995. Book Review: "Constitutional Firepower: New Light on the Meaning of the Second Amendment to Keep and Bear Arms, the Origins of an Anglo-American Right," by Joyce L. Malcolm. *The Journal of Criminal Law and Criminology* 86(1): 231-246.

Rabkin, Jeremy. 1996. "The Supreme Court in the Culture Wars." *The Public Interest* Fall: 3-26.

Rabkin, Jeremy. 1999. "The Culture War That Isn't." *Policy Review* 96: 3-19.

Rakove, Jack N. 2000. "The Second Amendment: The Highest Stage of Originalism." *Chicago-Kent Law Review* 76(1): 103-66.

Regan, Donald H. 1979. "Rewriting *Roe v. Wade*." *Michigan Law Review: Symposium on the Law and Politics of Abortion* 77(7): 1569-1646.

Reyes, Rene. 2011-2012. "Common Cause in the Culture Wars?" *Journal of Law and Religion*. 27: 231-71.

Reynolds, Glenn Harlan and Brannon P. Denning. 2008. "*Heller's* Future in the Lower Courts." *Northwestern University Law Review* 102(4): 406-14.

Reynolds, Glenn Harlan, and Don B. Kates. 1994-95. "The Second Amendment and States' Rights: a Thought Experiment." *William & Mary Law Review* 36(5): 1737-68.

Reynolds, Glenn Harlan. 1995. "A Critical Guide to the Second Amendment." *Tennessee Law Review* 62(3): 461-511.

Reynolds, Glenn Harlan. 2007. "Guns and Gay Sex: Some Notes on Firearms, the Second Amendment, and 'Reasonable Regulation'." *Tennessee Law Review* 75(1): 137-48.

Reynolds, Glenn Harlan. 2012. "Second Amendment Penumbra: Some Preliminary Observations." *Southern California Law Review* 85(2): 247-59

- Richards, Mark J. and Herbert M. Kritzer. 2002. "Jurisprudential Regimes in Supreme Court Decision Making." *American Political Science Review* 96(2): 305-20.
- Rienzi, Mark L. 2013. "God and the Profits: Is there Religious Liberty for Money-makers?" *Geo. Mason L. Rev.* 21(1): 59-116.
- Risen, James and Judy L. Thomas. 1998. *Wrath of Angels: The American Abortion War*. New York: Basic Books.
- Rizzo, J. 1976. "The Constitutionality of Sodomy Statutes." *Fordham Law Review* 45: 553-95.
- Rohde, David W. and Harold J. Spaeth. 1976. *Supreme Court Decision Making*. San Francisco: Freeman.
- Rose, Melody. 2007. *Safe, Legal, and Unavailable? Abortion Politics in the United States*. Washington D.C.: CQ Press.
- Rosenbury, Laura. 2010. "Sex In and Out of Intimacy." *Emory Law Journal* 59: 809-68.
- Rosenthal, Lawrence. 2009. "Second Amendment Plumbing After *Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs." *The Urban Lawyer, American Bar Association* 41(1): 1-92.
- Rostron, Allen K. 2012. "Justice Breyer's Triumph in the Third Battle Over the Second Amendment." *George Washington Law Review* 80(3): 703-63.
- Roy, D. and D.R. Songer. 2010. "Does the Attitudinal Model Explain Unanimous Reversals?" *Justice System Journal* 31: 342-372.
- Ruger, Theodore, Pauline T. Kim, Andrew D. Martin and Kevin M. Quinn. 2004. "The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking." *Columbia Law Review* 104(4): 1150-1210.
- Ruskola, Teemu. 2005. "Gay Rights versus Queer Theory, What is Left of Sodomy after *Lawrence v. Texas*?" *Social Text* 84-85: 235-49.
- Rutherford, Jane. 1996. "Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion." *Cornell L. Rev.* 81: 1049-1128.
- Ryan, James E. 1992. "Note, *Smith* and the Religious Freedom Restoration Act: An Iconoclastic Assessment." *Va. L. Rev.* 78: 1407-57.
- Sandel, Michael J. 1989. "Moral Argument and Liberal Toleration: Abortion and Homosexuality." *California Law Review* 77: 521-38.
- Saphire, R. 1985. "Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice and *Dronenburg v. Zech*." *U. Dayton L. Rev.* 10: 767-813.

Schauer, Grederick. 2000. "Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior." *University of Cincinnati Law Review* 68: 615-17.

Schlafly, Phyllis. 2008. "How the Government Influences Our Culture." *Northwestern Law Review* 102: 491-94.

Schragger, Richard. 2008. "The Last Progressive: Justice Breyer, *Heller*, and 'Judicial Judgment'." *Syracuse Law Review* 59(1): 283-94.

Schragger, Richard. 2011. "The Politics of Free Exercise After *Employment Division v. Smith*: Same-Sex Marriage, The 'War on Terror,' and Religious Freedom." *Cardozo L. Rev.* 32(5): 2009-31.

Schwartzman, Micah. 2012. "What if Religion is Not Special?" *U. Chi. L. Rev.* 79: 1351-1426.

Segal, Jeffrey A. 1986. "Supreme Court Justices as Human Decision Makers: An Individual-Level Analysis of the Search and Seizure Cases." *Journal of Politics* 48(4): 938-55.

Segal, Jeffrey A. and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83(2): 557-65.

Segal, Jeffrey A., and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. New York: Cambridge University Press.

Segal, Jeffrey A., Lee Epstein, Charles M. Cameron and Harold J. Spaeth. 1995. "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited." *Journal of Politics* 57(3): 812-23.

Shalhope, Robert E. 1982. "The Ideological Origins of the Second Amendment." *The Journal of American History* 69(3): 599-614.

Shaman, Jeffrey M. 2008. "The Wages of Originalist Sin: *District of Columbia v. Heller*" Available at: http://works.bepress.com/jeffrey_shaman/2.

Shapiro, Ian, ed. 1995. *Abortion: The Supreme Court Decisions*. Indianapolis: Hackett Publishing Company.

Shapiro, Ilya. 2008. "Friends of the Second Amendment: A Walk Through the Amicus Briefs in *D.C. v. Heller*." *Journal on Firearms and Public Policy* 20: 15-41.

Shapiro, Ilya. 2010. "More Friends of the Second Amendment: A Walk through the Amicus Briefs in *McDonald v. Chicago*." *Journal on Firearms & Public Policy* 22: 5-32.

Sheldon, Charles H. 1999. "The Incidence and Structure of Dissensus on a State Supreme Court," in *Supreme Court Decision-Making: New Institutional Approaches*, Clayton, Cornell W. and Howard Gillman, eds. Chicago: The University of Chicago Press.

- Sherry, Suzanna. 1996. "Enlightening the Religion Clauses." *J. Contemporary Legal Issues* 7: 473-95.
- Siebeneck, Carissa D. 2008. "Sexual Privacy after *Lawrence v. Texas*." *Georgetown Journal of Gender & Law* 9: 561-592.
- Siegel, Neil S. and Reva B. Siegel. 2013. "Equality Arguments for Abortion Rights." *UCLA L. Rev. Disc.* 60: 160-70.
- Siegel, Reva B. 2008. "Dead or Alive: Originalism as Popular Constitutionalism in *Heller*." *Harvard Law Review* 122(1): 191-245.
- Siegel, Reva B. 2009. "*Heller* & Originalism's Dead Hand - In Theory and in Practice." *UCLA Law Review* 56(5): 1399-1425.
- Sisk, Gregory C, Michael Heise, and Andrew P. Morriss. 1998. "Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning." *New York University Law Review* 73: 1377-1463.
- Slovenko, R. 1985. "The Homosexual and Society: A Historical Perspective." *U. Dayton L. Rev.* 10: 445-57.
- Smith, Christian, et al. 1996. "The Myth of Culture Wars." *Culture: Newsletter of the Sociology of Culture, American Sociological Association* 11(1): 1-10.
- Smith, Rogers M. 1993. "Beyond Toqueville, Myrdal, and Hartz: The Multiple Traditions in America." *American Political Science Review* 87: 549-66.
- Smith, Steven D. 2004-2005. "The Iceberg of Religious Freedom: Sub-Surface Levels of Nonestablishment Discourse." *Creighton L. Rev.* 38: 799-814.
- Smith, Steven D. 2005. "What Does Religion Have to do with Freedom of Conscience?" *Colo. L. Rev.* 76(4): 911-40.
- Smith, Steven D. 1996. "Unprincipled Religious Freedom." *J. Contemporary Legal Issues* 7: 497-516.
- Smith, Steven D. 1995. *Foreordained Failure*. Oxford: Oxford University Press.
- Solinger, Rickie, ed. 1998. *Abortion Wars: A Half Century Struggle: 1950-2000*. Berkeley: University of California Press.
- Solum, Lawrence B. 2009. "*District of Columbia v. Heller* and Originalism." *Northwestern University Law Review* 103(2): 923-82.

- Songer, Donald R. 2012. "The Dog That Did Not Bark: Debunking the Myths Surrounding the Attitudinal Model of Supreme Court Decision Making." *The Justice System Journal* 33(3): 340-362.
- Songer, Donald R. and Reginald S. Sheehan. 1992. "Interest Group Success in the Courts: Amicus Participation in the Supreme Court." *Political Research Quarterly* 46: 339-54.
- Songer, D. R., and S.A. Lindquist. 1996. "Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making." *Am. J. Pol. Science* 40(4): 1049-1063.
- Spaeth, Harold J. 1965. "Jurimetrics and Professor Mendelson." *Journal of Politics* 27(4): 875-80.
- Spindelman, Marc. 2004. "Sodomy Politics in *Lawrence v. Texas*." *Public Law and Legal Theory*, Working Paper Series, No. 14; *Center for Law, Policy and Social Science*, Working Paper Series, No. 10:1-8. Available at SSRN: <http://ssrn.com/abstract=556724>.
- Spindelman, Marc. 2004. "Surviving *Lawrence v. Texas*." *Michigan Law Review* 102: 1615-67.
- Spitzer, Robert J. 2000. "Lost and Found: Researching the Second Amendment." *Chicago-Kent Law Review* 76(1): 349- 401.
- Spitzer, Robert J. 2004. "Don't Know Much About History, Politics, Or Theory: A Comment." *Fordham Law Review* 73(2): 721-30.
- Spriggs, J. F. and P. J. Wahlbeck. 1997. "Amicus Curiae and the Role of Information at the Supreme Court." *Political Research Quarterly* 50: 365-86.
- Stark, Vincent. 2009. "Public Morality as a Police Power after *Lawrence v. Texas* and *Gonzales v. Carhart*." *Georgetown Journal of Gender & Law* 10: 165-208.
- Stein, Ed. 2004. "Introducing *Lawrence v. Texas*: Background and a Glimpse of the Future." *Cardozo Women's Law Journal* 10: 263-88.
- Steinberg, David E. 1991. "Religious Exemptions as Affirmative Action." *Emory L. J.* 40: 77-139.
- Sternglantz, Ruth E. 2005. "Raining on the Parade of Horribles: of Slippery Slopes, *Faux* Slopes, and Justice Scalia's Dissent in *Lawrence v. Texas*." *University of Pennsylvania Law Review* 153(3): 1097-1123.
- Stopler, Gila. 2004. "The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality." *Wm. & Mary J. Women & L.* 10: 459-532.
- Sundquist, James L. 1983. *Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States*. Washington, D.C.: Brookings Institution.

Sunstein, Cass R. 2003. What Did *Lawrence* Hold? Of Autonomy, Desuetude, Sexuality, and Marriage.” *Chicago John M. Olin Law & Economics Working Paper*, No. 196:1-44. Available at SSRN: http://ssrn.com/abstract_id=450160.

Sunstein, Cass R. 2008. “Second Amendment Minimalism: Heller as Griswold.” *Harvard Law Review* 122(1): 246- 72.

Teles, Steven M. 2008. *The Rise of the Conservative Legal Movement: The Battle for the Control of the Law*. Princeton: Princeton University Press.

Thomson, Irene Taviss. 2010. *Culture Wars and Enduring American Dilemmas*. Ann Arbor: University of Michigan Press.

Thomson, Judith Jarvis. 1971. “A Defense of Abortion.” *Philosophy and Public Affairs* 1: 47-66.

Toler, Lorianne Updike and J. Carl Cecere. “Pre-‘Originalism.’” *Harvard Journal of Law and Public Policy* 36: 277-318.

Tribe, Lawrence H. 2004. “*Lawrence v. Texas*: The ‘Fundamental Right’ That Dare Not Speak Its Name.” *Harvard Law Review* 117: 1894-1955.

Tribe, Lawrence. 1990. *Abortion: The Clash of Absolutes*. New York: W.W. Norton and Company.

Turner, William B. 2006. “Nietzsche, Foucault, Scalia.” *Emory University School of Law, Public Law & Legal Theory Research Paper Series*, Research Paper 06-28: 1-63. Available at SSRN: <http://papers.ssrn.com/abstract=948311>.

Turnipseed, Terry L. 2009. “Scalia's Ship of Revulsion Has Sailed: Will *Lawrence* Protect Adults Who Adopt Lovers to Help Ensure their Inheritance from Incest Prosecution?” *Hamline Law Review* 32(1): 95-132.

Tushnet, Mark V. 2008. “Two Essays on *District of Columbia v. Heller*.” *Harvard Public Law Working Paper*, No. 08-17: 1-46. Available at SSRN: <http://ssrn.com/abstract=1189494>.

Tushnet, Mark. 2008. “*Heller* and the New Originalism.” *Ohio State Law Journal*. 69(4): 609–24.

Tushnet, Mark. 2009. “*Heller* and the Perils of Compromise.” *Lewis & Clark Law Review* 13(2): 419 – 32.

Tushnet, Mark. 2001. “The Redundant Free Exercise Clause?” *Loy. U. Chi. L.J.* 33: 71-94.

Unah, Isaac and Ange-Marie Hancock. 2006. “U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model.” *Law and Policy* 28(3): 295-320.

Uviller, H. Richard and William G. Merkel. 2000. “The Second Amendment In Context: The Case of The Vanishing Predicate.” *Chicago-Kent Law Review* 76(1): 403-600.

- Uviller, H. Richard and William G. Merkel. 2002. "The Authors Reply to Commentaries on, and Criticisms of The Militia and the Right to Bear Arms, or How the Second Amendment Fell Silent." *William and Mary Bill of Rights Journal* 12(2): 357-66.
- van Alstyne, William. 1994. "The Second Amendment and the Personal Right to Arms." *Duke Law Journal* 43(6): 1236-1255.
- van Alstyne, William. 1989. "Closing the Circle of Constitutional Review from *Griswold v. Connecticut* to *Roe v. Wade*: An Outline of a Decision Merely Overruling *Roe*." *Duke Law Journal*, 1989 (6): 1677-88.
- Volkoh, Eugene. 1998. "The Commonplace Second Amendment." *New York University Law Review* 73(3): 793-821.
- Wahlbeck, Paul J. 1997. "The Life of the Law: Judicial Politics and Legal Change." *Journal of Politics* 59(3): 778-802.
- Wahlbeck, Paul J., James F. Spriggs II, and Forrest Maltzman. 1999. "The Politics of Dissents and Concurrences on the U.S. Supreme Court." *American Politics Research* 27(4): 488-514.
- Wahlbeck, Paul J., James F. Spriggs, II and Forrest Maltzman. 1998. "Marshalling the Court: Bargaining and Accommodation on the United State Supreme Court." *American Journal of Political Science* 42(1): 294-315.
- Walker, Anders. 2008. "From Ballots to Bullets: *District of Columbia v. Heller* and the New Civil Rights." *Louisiana Law Review* 69(3): 509-48.
- Watson, Bradley C.S., ed. 2002. *Courts and the Culture Wars*. New York: Lexington Books.
- Wechsler, Herbert. 1959. "Toward Neutral Principles of Constitutional Law." *Harvard Law Review* 73(1): 1-35.
- Whelan, Edward. 2012. "The HHS Contraception Mandate vs. the Religious Freedom Restoration Act." *Notre Dame L. Rev.* 87(5): 2179-90.
- White, John Kenneth. 2003. *The Values Divide*. New York: Chatham House.
- Whittington, Keith E. 2011. "The Supreme Court in Politics." *Reviews in American History* 39: 631-36.
- Williams, David C. 1991. "Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment." *Yale Law Journal* 101(3): 551-615.
- Williams, David C. 1996. "The Militia Movement And Second Amendment Revolution: Conjuring With The People." *Cornell Law Review* 81(4): 879-952.
- Williams, David C. 2003. *The Mythic Meaning of the Second Amendment: Taming Political Violence in a Constitutional Republic*. New Haven: Yale University Press.

- Williams, David C. 2008. "Death to Tyrants: District of Columbia v. Heller and the Uses of Guns." *Ohio State Law Journal*. 69(4): 641-69.
- Williams, Rhys H., ed. 1997. *Cultural Wars in American Politics: Critical Reviews of a Popular Myth*. New York: de Gruyter.
- Wilson, Joshua C. 2013. *The Street Politics of Abortion: Speech, Violence, and America's Culture Wars*. Stanford: Stanford University Press.
- Winkler, Adam. (2009) "Heller's Catch-22." *UCLA Law Review* 56(5): 1551 – 77.
- Winkler, Adam. 2007. "Scrutinizing the Second Amendment." *Michigan Law Review* 105(4): 683-733.
- Witherspoon, James S. 1985. "Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment." *St. Mary's L.J.* 17: 29-71.
- Wolfe, Alan. 1998. *One Nation After All: What Middle-Class Americans Really Think About: God, Country, Family, Racism, Welfare Immigration, Homosexuality, Work, the Right the Left, and Each Other*. New York: Viking.
- Wrightsmann, Lawrence S. 2006. *The Psychology of the Supreme Court*. New York: Oxford University Press.
- Wuthnow, Robert. 1989. *The Struggle for America's Soul: Evangelicals, Liberals, and Secularism*. Grand Rapids: Eerdmans.
- Wuthnow, Robert. 1988. *The Restructuring of American Religion: Society and Faith Since World War II*. Princeton: Princeton University Press.
- Yassky, David. 2000. "The Second Amendment: Structure, History, and Constitutional Change." *Michigan Law Review* 99(3): 588-668.
- Yates, Jeff L., Levey, Brian P. and Moeller, Justin A. 2009. "For the Times They are a Changin': Explaining U.S. Supreme Court Justices' Voting Through Identification of Micro-Publics." *5th Annual Conference on Empirical Legal Studies Paper*, 1-35.