

TAKING THEOLOGY SERIOUSLY: THE STATUS OF THE RELIGIOUS BELIEFS OF JUDICIAL NOMINEES FOR THE FEDERAL BENCH†

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INTRODUCTION

Nominees to the federal bench, like all citizens, have beliefs. These beliefs include everything from what they were taught in law school to what they know about history or mathematics or what they may have learned in church or synagogue. And yet, it is the latter beliefs that are singled out for special scrutiny by the United States Senators who have the constitutional duty of advice and consent in the appointment of federal judges.¹

I believe there are three reasons for this. First, the issues that are often associated with what have come to be known as the culture wars²—abortion,³ human sexuality,⁴ and origins⁵—have

† On November 9, 2005, the *Notre Dame Journal of Law, Ethics & Public Policy* hosted a symposium entitled *The Religious Commitments of Judicial Nominees*. Mr. Beckwith was the third speaker at the Symposium. His remarks have been revised for publication. See also D'Army Bailey, *The Religious Commitments of Judicial Nominees—Address by Judge Bailey* (Nov. 9, 2005), in 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 443 (2006); Matthew J. Franck, *The Unbearable Unimportance of the Catholic Moment in Supreme Court History* (Nov. 9, 2005), in 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 447 (2006).

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1. U.S. CONST. art. II, § 3.
2. See JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).
3. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). For analyses of these opinions and/or their reasoning, see HADLEY ARKES, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE* 327–422 (1986); RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 102–78 (1994); LAWRENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990); Francis J. Beckwith, *Roe v. Wade: Its Logic and Its Legacy*, S. BAPTIST J. THEOLOGY, Summer 2003, at 4.
4. See *Lawrence v. Texas*, 539 U.S. 558 (2003). For a high-level exchange on the question of homosexuality and marriage, see the following articles: Hadley Arkes, *Questions of Principle, Not Predictions: A Reply to Macedo*, 84 GEO. L.J. 321

been elevated by the federal courts to questions that are implicitly covered by the principles of the U.S. Constitution. Second, these same questions are addressed by a number of religious traditions that provide contrary answers to the ones given by the federal judiciary. Third, it seems to me that most of the U.S. Senators who appear concerned about a nominee's religious beliefs—or what are sometimes called “personal” or “deeply-held beliefs”⁶—do not believe that these religious beliefs could ever be items of real knowledge and thus are not legitimate points of view that fall under the umbrella of what many political philosophers call “public reason.”⁷ Hence, what some U.S. Senators fear is that a federal judge or Supreme Court justice confirmed under their watch may employ the deliverances of her theological tradition and provide in her judicial opinions contrary answers to the

(1995); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995); Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995); Stephen Macedo, *Reply to Critics*, 84 GEO. L.J. 329 (1995).

5. I am referring to the policy questions arising from the teaching of evolution in public schools. See *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982); *Edwards v. Aguillard*, 482 U.S. 578 (1987). For differing views on these cases and the issue of evolution and public education, see Francis J. Beckwith, *Public Education, Religious Establishment, and the Challenge of Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 461 (2003); Kent Greenawalt, *Establishing Religious Ideas: Evolution, Creationism, and Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321 (2003); Jay D. Wexler, *Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools*, 56 VAND. L. REV. 751 (2003).

6. Columnist Charles Krauthammer provides this example:

[William] Pryor has more recently been attacked from a different quarter. Senate Democrats have blocked his nomination to the 11th U.S. Circuit Court of Appeals on the grounds of his personal beliefs. “His beliefs are so well known, so deeply held,” charged his chief antagonist, Sen. Charles Schumer [D-NY], “that it’s very hard to believe—very hard to believe—that they’re not going to deeply influence the way he comes about saying, ‘I will follow the law.’”

An amazing litmus test: Deeply held beliefs are a disqualification for high judicial office. Only people of shallow beliefs (like Schumer?) need apply.

Of course, Schumer’s real concern is with the *content* of Pryor’s beliefs. Schumer says that he would object to “anybody who had very, very deeply held views.” Anybody? If someone had deeply held views in *favor* of abortion rights, you can be sure that Schumer would not be blocking his nomination. Pryor is being pilloried because he openly states (1) that *Roe v. Wade* was a constitutional abomination, and (2) that abortion itself is a moral abomination.

Charles Krauthammer, *A Judge Prejudged*, WASH. POST, Aug. 29, 2003, at A23 (emphasis added).

7. See, e.g., NATURAL LAW AND PUBLIC REASON (Robert P. George & Christopher Wolfe eds., 2000); JOHN RAWLS, POLITICAL LIBERALISM (1993).

questions that these senators believe have already been correctly settled by public reason. Given this conclusion, I will suggest a solution that treats theology with epistemological respect while at the same time allaying some, though I suspect not all, of the fears expressed by some U.S. Senators.

I. THEOLOGY AS A KNOWLEDGE-TRADITION

Imagine that a member of the U.S. Senate Judiciary Committee were to ask a nominee for the federal bench the following question: "Would you permit what you've learned about science, mathematics, professional ethics, or history to influence the judgments you will make on this court?" Many of us would find this to be an odd question, since we would think the question almost impossible to answer in any definitive way unless we had specific knowledge of an actual case in which the judge's knowledge in these areas of study would be relevant to his judgment. We would, however, concede that there could be cases in which the judge's background beliefs may, and sometimes ought to, shape his or her judgments.

For example, in a famous exchange between contrary opinions in the case of *Rosenberger v. Virginia*,⁸ Justices Thomas⁹ and Souter¹⁰ sparred over differing interpretations and applications of James Madison's *Memorial and Remonstrance Against Religious Assessments*.¹¹ Each offered what he believed was the correct historical understanding of the meaning of Madison's famous essay. We think this perfectly appropriate even if it turns out that one of the justices is mistaken. Illustrations from science, mathematics, economics, and professional ethics are easy to come by as well. To cite but one illustration, in a well-known article on the use and misuse of probability theory by advocates and courts,¹² Lawrence Tribe cites a California Supreme Court case in which "the court ruled improper a prosecutor's misconceived attempt to link an accused interracial couple with a robbery by using probability theory."¹³ However, as Tribe notes, the court "discerned 'no inherent incompatibility between the disciplines of

8. *Rosenberger v. Rectors of the Univ. of Va.*, 515 U.S. 819 (1995).

9. *Id.* at 852-63 (Thomas, J., concurring).

10. *Id.* at 863-99 (Souter, J., dissenting).

11. JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785), reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 63-72 (1947) (Rutledge, J., dissenting).

12. Lawrence Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

13. *Id.* at 1334-38 (citing *People v. Collins*, 438 P.2d 33 (Ca. 1978)). As Tribe points out, the California Supreme Court, in overturning a conviction,

law and mathematics and intend[ed] no general disapproval . . . of the latter as an auxiliary in the fact-finding processes of the former.’”¹⁴

We do not consider these examples troubling because we correctly believe that certain disciplines and areas of study—such as history and mathematics—are knowledge-traditions whose deliverances provide us with insights that may be useful to a court in a particular case, even when those well-versed in any of these traditions—as the Souter/Thomas debate clearly shows—strongly disagree with each other

Theology, however, is a different matter. For many people, including, I suspect, most members of the U.S. Senate, theological beliefs are not part of a knowledge tradition. These beliefs are labeled as personal and private, which means they are epistemologically on the level of matters of taste or preference. That is, they may be fine for you, but they cannot, in principle, serve as a resource from which one may actually acquire knowledge that may positively contribute to one’s professional responsibility as a judge or even as an elected official.

This understanding is so much a part of the philosophical infrastructure of our public culture that we think nothing of it when it is presented to us in policy discussions. Take, for example, the 2004 speech given by Ron Reagan, the son of the late U.S. President Ronald W. Reagan, at the Democratic National Convention in Boston.¹⁵ Commenting on Americans who oppose embryonic stem-cell research, the younger Reagan argued:

Now, there are those who would stand in the way of this remarkable future, who would deny the federal funding so crucial to basic research. They argue that interfering with the development of even the earliest stage embryo, even one that will never be [sic] implanted in a womb and will never develop into an actual fetus, is tantamount to murder. . . . [M]any are well-meaning and sincere. Their belief is just that, an article of faith, and they are entitled to it.

But it does not follow that the theology of a few should be allowed to forestall the health and well-being of the

corrected the prosecutor’s use of probability theory by employing mathematics and other extra-legal conceptual notions.

14. *Id.* at 1337 (quoting *Collins*, 438 P.2d at 33).

15. Ron Reagan, Speech Before the Democratic National Convention (July 29, 2004), available at http://www.usatoday.com/news/politicselections/nation/president/2004-07-29-reagan-speech-text_x.htm.

many. And how can we affirm life if we abandon those whose own lives are so desperately at risk?¹⁶

For the younger Reagan, one's theological tradition can never in principle trump the goals of "health" and "well-being." Perhaps realizing that these terms and their meanings cannot be understood and known apart from more fundamental beliefs about human beings and their nature, Reagan offers an account of the value of nascent life that sequesters early embryos from the class of moral subjects. He maintains that early embryos "are not, in and of themselves, human beings,"¹⁷ since they lack certain characteristics: they "have no fingers and toes, no brain or spinal cord. They have no thoughts, no fears. They feel no pain."¹⁸ And because the cells that make up the tiny bodies of these early embryos have yet to develop into the cells of particular organs or systems (i.e., they have not differentiated), an early embryo conceived in a laboratory, so that researchers may use its stem-cells, is merely "undifferentiated cells multiplying in a tissue culture" and not "a living, breathing person—a parent, a spouse, a child."¹⁹

Ironically, by classifying early embryos as morally outside the circle of legal protection, Ron Reagan enters the arena of theological exploration on a question of philosophical anthropology.²⁰ He chooses to answer a question of scholarly interest to theologians and philosophers ("What is man?") in order to justify a particular act (the killing of embryos). He refers to the position of his adversaries as "an article of faith," even though he chooses to answer precisely the same question ("What is man?") his adversaries answer. His adversaries' answer justifies forbidding the same act Reagan seeks to permit, killing early embryos. As anyone familiar with the literature on this subject will tell you, those who defend the position that the unborn are persons from conception offer *reasons* that are parts of arguments with *conclusions*.²¹ These conclusions indeed may be, for many of their

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. "Philosophical anthropology" deals with questions about the nature of human beings, such as what constitutes a human being, whether human beings have immaterial natures, souls, or minds, and/or whether the absence or presence of those attributes or properties determines a human being's status as a moral subject.

21. See, e.g., PATRICK LEE, ABORTION AND UNBORN HUMAN LIFE (1996); J. P. MORELAND & SCOTT B. RAE, BODY & SOUL: HUMAN NATURE AND THE CRISIS IN ETHICS (2000); THE PRESIDENT'S COUNCIL ON BIOETHICS, HUMAN CLONING AND HUMAN DIGNITY: AN ETHICAL INQUIRY 258–66 (2002) (personal statement of

advocates, articles of faith,²² but they are also, in the considered judgments of these thoughtful citizens, deliverances of reason as well.²³ Surely, these citizens may be mistaken about the strength

Council Member Robert P. George (joined by Council Member Alfonso Gómez-Lobo)); STEPHEN SCHWARZ, *THE MORAL QUESTION OF ABORTION* (1990); Francis J. Beckwith, *Law, Religion, and the Metaphysics of Abortion: A Reply to Simmons*, 43 J. CHURCH & ST. 19 (2001); Francis J. Beckwith, *When You Come to a Fork In the Road, Take It?: Abortion, Personhood, and the Jurisprudence of Neutrality*, 45 J. CHURCH & ST. 485 (2003); Francis J. Beckwith, *The Explanatory Power of the Substance View of Persons*, 10 CHRISTIAN BIOETHICS 33 (2004); Patrick Lee, *The Pro-life Argument from Substantial Identity: A Defense*, 18 BIOETHICS 249 (2004); Patrick Lee & Robert P. George, *The Wrong of Abortion*, in CONTEMPORARY DEBATES IN APPLIED ETHICS 13 (Andrew I. Cohen & Christopher Wellman eds., 2005).

22. In fact, the Thomistic tradition within Christian theology supports the notion that some truths of faith may also be truths of reason. As I pointed out elsewhere:

For Aquinas, there are things that can be known by reason, things that can be known by faith, and things that can be known by both or either. For example, the periodic table can be known by reason, the Trinity can be known only by special revelation (faith), and God's existence can be known by reason (the Five Ways) and faith (revelation), though things known by faith alone can never be contrary to reason. There is no two-tier view of knowledge for Aquinas, for objects of faith are truly known and may count against someone's apparent deliverances of "reason," and it is the job of the philosopher to show that such deliverances are in fact against reason.

The difference between objects of faith and objects of reason for Aquinas is not in their status as objects of knowledge, but in how the knowledge is acquired by the human mind. Take, for example, the case of God's existence and nature. According to Aquinas, one can know through reason that there is an eternally existing necessary and personal agent that is the first cause of all that contingently exists. But that such a being is a Trinity—three persons and one eternal substance—is something revealed in special revelation, Scripture, and is not the result of the deliverances of reason. Still, in rebutting the charge that the Trinity is against reason, the philosopher may offer conceptual clarity to the skeptic and show that the doctrine is not incoherent or irrational. In that sense, the philosopher is showing that that which is known by faith (the Trinity) is not contrary to reason, even as he maintains that God's existence is known by both reason and faith and is thus contrary to neither.

Francis J. Beckwith, *What's Upstairs?*, FIRST THINGS, Nov. 2004, at 51, 54–55 (reviewing NANCY PEARCEY, *TOTAL TRUTH* (2004)).

23. For example, many defenders of the early embryo's personhood have offered strong counter-arguments to the sort of case the younger Reagan offered in 2004. See, e.g., sources cited *supra* note 21. None of these counter-arguments appeal to sacred scripture or religious authority. Rather, they offer reasons that can be fully understood by skeptics such as Reagan. To take but one example of what I mean, Reagan denies that the early embryo is a moral subject because it cannot think and it does not have external features (e.g., hands, feet) we associate with more mature members of the human species. First, concerning the latter, one could reply that external features carry no

of their arguments, but they are in no worse a position epistemologically than Ron Reagan and those who offer different reasons for a contrary position, since they too may be mistaken about the strength of their arguments. In my opinion, it is only because the younger Reagan and his allies do not consider theological beliefs as belonging to a knowledge-tradition that they can dismiss *a priori* theologically informed policy proposals as *de facto* epistemologically inferior to so-called secular ones, even when secular ones answer precisely the same questions as do the so-called “articles of faith.” The younger Reagan and his allies offer no reasons for this epistemological apartheid, since they know that convincing their peers that a view is or may be “religious” relieves them of their epistemic duty to rationally assess that view as a serious contender to the deliverances of so-called “secular reason.”²⁴

moral weight, because (1) external features are relative to a human being’s development but do not change its nature, and (2) the early embryo has precisely the correct external features that all human beings have at that time in their development. Second, the absence or presence of thinking does not change the nature of human beings. All human beings can think by nature, but some of them lack the present capacity to exercise that natural power either (1) because of immaturity (as in the case of the early embryo), or (2) because of illness (as in the case of a temporarily comatose person), or (3) because of congenital defect (as in the case of the anencephalic child). But these lacks all testify to the nature of the being in question, that it is in fact one of us, and ought to be treated with dignity and respect. There are much more sophisticated responses to Reagan-type arguments, but this is not the place to present them. Nevertheless, this example gives the reader a feel for the sorts of replies that have been in the literature for quite some time and which the younger Reagan has apparently not entertained or engaged.

24. Ironically, Reagan’s father, in a 1983 article, answered his son’s argument over two decades before the younger Reagan uttered it:

Regrettably, we live at a time when some persons do *not* value all human life. They want to pick and choose which individuals have value. Some have said that only those individuals with “consciousness of self” are human beings. One such writer has followed this deadly logic and concluded that “shocking as it may seem, a newly born infant is not a human being.”

A Nobel Prize winning scientist has suggested that if a handicapped child “were not declared fully human until three days after birth, then all parents could be allowed the choice.” In other words, “quality control” to see if newly born human beings are up to snuff.

Obviously, some influential people want to deny that every human life has intrinsic, sacred worth. They insist that a member of the human race must have certain qualities before they accord him or her status as a “human being.”

Ronald Reagan, *Abortion and the Conscience of the Nation*, HUMAN LIFE REV., Spring 1983, at 7, 10, available at <http://www.humanlifereview.com/reagan>.

This helps make sense of the comments of Senator John Kerry (D-MA). While campaigning for the U.S. presidency in 2004, Senator Kerry said that he believes that human life begins at conception, though he claimed that this belief should not be reflected in our laws.²⁵ If the Senator had said something similar about another issue, such as spousal abuse, we would think his comments incoherent. So, let us imagine that Senator Kerry had said he believes that spousal abuse is wrong, but that this belief is his own private, personal one, and for that reason, it would be wrong for him to extend that belief through the law to others who may be members of religious traditions that encourage, or at least permit, spousal abuse. If Senator Kerry had made *that* claim, we would know immediately that he does not grasp what it means to say that an act is wrong. Why then do many of our fellow citizens not see the same incoherency when political leaders like Senator Kerry apply this reasoning to the question of abortion? I believe it is because Senator Kerry and those who think like him artificially separate their view of the unborn's nature from their ordinary beliefs about the real world and place that view in the same category in which matters of taste and preference reside. Their view of the unborn is "an article of faith" that is not in principle a belief about the real world, and thus, it can never count as real knowledge.

This view is sometimes called, in the words of Concordia University professor Edward Veith, the "'two-spheres' approach, in which faith has nothing to do with the pursuit of objective knowledge."²⁶ For proponents of the "two-sphere" approach, theology is not a knowledge-tradition whose deliverances may contribute to, or count against, the deliverances of other points of view or knowledge-traditions.²⁷ That is, theology ought to play no part in the epistemological responsibilities of professionals in whatever discipline or vocation they may pursue. This is because theology is just a synonym for one's personal piety and religious life, a sphere totally separate from worldly ventures.²⁸

25. Jonathan Finer, *Kerry Says He Believes Life Starts at Conception*, WASH. POST, July 5, 2004, at A6.

26. Gene Edward Veith, *Baptist Brawl*, WORLD MAG., Feb. 14, 2004, at 29, 29 (describing, as opposed to promoting, this theory).

27. For an application of this perspective to the issue of abortion, see Paul D. Simmons, *Religious Liberty and Abortion Policy: Casey as 'Catch-22'*, 42 J. CHURCH & ST. 69 (2000); see also Paul D. Simmons, *Religious Liberty and the Abortion Debate*, 32 J. CHURCH & ST. 567 (1990).

28. The former president of Baylor University (1981–1995), Dr. Herbert H. Reynolds, is a champion of this view. Robert Benne writes:

Christianity, in this form of *Baptist* piety, includes an inevitable moral imperative. But in one's relationship with Christ—which is

For these scholars, questions about a judicial nominee's religious beliefs are impolite and intrusive, since those beliefs, no matter how devout, have no bearing on one's success as a jurist. On the other hand, a jurist who understands her religious beliefs as items of knowledge that contribute to her understanding of the world, is confusing the two spheres and, as a result of that confusion, will diminish her chances of performing well on the bench. Consequently, a "two-spheres" jurist is not perceived as a threat to the jurisprudential status quo, for she embraces a position not dissimilar to the one offered by 1960 presidential candidate John F. Kennedy, when he addressed a group of Baptists and assured them that nothing of his Catholic faith would play any role in his judgments as occupant of the White House.²⁹

II. TAKING THEOLOGY SERIOUSLY

Of course, for concerned senators the problem is with prospective judges and justices who reject the two-spheres approach and in fact believe that theology is a knowledge tradition. In light of what I have said about theology and its epistemological status, I would like to address their concern.

highly individual and inward—one has "soul competency." A true Christian shares the freedom of the priesthood of each believer. This competency and freedom compel one to read the Bible and its meanings according to conscience. Nothing about the faith should be articulated in creeds or systems of Christian thought.

"We do not believe in systematic theology," said Reynolds, explaining his style of *Baptist* piety. According to his view, public articulations of systematic theology, as well as public displays of piety, partake in the kind of "religiosity" that Jesus condemns in Matthew 6. Moreover, such affirmations quickly become oppressive and rob other believers of their Christian freedom, their "soul competency."

This traditionally *Baptist* construal of the faith results in a particular vision of the Christian university. Some have called it the "atmospheric" or "*two-spheres*" approach. The Christian character of the university resides in the hospitable, friendly, caring, just and edifying atmosphere created by sincere Christians. It also resides in the religion courses and the extracurricular religious activities that permeate the university. But what happens in the classrooms of this kind of Christian university is pretty much the same as what occurs in public universities. The only difference is that the Christian professor operates out of a sense of Christian vocation. Professors are in the university to "teach algebra, political science, the best way they know how, which is to me the Christian way to do it," said Reynolds.

Robert Benne, *Crisis of Identity: A Clash Over Faith and Learning*, CHRISTIAN CENTURY, Jan. 27, 2004, at 24–25.

29. John F. Kennedy, Address to the Greater Houston Ministerial Association (Sept. 12, 1960), available at <http://jfklibrary.org/j091260.htm>.

First, their concern ignores other important aspects of these same theological traditions that in fact may contribute to a jurist's excellence. Most of these traditions call for their practitioners to be honest, law-abiding, and just in whatever vocation they may find themselves. This means that a devout jurist from such a tradition will strive to make judgments, as required by his oath, based on the facts and the law, even when both may require that he issue a ruling that is inconsistent with what he knows to be true outside of the narrow strictures of the case under review. For example, a jurist whose theological tradition affirms the personhood of the unborn may have no choice but to rule that a defendant cannot be guilty of negligent homicide—and therefore dismiss the case—because the only fatality was a pre-viable fetus who, under the law in the judge's jurisdiction, is not a legal person under criminal law and thus cannot be the victim of a homicide.³⁰ This no more compromises a jurist's conviction that his religious beliefs are part of a knowledge-tradition than it would compromise his conviction that forensic science is part of a knowledge-tradition when the law requires him to apply the exclusionary rule in a particular case because the forensic evidence was acquired illegally. So, in both cases, a jurist must issue a ruling that is inconsistent with what he knows to be true.

Second, as I noted earlier, there are very few questions about which a nominee's theological beliefs actually raise concerns. These are questions about abortion, human sexuality, and origins. Ironically, they are questions to which many theological traditions offer answers contrary to the ones offered by the courts.

30. If such a case were to be appealed and the prosecutor argued that the Fourteenth Amendment called for the states to protect the right to life of persons, including pre-born human beings, under their jurisdiction, it is likely that the court would, based on *Roe v. Wade*, uphold the trial court's verdict. For in *Roe*, the U.S. Supreme Court declared that pre-born human beings are not Fourteenth Amendment persons. See *Roe v. Wade*, 410 U.S. 113, 157–58. However, it is certainly possible that a future Supreme Court could reject this understanding of the Fourteenth Amendment and argue that pre-born human beings are in fact covered by the Fourteenth Amendment. In this sort of case, as I argue by analogy below, a justice may very well rely on the resources of his theological tradition in order to compose an argument to support this new interpretation. On the other hand, one can imagine a strong originalist, such as Justice Antonin Scalia, who, though believing his theology is a knowledge-tradition, rejects the new interpretation of the Fourteenth Amendment because abortion had been a matter of health and morals whose regulation had been exclusively left to state governments until *Roe v. Wade* in 1973. My point is this: one's overarching judicial philosophy may have more to do with one's application of the law in particular cases than one's theological beliefs, even if one maintains that those beliefs are part of a knowledge tradition. See *infra* note 33 for the text of Robert P. George's comment.

If, in fact, the courts, with the encouragement of an army of activist groups, law professors, and legislators, had not provided answers that depend on the veracity of a controversial metaphysics that implies the falsity of most theological traditions that claim to be knowledge-traditions,³¹ there would be no controversy. Instead of providing a real legal rationale for their opinions on these matters, one that relies on the proper scope of the

31. Take, for example, the comments of law professor Steven G. Gey, who offers the following judgments about the veracity of theological claims, their attendant moral notions, and their application to our understanding of natural rights. Take special notice that he places theological beliefs in the realm of matters of taste and preference:

The establishment clause should be viewed as a reflection of the secular, relativist political values of the Enlightenment, which are incompatible with the fundamental nature of religious faith. As an embodiment of these Enlightenment values, the establishment clause requires that the political influence of religion be substantially diminished. . . . Religious belief and practice should be protected under the first amendment, but only to the same extent and for the same reason that all other forms of expression and conscience are protected—because the first amendment prohibits government from enacting into law any religious, political, or aesthetic orthodoxy.

Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 79 (1990). Elsewhere, Professor Gey elaborates: “[R]eligious principles are not based on logic or reason, and, therefore, may not be proved or disproved.” *Id.* at 167. Finally, Gey remarks:

[W]hereas religion asserts that its principles are immutable and absolutely authoritative, democratic theory asserts just the opposite. The sine qua non of any democratic state is that everything political is open to question; not only specific policies and programs, but the very structure of the state itself must always be subject to challenge. Democracies are by nature inhospitable to political or intellectual stasis or certainty. Religion is fundamentally incompatible with this intellectual cornerstone of the modern democratic state. The irreconcilable distinction between democracy and religion is that, although there can be no sacrosanct principles or unquestioned truths in a democracy, no religion can exist without sacrosanct principles and unquestioned truths.

Id. at 174.

Professor Gey’s comments are rife with philosophical incoherence. To cite but one example, he states that “no religion can exist without sacrosanct principles and unquestioned truths,” but right before that he asserts that “the sine qua non of any democratic state is that everything political is open to question,” which is to say that this is a sacrosanct principle essential to a democratic state. *Id.* But we are nevertheless told by Professor Gey that “there can be no sacrosanct principles or unquestioned truths in a democracy.” *Id.* What Professor Gey is offering his readers is self-referentially incoherent, hardly the sort of thing one expects from a scholar who condescendingly, and without proof or argument, claims that “religious principles are not based on logic or reason” *Id.* at 167.

state's police powers and the limits of the Constitution, some jurists chose to engage in the sort of philosophizing that requires that they issue negative judgments about the theological metaphysics of their neighbors.³² If some senators fear theologically serious jurists on the federal bench, it is only because secular liberal jurists, serious about their own metaphysical commitments, employed their influence and juridical power to place in the law their own philosophical understandings. In other words, it is not that some senators fear jurists answering theological questions

32. Take, for example, the comments of Justice John Paul Stevens, who criticizes the preamble of a Missouri statute that states that human life begins at conception:

Indeed, I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution. This conclusion does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions, or on the fact that the legislators who voted to enact it may have been motivated by religious considerations. Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause.

Webster v. Reproductive Health Servs., 492 U.S. 490, 566–67, (1989) (Stevens, J., concurring in part and dissenting in part) (citations omitted). He later adds:

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

Id. at 569.

Justice Stevens first asserts that the belief that a human begins at conception is religious, and then claims that “as a secular matter” the state has no interest in protecting a pre-sentient fetus. This is a perfect illustration of the view that theology is not a knowledge tradition: Justice Stevens thinks that to identify a belief as a religious tenet means that it could not in principle count as an item of knowledge capable of defeating the deliverances of “secular reason.” But what is really curious is that what Justice Stevens offers as “a secular matter,” that there is no *prima facie* wrong in killing a pre-sentient human being, depends on a philosophical anthropology that is tied to a view of the world that answers the same question that traditional religions attempt to answer, i.e., What property or properties must a being possess in order to be considered a subject of moral concern, and thus requires legal protection? Justice Stevens provides an answer to this question: full sentience is the property a human being must possess in order for the law to be justified in recognizing it as a being worthy of legal protection. But, ironically, like a stereotypical religious believer, Justice Stevens dogmatically stipulates this answer and provides no reasons for why anyone should believe it is true.

from the bench, it is that they fear answers that they believe are heretical, that are not consistent with what these senators deem are unassailable beliefs about what is good, true, and beautiful.

Still, there would be very few cases, even those that concern the culture-war questions, that would permit a jurist to employ the resources of her theological beliefs even if she maintains that those beliefs are part of a knowledge-tradition. For such theologically serious jurists are typically drawn from religious traditions that embrace an understanding of the rule of law, fundamental rights, representative democracy, civic republicanism, separation of powers, and constitutional government that entails juridical modesty and judicial restraint.³³ Precisely because these jurists are theologically serious, they are unlikely to use the power of

33. Consider, for example, the remarks of Robert P. George, a theologically serious legal philosopher and political theorist:

I agree with [Edward S.] Corwin and his followers that the fabric and theory of our Constitution embodies our founders' belief in natural law and natural rights. And while I also share their view that judicial review itself emerged as part of the strategy of the founding generation to insure governmental conformity with natural law and to protect natural rights, I do not draw from this the conclusion that judges have broad authority to go beyond the text, structure, logic, and original understanding of the Constitution to invalidate legislation that, in the opinion of judges, is contrary to natural justice. On the contrary, [Justice Hugo] Black, [Robert] Bork, [Justice Antonin] Scalia, and other "textualists" and "originalists" are nearer the mark, in my judgment, in calling for judicial restraint in the absence of a clear constitutional warrant for overturning duly enacted legislation. This is because the Constitution, as I read the document, places primary authority for giving effect to natural law and protecting natural rights to the institutions of democratic self-government, not to the Courts, in circumstances in which nothing in the text, its structure, logic, or original understanding dictates an answer to a dispute as to proper public policy. It is primarily for the state legislatures, and, where power has been duly delegated under the Constitution, to the Congress to fulfill the task of making law in harmony with the requirements of morality (natural law), including respect for valuable and honorable liberties (natural rights).

Judicial review is, I believe, constitutionally legitimate, and can, if exercised with proper restraint, help to make the natural law ideal of constitutional government a reality. Courts, however, can usurp, and, I believe, often have usurped, legislative authority under the guise of protecting individual rights and liberties from legislative encroachment. And courts can usurp, and have usurped, legislative authority in good as well as bad causes. Whenever they do so, however, even in good causes, they violate the rule of law by seizing power authoritatively allocated by the framers and ratifiers of the Constitution to other branches of government (even if that power could, rightly, have been allocated to them). And respect for the rule of law is itself a requirement of natural justice.

their office to engage in the sort of judicial usurpation of legislative, state, and executive powers that has marked the record of their liberal counterparts. They will, for example, not find in the Constitution, as the Supreme Court has found, rights to consensual sodomy³⁴ and abortion³⁵ that trump the laws of local governments, which have the popular support of their citizenry. In other words, because they will not use their office to exercise powers the Constitution does not give them to place in our laws their religious views, even though they believe those views are true items of real knowledge, these theologically serious jurists are far less dangerous than their liberal counterparts, who have in fact employed their office to place in our laws answers to the very same questions that theological traditions have offered answers.

I can, however, imagine a case in which a judge or justice could appropriately employ the resources of her theological tradition in a way that is consistent with the rule of law and the proper role of the federal judiciary. Consider the following fanciful example, from which we can extrapolate to the contentious issue of abortion. Suppose the Earth were visited by members of an alien race, such as the Vulcans of Star Trek. Let's say that one of the Vulcans, Sarek,³⁶ is killed as a result of what we would call negligent homicide if Sarek were a human being. The District

Sometimes courts have no legitimate authority to set right what they perceive (perhaps rightly) to be a wrong; and where this is the case, it is wrong—because usurpative—for them to do so. There is no paradox in this. Fidelity to the rule of law imposes on public officials in a reasonably just regime (that is, a regime that it would be wrong for judges to attempt to subvert) a duty in justice to respect the constitutional limits of their own authority. To fail in this duty, however noble one's ends, is to behave unconstitutionally, lawlessly, unjustly. The American founders were not utopians; they knew that the maintenance of constitutional government and the rule of law would limit the power of officials to do good as well as evil. They also knew, and we must not forget, that to sacrifice constitutional government and compromise the rule of law in the hope of rectifying injustices is to strike a bargain with the devil.

Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *FORDHAM L. REV.* 2269, 2282–83 (2001) (notes omitted).

34. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

35. *Roe v. Wade*, 410 U.S. 113, 164 (1972); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 896 (1992).

36. In my public presentation of this illustration at the University of Notre Dame on November 9, 2005, I used the Star Trek character of Spock rather than Sarek in my example. It was, however, pointed out by the moderator, Gerard V. Bradley (Professor, Notre Dame Law School), that the character of Spock is half-human, and thus my illustration was not quite to the point. So, this is why I employ the character of Sarek, Spock's full-Vulcan father, in this

Attorney refuses to prosecute on the grounds that Sarek is not protected under the negligent homicide statute, since it only applies to human beings and Sarek is not a human being. Suppose that the ACLU and the Thomas More Law Center take up Sarek's cause and the Supreme Court eventually takes the case. One of the Justices, a devout Catholic, argues in his majority opinion that Sarek is in fact protected by the criminal statute because he in fact has Fourteenth Amendment rights. He has these rights, according to the Court, because Sarek was a being, a person, whose nature had properties (e.g., the capacity for rational moral agency³⁷) identical to those properties possessed by the sorts of beings the Fourteenth Amendment was intended to protect.

The application to the abortion controversy should be obvious: if in fact the unborn is a person, then the Fourteenth Amendment applies to it, even if the drafters of the amendment did not have the unborn in mind. Take, for example, the reasoning of a federal district court in the 1970 case *Steinberg v. Brown*:³⁸

[C]ontraception, which is dealt with in *Griswold*, is concerned with preventing the creation of a new and independent life. The right and power of a man or a woman to determine whether or not to participate in this process of creation is clearly a private and personal one with which the law cannot and should not interfere.

It seems clear, however, that the legal conclusion in *Griswold* as to the rights of individuals to determine without governmental interference whether or not to enter into the process of procreation cannot be extended to cover those situations wherein, voluntarily or involuntarily, the preliminaries have ended, and a new life has begun. Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it.³⁹

As I noted in an article published elsewhere:

What the Court in *Steinberg* is suggesting should be uncontroversial: a legal principle has universal application. So, for example, if a statute that forbids burglary became law at a time when no computers existed, it would not fol-

published version. Special thanks to the logical Professor Bradley for correcting me on this matter. May he live long and prosper.

37. See sources cited *supra* note 21, which defend this point of view or one similar to it.

38. 321 F. Supp. 741, 746–47 (N.D. Ohio 1970).

39. *Id.* at 746.

low that the prohibition against burglary does not apply to computers, that one is free to burgle computers from the homes of one's neighbors since the "original intent" of the statute's framers did not include computers. What matters is whether the entity stolen is *property*, that it is a thing that can be owned, not whether it is a particular thing (in this case, a computer) that the authors of the anti-burglary statute knew or did not know to be property at the time of its passage. To employ another analogy, the religion clauses of the First Amendment apply to religious believers whose faiths came to be after the Constitution was ratified: a Baha'i is protected by the First Amendment even though the Baha'i Faith did not exist in 1789. Therefore, if the unborn *is* a person, the Fourteenth Amendment is meant to protect him or her even if the authors of the Fourteenth Amendment did not have the unborn in mind.⁴⁰

How does this differ from the California Supreme Court's reliance on the resources of probability theory and mathematics in *People v. Collins*⁴¹ to overturn a lower-court criminal conviction, or Justice Thomas's and Justice Souter's appeal to historical sources in order to arrive at contrary opinions about the meaning and application of Madison's *Remonstrance*?² In all these cases, jurists are appealing to extra-legal knowledge traditions in terms that are publicly accessible. In the cases of Sarek and *Steinberg*, the courts are in fact relying on the resources of their theological traditions (albeit, philosophically informed), but not their "private beliefs" or "personal piety." They are offering the sorts of reasons that one is accustomed to encountering in all knowledge traditions. Like the California court and Justices Thomas and Souter, they are not contravening the law. Rather, they are offering an understanding of it that extracts from it legal principles that are subsequently applied to a new case for which these principles are well-suited, even though their earliest defenders did not anticipate this application.⁴²

40. Beckwith, *supra* note 3, at 12. For a debate on the application of the Fourteenth Amendment to the unborn, see Nathan Schlueter & Robert H. Bork, *Constitutional Persons: An Exchange on Abortion*, FIRST THINGS, Jan. 2003, at 28. Thank you to James R. Stoner (Professor of Political Science, Louisiana State University) for bringing the Schlueter/Bork exchange to my attention.

41. 438 P.2d 33 (Cal. 1968).

42. Two Protestant scholars—Alvin Plantinga (University of Notre Dame) and J. P. Moreland (Biola University)—and two Catholic scholars—Robert P. George (Princeton University) and Pope Benedict XVI—have been instrumental in helping me to understand and defend the notion of theology as a knowledge-tradition. Among their many works, I recommend the following: ROBERT P. GEORGE, *THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRI-*

SIS (2001); J.P. MORELAND, *LOVE YOUR GOD WITH ALL YOUR MIND: THE ROLE OF REASON IN THE LIFE OF THE SOUL* (1997); ALVIN PLANTINGA, *WARRANTED CHRISTIAN BELIEF* (2000); JOSEPH RATZINGER [NOW POPE BENEDICT XVI], *TRUTH AND TOLERANCE: CHRISTIAN BELIEF AND WORLD RELIGIONS* (2004).