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1. THE CONSTITUTION AS A BASIS FOR THE INTEGRATION PROCESS

a) The transfer of competences as a limitation of sovereignty

The European Union is a supranational organization based on a legal order which has been created by the transfer of internal competences by the member states. This transfer means a limitation of sovereignty, by giving the supranational institutions the permission to act in these fields of competence politically, in particular to make legislation with direct normative effect in the internal order of the member States. The German Constitutional Court explains the consequences of such a transfer: State sovereignty opens, the legal order of the state is no longer exclusively national and closed but opened so that supranational law can enter directly into the national legal order. The State no longer claims the exclusive validity of its own laws on its territory. National law and supranational law, both have legal effect within the State.¹

The transfer of internal competences to the European Communities and later to the European Union has been effectuated by treaties of the member States, the foundation treaties as well as the various reform treaties, which have attributed these competences to the supranational institutions. The consent of the member States to these treaties have been given by parliamentary acts which are the internal legal basis for the competence transfer. Thus, we can state a double dimension of this transfer: the internal parliamentary act which approves the treaty, in which the competences of the supranational institutions are enumerated.

¹ Federal Constitutional Court (FCC) vol. 37, 271, 280.
This act of approval (Zustimmungsgesetz), as an act of the national Parliament, is the basis for the constitutional justice control. The act is of great importance for various reasons: it reflects the will of Germany to accomplish integration within the finalities formulated in the treaty. The so-called integration program\(^2\) is determined by this treaty to which the national act of approval refers. If the supranational institutions would act outside the integration program, this action would be ultra vires.\(^3\) This means in particular that an action of these institutions without a competence transferred by the treaty would not be covered neither by the treaty nor by the act of approval to this treaty and therefore not compatible with Constitutional law.

We can therefore state:

1. The Constitution gives the permit to transfer national competences to the supranational organizations; the relevant articles are 23.1 for the period from the creation of the European Union in 1993 on and 24.1 for the period before.

2. The transfer is effectuated by an international (or better: supranational) treaty between the member States determining the supranational competences for Europewide legislation and the national act of approval to this treaty, which realizes the constitutional transfer permit.

3. The act of approval has various functions: (a) it enables the State President to ratify the transfer treaty, (b) it determines the “integration program” which is the normative framework for the actions of the supranational institutions and must be strictly observed by them, (c) it is the reason for the normative validity (Geltungsgrund) of supranational law,\(^4\) and (d) the basis for the supranational structure of the EU (former: EC) legal order, in particular for its direct normative effect in the member States and for its primacy over national law.\(^5\)

b) The concept of supranationality

Furthermore, we can state that supranationality, the characteristic of the European Union (and formerly of the EC), is composed of three elements:\(^6\)

(1) EU law constitutes an autonomous legal order created by the transfer of national competences, (2) supranational law has direct normative effect (validity and applicability) within the member States, and (3) supranational law has primacy of over national law.

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\(^2\) FCC vol. 123, 267, 398

\(^3\) FCC vol. 89, 155, 188; vol.123, 267, 354-355.

\(^4\) FCC vol. 37, 271, 280; vol. 85, 191, 204; vol.123, 267, 347-348, 349.

\(^5\) FCC vol. 75, 223, 244-245; vol. 85, 191, 204; vol. 123, 267, 400.

Constitutional Courts have to safeguard the Constitution. This is the primary task of Constitutional Courts, the internal dimension of Constitutional law. However, there is also an external dimension of it, which means that the legal order of the State is, as it has been already pointed out, not a closed but an “opened” order. This fact is due to the mentioned transfer of competences which means, in the words used by the German Basic Law (BL), the transfer of sovereign powers (“Hoheitsrechte”). Other European Constitutions have a different terminology: limitation of sovereignty, transfer of sovereignty, transfer of the exercise of competences, transfer of competences. However, all these constitutional provisions which are the basis for the integration treaties common to all the member States have the same effect of building up a supranational order. Therefore the semantic divergence of these constitutional provisions is not decisive because the result of realizing these provisions is the creation of the supranational system which has been defined by the European Court of Justice (ECJ) very early, in 1964, by the famous decision Costa/ENEL.

It shall also be mentioned that the term “supranational” used in the Treaty on the (no longer existing) European Coal and Steel Community 1951 for characterizing the High Authority (the predecessor of the EC/EU Commission) as independent from member States influence being therefore a real Community institution. Later this term was extended to the qualification of the EC/EU for distinguishing these organizations from traditional international bodies. As to the terminology of the German Federal Constitutional Court (FCC) we can state first a certain reservation to use this term but then, in the 2009 decision on the Treaty of Lisbon, the Court did not hesitate to speak of supranationality. However, at the same time the FCC characterized the EU as “intergovernmental”, as a “Staatenverbund”, and reduced by this the concept of supranationality, as it has been defined by the ECJ.

2. THE POSITION OF THE FCC TOWARDS EC/EU INTEGRATION

a) The initial phase of acceptance

The FCC was aware of the importance of the European integration of post-war Germany. The preamble of the Basic Law of 1949 clearly puts forward as a main finality of the Federal Republic to become a member of the world community and to take part actively in the integration of Europe.

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7 See Rainer Arnold, The Integration Clauses in the Constitutions of the Member States (in Czech), ), Evropské právo, 1/1998, 2-4
8 See note 6.
9 FCC vol. 123, 267, 348
This new orientation corresponds to the already mentioned external dimension of the Constitution, to the “open statehood” (“offene Staatlichkeit”) which is a characteristic element of the State.\textsuperscript{10}

The initial phase of the FCC integration jurisprudence is characterized by a prompt obedience of the ECJ position. Costa/ENEL is expressly accepted\textsuperscript{11} so that the supranational structure of the Community has been declared conform to the Constitution. The particular nature of Community law and with that its autonomy, the direct effect of this law within the member States as well as its primacy over national law have been confirmed by the FCC. The Court has even used the term of Constitutional law for the definition of the supranational order (without calling it supranational).\textsuperscript{12}

The fact that the Court confirmed the autonomy of Community law has had the procedural consequence that an individual constitutional complaint (“Verfassungsbeschwerde”) against supranational law was regarded as inadmissible for its autonomous character not being German law.\textsuperscript{13} This position has been abandoned, insofar as the question of supranational ultra vires acts are concerned, in the Maastricht treaty decision of 1993 where the FCC had the intention to expand its control also to supranational law for its serious impact on the national sphere.\textsuperscript{14}

Furthermore, the direct effect of EC directives as it has been developed by the ECJ was confirmed by the FCC which accepted the power of the ECJ to interpret the text of the then article 189.3 EEC Treaty in this way. The FCC has given preference the ECJ jurisprudence even against the opinion of the Federal Fiscal Court.\textsuperscript{15}

Furthermore, the FCC confirmed that the ECJ is included into the guarantee of the legal judge (article 101.1 BL) for the reason that the supranational court has been functionally connected with the German court system. This means that the omission to ask the ECJ for a preliminary question violates, under certain circumstances, this fundamental constitutional guarantee.\textsuperscript{16}

b) The first reservation: fundamental rights

The question of the fundamental rights protection of the individual with regard to the Community order was an important subject of the CCF jurisprudence. The problem arised from the fact that a high percentage of supranational law has to be executed by national authorities. Therefore it was initially unclear whether German fundamental rights had to be applied for actions of German

\textsuperscript{11} Ibidem
\textsuperscript{12} Ibidem
\textsuperscript{13} FCC vol. 89, 155
\textsuperscript{14} FCC vol. 75, 223
\textsuperscript{15} FCC vol. 82, 159
authorities based on EC law. On the one hand, national authorities have to respect national fundamental rights as laid down in the national Constitution, on the other hand, the national authorities are obliged to execute supranational law as being different from national law. This fundamental problem was dealt with in the two famous “Solange” decisions of the FCC, rendered in 1974\(^\text{17}\) and, 12 years later, in 1986.\(^{18}\)

The first of these two decisions confirmed the application of the German fundamental rights for the reason that no fundamental rights protection existed on the Community level and therefore the fundamental rights of the national Constitution had to take over this protection. The FCC regarded the protection of the individual by fundamental as indispensable. The Court accepted that the ECJ would assume the protection task as soon as an adequate fundamental rights protection system would have been established on the supranational side.

In the second decision of 1986, the FCC regarded the judge-made protection of fundamental rights which has been developed in the meantime by the ECJ as equivalent to the guarantees laid down the German Constitution, the Basic Law. For this reason the Court declared no longer to apply the German fundamental rights and to leave it to the ECJ to review supranational secondary law for its conformity with the supranational fundamental rights. It shall be mentioned that the ECJ judges had elaborated numerous fundamental rights which they qualified as general principles of Community law resulting from the common Constitutional tradition of the member States.\(^{19}\)

This position of the FCC confirmed by the banana market decision in 2000\(^{20}\) has been upheld until now. The competence to review supranational legal acts is within the hands of the ECJ while the FCC watches over the supranational protection standards in general. This means that the Germany Constitutional Court would renew its control of supranational legislation if the ECJ would essentially reduce these standards or even abolish them. With the entry into force of the EU Fundamental Rights Charter in December 2009 it seems nearly impossible that this would happen.

As a summary it can be said that the Solange jurisprudence of the FCC has the following essential contents:

1. The fundamental rights protection of the individual is regarded to be indispensable and is considered to be an element which identifies the German constitutional order. The supranational system established by the transfer of competences according to article 24.1 and (since 1993 to article 23.1) BL must guarantee the freedoms and rights of the individual as the BL does.

2. The FCC recognizes that the supranational order itself shall protect the individual concerned by supranational legal acts which are executed by German authorities. This is a consequence of the autonomy of the EC/EU legal order.

\(^{17}\) FCC vol. 37, 271
\(^{18}\) FCC vol. 72, 339
\(^{19}\) See for example the Hauer case, ECJ 44/79, ECR 1979, 3727
\(^{20}\) FCC vol. 102, 147
3. As far as the protection is not assured by supranational fundamental rights, the FCC has to apply the German fundamental rights.

4. FCC and ECJ cooperate in the above-mentioned sense (the Maastricht decision speaks of a “relationship of co-operation” between these courts\textsuperscript{21}).

5. The new concept of constitutional identity as developed by the FCC in the Lisbon Treaty decision\textsuperscript{22} introduces a further reservation which even could override the \textit{Solange II} approach. This means that the application of the supranational fundamental rights would be hindered if this would be contrary to the German constitutional identity. This could happen in a case in which the interpretation of the supranational personality rights would be seriously and manifestly contrary to the German concept of human dignity.

c) The reservation of constitutional identity

The FCC, which has accepted since long the primacy of supranational over national law including national Constitutional law, has clearly established, in its Lisbon Treaty decision, an ultimate limit of primacy, namely the German constitutional identity.

The identity concept which the FCC has developed has two main elements: (1) The German Constitution does not allow to abolish the German State by integrating it into a European Federal State. A new Constitution, either German or European, would be necessary for this step. Continuing as a State requires to be able to make own political decisions, that is to adopt, in a substantive way, own legislation on various fields of major importance.\textsuperscript{23} These fields are enumerated by the FCC. This first element of identity can be called the element of “remaining statehood”.

(2) Furthermore, constitutional identity has been connected by the FCC with the so-called ”eternity clause” (article 79.3 BL). This provision of the Constitution excludes certain matters from being changed by a formal constitutional reform. These matters are what is written down in article 1 BL (dignity of human being) as well as in article 20 BL (the State defining principles concerning Federation, Republic, Social State orientation and Rule of Law, especially with the aspect of legality and constitutionality of State actions as denominated in article 20.3 BL). Constitutional reform cannot modify these matters (though changes had been accepted to a certain extent by the FCC\textsuperscript{24}). This barrier is also applicable for supranational law affecting national constitutional law. Article 23.1 BL, the constitutional basis for a transfer of internal competences to the supranational organization, makes an explicit reference to article 79.3 BL, what corresponds with the doctrine qualifying the supranationalization of State power as a “substantive constitutional reform”.

\textsuperscript{21} FCC vol. 89, 155, 174-175, 178.
\textsuperscript{22} FCC vol. 123, 267
\textsuperscript{23} FCC vol. 123, 267, 357-358.
\textsuperscript{24} FCC vol. 30, 1 C12c
While the *formal* reform of the Constitution is effectuated by a two thirds majority in the Federal Parliament as well as in the Federal Council, connected with the modification of the Constitution text, the *substantive* reform is based on the transfer of competences formerly belonging to the State and attributed by the transfer to supranational institutions giving them the power to make Europewide legislation with a direct effect within the German internal legal order. This has an essential impact on the constitutional order as created by the BL in 1949. It is easily understandable that such a transfer of internal competences changes essentially the legal order as originally foreseen by the German Constitution. It is therefore justified to qualify this transfer as a substantive reform of the BL.

The consequence is that the limits for a formal reform of the Constitution must also be respected for a substantive reform of it.

It can be doubtful whether it is possible to define the concept of constitutional identity exclusively with reference to article 79.3 BL. Constitutional identity is a dynamic, not a static concept. During a more than 60 years jurisprudence of the FCC new elements of identification have been elaborated. The principle of "open statehood" has been pointed out by the Court, an aspect which indicates that constitutional identity is not only defined by internal constitutional law but also by international and in particular supranational law. National constitutional identity is the identity of an "integrated State" whose sovereignty is relative and based on a legal order composed of national and supranational law. Furthermore, article 79.3 BL does not refer to the existence of a system of constitutional justice with large competences as it is characteristic for Germany. It cannot be denied that this is an identifying element of the German constitutional order.

For these reasons article 79.3 BL seems not adequate for determining exactly what constitutional identity is. However, the constitutional jurisprudence is clear on this issue.

It should be mentioned here that the concept of constitutional identity has been referred to by the FCC in its jurisprudence connected with the financial crisis in 2011 and 2012. The core argument is that financial aid from Germany should not paralyze the budgetary power of the State which is basic for democracy and therefore an element of constitutional identity. The FCC respected in these decisions the discretionary power of the Parliament making financial aid laws as a matter of politics but clearly pointed out that an ultimate borderline should not be trespassed. In such a case the financial aid measures would be unconstitutional. This, however, has not yet occurred.\(^{25}\)

d) The “ultra vires” jurisdiction of the Maastricht and Mangold decisions

The main item the FCC dealt with in the Maastricht decision (1993) was the “ultra vires” question. The complainants argued that the Maastricht treaty establishing the European Union would give un-

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limited competence to the EU. This would violate national sovereignty and give State quality to the EU. The FCC rejected this argumentation qualifying the EU not as a State (mainly because of its lack of the so-called “competence of competence” (“Kompetenz-Kompetenz”), that is the competence to create unilaterally whatever competence), but as an “association of States” (“Staatenverbund”), a supranational organization composed of member States with state-like instruments and mechanisms for its functioning.\textsuperscript{26} Supranational institutions are not allowed, according to the EU Treaty, to act “ultra vires”, beyond the competences transferred to them. The institutions have strictly to follow the EU treaty conforming to the principle of “competence conferral” (principle of “competence attribuée”). If not, the supranational act would be illegal. The national act of approval of the EU treaty determines the competences transferred to the EU; it therefore indicates the so-called “integration program” (“Integrationsprogramm”)\textsuperscript{27} to which Germany consented by this treaty.

The question what \textit{ultra vires} really means was the main issue in the \textit{Mangold} decision of the FCC.\textsuperscript{28} The Court explained that only a manifest and serious transgression of competence, which would entail a shift of the competence system provided for by the EU treaty, could be qualified as \textit{ultra vires}. This decision has limited the \textit{ultra vires} control to specific, obvious situations of transgression of competences.

e) Who has the final word?

An important question was raised in the Maastricht as well as in the Lisbon decision: which court can ultimately say that a supranational act is \textit{ultra vires} or incompatible with constitutional identity: the FCC or the ECJ? Which of these courts has the final word?

The FCC claims the final competence to say this and to declare, on the basis of such a statement, the supranational legal act concerned inapplicable on the German territory. This position can lead to a jurisdiction conflict because the ECJ claims the final word, according to article 267 TFEU, for the interpretation of EU law and the evaluation whether EU secondary law is incompatible with higher EU law and therefore void.

The FCC explains its position with detailed arguments in the Lisbon judgment.\textsuperscript{29} It declares the right of the State to decide on whether its constitutional identity is violated by supranational law as a right which is inherent in statehood and not transferable to a supranational court.

\textsuperscript{26} FCC vol. 89, 155.
\textsuperscript{27} FCC vol. 123, 267, 398
\textsuperscript{28} FCC vol. 126, 286
\textsuperscript{29} FCC vol. 123, 267, 353-354.
As to the ultra vires concept, the FCC also confirms its own exclusive power to decide ultimately on this question. However, the Court expresses the necessity to make a preliminary question to the ECJ before its final decision.\textsuperscript{30}

Insofar as constitutional identity is concerned, it must also be taken into consideration that article 4 TEU obliges the EU to respect the national identity (including constitutional identity) of the member States. This provision reflects the supranational perspective of constitutional identity. While the national Constitutional Court defines constitutional identity from a national perspective, the ECJ interprets national and constitutional identity of a member State from the supranational perspective expressed by article 4 TEU.

It falls within the competence of the national Constitutional Court to determine what national constitutional identity is. However, the competence to declare void or inapplicable secondary EU law is exclusively the hands of the ECJ. Therefore, the Constitutional Court has two make a preliminary question to the ECJ if it considers a supranational act as contrary to the member State’s constitutional identity. The ECJ has to examine the validity of this act for a violation of the mentioned article 4. Hereby the court must be aware of the difference between the national and the supranational perspective of constitutional identity. The ECJ can declare a supranational legal act void only if this legal act is incompatible with article 4 TEU.\textsuperscript{31}

\textbf{3) CONCLUSION.}

The German constitutional jurisprudence reflects central dimensions of modern constitutional law: to safeguard the basic legal order of the State and to adapt it to international and supranational law. The approach of the FCC is distinctly based on the idea of “open statehood” and clearly favors integration. Constitutional identity is the new term for the limits of supranational power. If politics would like to go beyond these limits and for example integrate Germany into a European Federal State, a new Constitution would be necessary.

\textsuperscript{30} FCC vol. 126, 286; vol. 123, 267, 354-355.

FOREWORD

A new wording of the Constitution has revised a role for the Georgian Government in state design and declared it the supreme body of the executive branch. Its high constitutional status is secured by appropriate powers.

The questions regarding the quality of the legitimacy of the Government in a situation where it has a status of a provisional government drew attention during the course of constitutional reform back in 2009-2010. The questions became even more current after the adoption of a Constitutional Law of Georgia on the Amendments and Changes to the Constitution of Georgia by the Parliament on 25 March, 2013. The new law revised six paragraphs of three different articles, however, almost all of them are linked directly or indirectly to the issue of a provisional government and focus on the element that the ‘old’ government should perform its duties and responsibilities until a new government is appointed. This law is temporary and is in force until the moment when a

3 See, sakanonmdeblo matsne (Legislative Bulletin)
newly elected President in 2013 takes the oath and, as some scholars observe, it aimed at avoiding a political crisis⁴. However, the fact that the current majority of the Parliament has not even tried to improve the institution of the acting government shows that the Parliament’s majority, like most of the constitutionalists, do not see the risks, political and legal errors and a possible stalemate. Furthermore, they accept that level of legitimacy of the provisional government which has been determined by the current norms regulating the institution.

The Government is the most important constitutional institution, with exclusive functions to coerce and apply physical resources and control their application⁵. Consequently, there are doubts about whether a provisional government, which many observers note does not possess legitimacy or enjoy low level of it, may act at its will while coercing or applying resources. The Georgian legislation should remove all doubts about these issues⁶. The present paper will examine the legal foundations for terminating the current (regular) government’s authorities, a procedure for the formation of an acting government and its conditions, and also the issues concerning the possibility for the forming of an acting government, its reasonableness and level of legitimacy.

1. LEGAL FACT OF TERMINATION OF CURRENT GOVERNMENT’S POWERS, AS A LEGAL FOUNDATION FOR THE FORMATION OF A PROVISIONAL GOVERNMENT

On a theoretical level of generalization, a legal basis for the formation and existence of an acting government is the termination of powers of a current government, as a state cannot operate without its main ‘hard working section’, that is, a supreme body of the executive branch - government, until a new government is appointed, which may take some time. The Georgian legislation links the termination of the current government’s powers and, consequently, the formation of a provisional government to the following legal conditions: the resignation of a Prime Minister, his/her removal from office through impeachment, and recognition of the authority of a newly elected Parliament⁷. There is one more circumstance which is not specified in the legislation, this is a death of a Prime Minister.

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⁴ See, for example comments by Irakli Kobakhidze on: www.constitution.ge
⁷ As an exception Constitutional Law adopted on 15 October, 2010 decides that formation of a new government and consequently its existence is necessary from the moment a newly elected President takes the oath in 2013 Presidential elections.
1.1 Death of a Prime Minister.

Death brings a natural termination of the Prime Ministerial powers. According to the joint responsibility (solidarity) principle of the cabinet (government) stipulated by the Constitution of Georgia, ‘Resignation of the Prime Minister or termination of his/her authority shall result in termination of authority of other members of the Government.’ In this situation, according to the Constitution of Georgia, the President should entrust the same composition of the government to perform its duties until a new government is formed.

1.2 Removal of a Prime Minister from the office through impeachment.

The Georgian Constitution establishes legal and political responsibilities for the Prime Minister and other members of the government because of great political importance of their positions. The Parliament is entitled to impeach the members of the government, including the Prime Minister for violation of the Constitution and/or committing a criminal act. The removal of a Prime Minister from office means termination of his/her duties and responsibilities, which should entail termination of the governmental powers, due to the above mentioned solidarity principle. In addition, it requires the President to authorize the outgoing government to perform its duties until a new government is formed.

1.3 Resignation of a Prime Minister.

Georgian legislation does not specify the grounds for resignation of the Prime Minister; it is his/her sovereign decision and should be followed by termination of the cabinet’s powers, due to the joint responsibility principle and the President’s directive, instructing the outgoing government to perform its duties until a new government is formed.

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8 Confirmed by a corresponding legal act.
9 Constitution of Georgia, Article 79(pa 7).
10 Constitution of Georgia, Article 80(1), (pa 3).
11 See the rules for impeachment: Constitution of Georgia, Article 63 and 64, also a Law on Impeachment.
12 That a Prime Minister is a member of the government stems even from the text of the paragraph 5 of the Article 79 of the constitution which states that ‘ a Prime Minister appoints and dismisses other members(underlined by us).
13 Constitution of Georgia Article 80 (1), paragraphs 1 and 3.
14 Constitution of Georgia Article 80 (1), paragraphs 1 and 3.
1.4 Recognition of a newly elected Parliament’s authorities.

The upper limit of a constitutional term of every government is connected with the constitutional terms of the Parliament’s authorities, consequently; immediately after recognition of the 2/3 of a newly elected Parliament’s composition\(^{15}\), the powers of the Cabinet is considered terminated (its authorities are terminated) and the President authorizes it to carry out its duties until formation of a new government as stipulated by the constitution.

1.5 The newly elected President taking the oath.

Constitutional changes adopted on 15 October\(^ {16}\) 2010 stipulate that the formation of a new government and, consequently, the emergence of an acting government should follow the moment of the newly elected President taking the oath in the 2013 general Presidential election. In this situation, like in all the above described circumstances, the President entrusts the outgoing government to perform its duties\(^ {17}\).

2. What happens after the government’s authorities are terminated? After the government resigns, or after it is dismissed or its authorities are otherwise terminated, a new government must be formed. However, it may take too long time, according to the norms of the Constitution of Georgia\(^ {18}\). Since a state cannot operate without a government, the governmental functions should be carried out by a provisional government. In all circumstances of termination of the governmental powers described above, the President of Georgia grants “it” (outgoing government)\(^ {19}\) - “the same composition of the government”\(^ {20}\) the same responsibilities until appointment of a new composition. It means that the President entrusts that government, whose authorities have been terminated, with similar, temporary powers.

3. How much time is needed for the formation of a new government, that is, for how long will an acting government remain in control in Georgia? The Georgian Constitution specifies the following procedures and terms for the formation of a government\(^ {21}\):

1. The President of Georgia shall within 7 days present a Prime Ministerial candidate who has been selected by the electoral bloc or party with the best electoral results;

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\(^{15}\) Constitution of Georgia Article 51.

\(^{16}\) Article 2 (pa. 4). See the text of the constitutional law in Avtandil Demetrashvili. 2009-2010 constitutional reforms in Georgia; Batumi, 2012; pg. 156-174.

\(^{17}\) After general Presidential elections held on 27 October, 2013, in existing political configuration of supreme state bodies formation of a new government completed in 4 days.

\(^{18}\) Constitution of Georgia, Article 80

\(^{19}\) Constitution of Georgia, Article 80 (pa. 1).

\(^{20}\) Constitution of Georgia, Article 80 (1) (pa. 1 and 3).

2. A Prime Ministerial candidate shall within 7 days select the members of government and submit the composition of the Government to the Parliament along with a governmental program for a vote of confidence;

3. The Parliament shall decide on the vote of confidence in the government within 7 days;

4. If the government receives Parliamentary confirmation, the President shall appoint a Prime Minister within two days, and the Prime Minister on his part shall appoint the members of the cabinet within the same period of time, two days.

   In such uncomplicated circumstances the process will be finished in 25 days. It means that, when taking holidays into account, the state will be governed by a provisional government for a maximum period of one month.\footnote{22}

5. In case a new government does not receive a vote of confidence, a voting on the same or revised composition of the government shall be repeated within 30 days after the first vote;

6. If the government receives a vote of confidence, the President shall appoint a Prime Minister within two days and the Prime Minister shall, in his/her turn, appoint the other members of the government within the same period of time, or two days.

   In this less problematic situation the procedure of formation of Government will be finished in 55 days and, taking holidays into account, it means that the state will have an acting government for almost two months.

7. In case a Prime Ministerial candidate is not presented or a government does not receive a vote of confidence in the repeated voting in the period said above (30 days), the President shall nominate a Prime Minister from among the candidates proposed by two fifths of the Parliament’s composition;

8. A candidate for Prime Minister shall select the members of the government within 7 days and shall appear before the Parliament for its confidence along with the government’ program;

9. The Parliament shall decide on a vote of confidence in the government within 7 days;

10. If the Parliament grants its confidence to the government, the President shall appoint a Prime Minister within two days and the Prime Minister in his/her turn shall appoint other members of the government within the same period of time, or two days.

   This very problematic formation of a new government (a minority government is being formed) will take 72 days and, taking holidays into account, it means that the state will be governed by an acting government for almost 3 months.

\footnote{22} Here, as in the remaining part of the text the terms are calculated by the highest limits. These maximum limits may not necessarily be used in formation of a new government since it depends on configuration of political powers in the bodies of a central system.
11. If the Parliament does not grant its confidence to this composition of the government, the President shall dissolve the Parliament and within three days call for an extraordinary election;

12. The issue of the forming of a new government’s will again become relevant after the Parliamentary elections and the procedure set out in the Article 80 will be repeated.

An acting government will function through the whole election cycle (nearly 70 days); thus in the case of an unproblematic formation it will function for about 100 days; in the case of less problematic circumstances it will remain effective for about 110 days and in a problematic situation – for about 130 days.

Let’s remember these numbers, the state can be governed by the provisional government for more than four months, and decide on how reasonable the imperative norms of the Constitution are, which require the President to authorize the “old/same government” with its duties and responsibilities.

4. EXISTENCE OF THE ACTING GOVERNMENT, ITS REASONABleness AND LEVELS OF LEGITIMACY IN DIFFERENT LEGAL SPACES

4.1 In the first place, we will focus on the contexts when it will be merely impossible to charge the government, which has been stripped of its powers, with governmental duties and responsibilities. The first situation occurs in the case of a Prime Minister’s death when, consequently, the cabinet’s authorities are terminated. It would be physically impossible to confer governmental duties upon a dead person. The second situation is related to a prime-minister who resigns willingly. As we have noted above, the Georgian legislation does not specify the reasons for voluntary resignation (and most likely it is impossible), although such reasons may be related to private life, poor health, family problems or political motives. Most likely, in these circumstances, this person either will not want to or be able to return to the office of a Prime Minister. This situation will necessitate the creation of a new government and, like in the above described circumstances, it would be impossible to charge the government that has resigned, or “the same composition of the government”, with identical duties. Both situations lead to a stalemate when the existence of an acting government, as the imperative norms of the Constitution require even for a short period, would be improbable.

23 In this case, the President will be required to charge an acting government with responsibilities once again (?!)

24 Surprisingly enough a well-known constitutionalist Irakli Kobakhidze believes that “the President’s power not to authorize the dismissed or resigned government with duties should be curtailed” See: www.constitution.ge
4.2. Dismissal of a Prime Minister through impeachment.

This process must be followed by a termination of the government’s authorities. Conferring governmental responsibilities upon a government run by a Head of Government under impeachment would present an unprecedented situation in the world’s constitutional theory, legislation and practice. The duties and responsibilities are imposed on a government, which has lost its trustworthiness and credibility during a nearly one month long impeachment procedure, with the head of government having been impeached. It’s hard to imagine even a low level of legitimacy for this government; it’s hard to believe that Georgian population shall have confidence in the government, the head of which, according to the decision adopted by the Constitutional Court and resolution passed by the Parliament of Georgia, has been incriminated through either violation of the Constitution or through other elements of crime in his/her action, or he/she is charged with both violation of the Constitution and with the commission of a criminal offence.

Unlike the two previous instances, the existence of the acting government is not ruled out here, but how reasonable is its existence? How legitimate are its activities and the decisions adopted? If the government is a body of the so-called ‘secondary legitimacy’ what level of legitimacy shall be enjoyed by a provisional government in general, and especially by that government whose head or all members are dismissed by the Parliament through impeachment? Accordingly, what kind of subordinate horizontal relations will be between the provisional government and the Parliament? The answers to these questions are hardly very difficult.

4.3. The recognition of powers of a newly elected Parliament.

As for the issue of legitimacy, a provisional government will raise fewer questions when supported by a solid majority of the Parliament through being created by the electoral subject from a political specter of this government. In this situation a provisional government enjoys the same kind of credibility enjoyed by the winner in the elections. Relations between the Parliament and government are substantially unproblematic and consequently the government will be formed swiftly and easily. Foreseeing or analyzing the situation where the outgoing (current) government, which must be charged with fulfilling responsibilities deriving from the imperative nature of the constitutional norm, does not belong to the political specter of a newly formed Parliamentary majority or is opposed to those political powers is not an easy task. The Fifth Republic of France experienced similar situations several times and it also happened in Georgia in 2012. The level of legitimacy of this provisional government will definitely not be in accordance with the popular will and its relations

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25 The Parliament is elected by people, the Parliament forms a government.
26 Difficult to believe, although theoretically it is possible that the Parliament would intend to dismiss all the members through impeachment procedure.
with a Parliamentary majority should move to a temporary co-habitation regime which will not be trouble-free in a state with fragile democratic traditions.

5. CONCLUDING OPINIONS

Even an observation of the provisional government as simple and general as this paper, enables us to conclude that:

a) The formation/setting up of a provisional government in the case of the Prime Minister’s death is absolutely impossible;

b) The possibility of forming an acting government should be ruled out in case of the Prime Minister’s voluntary resignation;

c) It is not justifiable to confer the government (including a Prime Minister) with official duties when the Head of Government is impeached.

d) It is not reasonable to charge the government with official duties when its political specter is in opposition to a newly elected Parliament majority’s political direction or is not in accordance with it;

e) It would be unproblematic and legitimate to confer the government with official duties when its political orientation is close to that of a newly elected Parliament’s majority.

Therefore, taking into account that in some cases (death of a Prime Minister, his/her voluntary resignation) the existence of an acting government is impossible, and that in other cases (impeachment of a Prime Minister, emergence of the majority in the newly elected Parliament from the political specter which opposes current government’s political orientation) it would be absolutely unacceptable and unjustifiable to form an acting government because of its lack of or lessened legitimacy, the following changes should be made to the Constitution of Georgia:

1. The first paragraph of Article 80 of the Constitution of Georgia should be worded as follows:

   “1. At the moment when a newly elected Parliament’s authorities have been recognized/approved, the government shall be considered dismissed and the President of Georgia shall be empowered to charge/authorize the same government to perform its duties until a new government is formed”.
2. The third paragraph of Article 80 (1) of the Constitution of Georgia should be worded as follows:

“3. In the case of such circumstances as stipulated by the first paragraph of this Article, the President of Georgia shall be empowered to authorize the same composition of the government to continue to perform its duties until a newly composed government is formed”.

After these changes enter into force, the law of Georgia on Structure, Authorities and Rules for Carrying Out its Activities should be revised, along with relevant norms of the Rules of Procedure of the Parliament of Georgia.
I. INTRODUCTION

Epochal events generally have great influence over deep-rooted beliefs, and at times they even succeed in modifying them. The values which have been considered proper and inviolable may be reassessed by such events. The disastrously negative experience of the National Socialist State changed the view of a famous German jurist and legal philosopher Gustav Radbruch, who was a legal positivist before the National-socialists’ advent.¹

The National-socialists’ era clearly demonstrated to Radbruch that positivism, which acknowledges all statutes adopted through established procedures and socially effectives as law, turned into a helpless concept in the face of unjust and criminal laws.² We can consider his well-known formula developed in the article “Statutory Lawlessness and Supra-Statutory Law” published in 1946 to be a result of reconsideration of some values caused by his negative experience.

A critique of Radbruch’s formula written by the British legal philosopher and positivist Herbert Hart, is conditioned by the latter’s different views, especially the view on the separation of law and morality. In the present paper we’ll try to explain Radbruch’s formula and examine Hart’s arguments and strength of his reasons.


II. THE ESSENCE OF RADBRUCH’S FORMULA

In order to better understand and assess Hart’s criticism, we should study the basic contents of the said formula in the first place. The addressee of the formula are the judges facing a dilemma. They have to either apply a norm which they believe is unjust, or reject it on the grounds of its unjust content. Radbruch believes that, “the conflict between justice and legal certainty may be resolved in that the positive law... takes precedence even when its content is unjust and improper, unless the contradiction between positive law and justice reaches such an intolerable level that the statute as “incorrect law” must yield to justice. It is impossible to draw a sharper line between cases of statutory non-law and law that is still valid despite unjust content. One boundary line, however, can be drawn with utmost precision: Where there is not even an attempt to achieve justice where equality, the core of justice, is deliberately disavowed in the enactment of positive law, then the law is not merely “incorrect law”, it lacks entirely the very nature of law. For law, including positive law, cannot be defined other than as an order and legislation whose very meaning is to serve justice”.

An examination of Radbruch’s formula enables us to conclude that he categorized unjust laws into three groups:

- The laws which should be applied by judges despite their unjust and improper nature;
- The laws which are intolerably unjust. In this case, justice takes precedence over legal certainty. Legal certainty is correctly described by Radbruch as “one value existing in the context of other values”. This part of Radbruch’s formula is known as the so-called “intolerability thesis” (Unerträglichkeitsthes).
- The statutes which lack the very nature of law. They do not aim at achieving justice. This part of Radbruch’s formula is called the disavowal thesis (Verleugnungsthese).

5 Radbruch: Gesetzliches Unrecht und übergesetzliches Recht, S. 83 (89).
6 In more detail, see: Norbert Hoerster: Was ist Recht? Grundfragen der Rechtsphilosophie, München 2006, S. 80.
7 Radbruch: Vorschule der Rechtsphilosophie, S. 121 (154).
8 Radbruch: Vorschule der Rechtsphilosophie, S. 121 (151).
III. EXPLANATION OF HART’S CRITICISM OF RADBRUCH’S FORMULA

A criticism of Radbruch’s formula goes on in the context of legal debate on the conception of law. It is disputable to what extent the conception of law should contain moral elements. The positivists agree on the so-called “separation thesis”, while non-positivists support the so-called “connection/connectivity thesis”. The supporters of the former believe that law should be morally neutral. In their view, it is most sufficient for a norm to be appropriately issued and socially effective. The adherents of the “connection thesis” believe that a law should also be morally effective. Therefore, the correctness of contents and justice are limiting criteria for non-positivistic conception of law.

Legal literature underlines that Radbruch’s formula contains only weak “connection thesis”. According to the thesis, the norms lose legal nature when contradiction between law and morality reaches an extreme, intolerable level. Nevertheless, Radbruch’s formula is a disavowal of the separation thesis since, according to this thesis, all statutes, notwithstanding their contents, represent law. A similar conclusion can be drawn from the definition of law that Rabdruch formulates in his paper “Introduction to Philosophy of Law”: “therefore, “law” can be defined as a unity of general, positive norms for social life (“the complex of general precepts for the living-together of human beings”). At the same time, under law’s generality he implies that law must be just.

Hart belongs to a group of adherents of the separation thesis. He supports the idea of separation of law and morals. In his view, a legal system does not necessarily need conformity with morality and justice. They cannot be criteria for norm’s validity. However, he recognizes the great influence of morals over the development and stability of law.

In the context of criticism of Radbruch’s formula, Hart’s article “Positivism and Separation of Law and Morals” is of utmost importance. Broadly speaking, Hart sees Radbruch’s formula as a passionate and naïve reaction caused by negative experience, rather than as a view built on intellectual arguments.

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10 Dreier: Recht, Moral, Ideologie, S. 194, 197 f.
11 Alexy: Mauerschützen, S. 4 ff
13 Hoerster: Was ist Recht?, S. 81.
14 Radbruch: Vorschule der Rechtsphilosophie, S. 121 (151).
15 Radbruch: Vorschule der Rechtsphilosophie, S. 121 (151).
17 Hart: Der Begriff des Rechts, S. 240.
18 Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (39 ff.).
19 Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (39 ff.).
The criticism of Radbruch’s formula has been thoroughly analyzed by German jurist and legal philosopher Robert Alexy. He studied and critically evaluated the arguments against Radbruch’s thesis, including Hart’s interpretations. We’ll briefly describe Hart’s arguments in this paper and evaluate them taking into account Alexy’s counterarguments. Apart from the opinions of Hart and Alexy, we will also describe the views of other legal scholars.

IV. HART’S ARGUMENTS. CRITICAL EVALUATION

a) Argument from Clarity (Klarheitsargument)

Hart’s most important argument against Radbruch’s formula is called the “argument from clarity” or “linguistic-conceptual”. Hart tries to prove that the formula is complex and vague: “For if we adopt Radbruch’s view, and with him and the German courts make our protest against evil law in the form of an assertion that certain rules cannot be law because of their moral iniquity, we confuse one of the most powerful, because it is the simplest, forms of moral criticism. If with the Utilitarians we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention. If, on the other hand, we formulate our objection as an assertion that these evil things are not law, here is an assertion which many people do not believe, and if they are disposed to consider it at all, it would seem to raise a whole host of philosophical issues before it can be accepted. So perhaps the most important single lesson to be learned from this form of the denial of the Utilitarian distinction is the one that the Utilitarians were most concerned to teach: when we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable philosophy.”

On the one hand, Alexy admits that positivist concept of law is clearer, while on the other hand he underlines that clarity is not the only aim for formulating a definition, and that a complex concept of law may also be understandable and clear. We have to agree with this view. The aim of any concept is to define a certain item or event. Reality is not changed by simplifying a definition and,

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20 Alexy: Begriff und Geltung des Rechts, S. 72 ff.
21 Alexy: Begriff und Geltung des Rechts, S. 75 f.
22 Schuhmacher: Rezeption und Kritik der Radbruchschen Formel, S. 57.
23 Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (45 f.).
24 Alexy: Begriff und Geltung des Rechts, S. 77.
in addition, simplifying may lead to the disregarding of significant characteristics of the items and events subjected to definition.

Alexy also answers Hart’s critique of “disputable philosophy” by emphasizing that the same could be told about positivism, since it is also philosophy and is similarly disputable.\(^{25}\) This counterargument appears correct. In our opinion, what really matters is the essence of an idea and how it is substantiated. Nearly all opinions are disputable, but what matters, is the degree of their authenticity, rather than the mere possibility of discussing them.

Another German legal philosopher, Ralf Dreier, also criticizes Hart’s linguistic/conceptual argument.\(^{26}\) In Dreier’s view, a conflict between law and morality is both a moral and a legal problem. He believes that the formulation of the problem as law/morals dichotomy by Radbruch, corresponds to post factum evaluation of the acts adopted in totalitarian states.

Although such difficulties occur even under the rule of law, states’ situations still differ, because the principles of morality have been incorporated in the positive law. Dreier concludes that in a state governed by the rule of law, a concept of law has been defined at constitutional levels in compliance with legal-ethical principles. Therefore he confines the linguistic/conceptual clarity thesis by questioning whether the application of a neutral (from legal-ethical viewpoint) concept of law would be reasonable in the context of unjust legal orders. Dreier agrees with the idea in the framework of empirical-practical researches, but rejects it on the grounds of legal-practical and legal-dogmatic standpoints: “taking into account a phenomenon of unjust states, legal practice and legal dogmatics (doctrine) cannot avoid confrontation of law with justice; ignoring it altogether would be equal to non-fulfillment of their tasks, as the examination of the courts’ practice in the National-socialist’s regime of statutory lawlessness has demonstrated”.\(^{27}\)

In the end, Dreier concludes that juristic/ethical modification of a concept of law does not mean that it will necessarily lose linguistic/conceptual clarity. Moreover: “The normative openness of law caused by clarity is a more matching expression for the complexity of the problems described by it”.\(^{28}\)

Dreier’s evaluation of Radbruch’s formula is correct. As experience has shown, the formula has helped reconsider the gloomy juristic legacy of the totalitarian past.\(^{29}\) The process cannot be led without taking justice into consideration. On the other hand, the adoption of an extremely unjust law in compliance with democratic procedures in a free, democratic and constitutional state is almost impossible. However, if it happens, other mechanisms, for example constitutional control, can be used to revoke unjust laws.

\(^{25}\) Alexy: Begriff und Geltung des Rechts, S. 79.

\(^{26}\) Dreier: Recht, Moral, Ideologie, S. 192 ff.

\(^{27}\) Dreier: Recht, Moral, Ideologie, S. 193.

\(^{28}\) Dreier: Recht, Moral, Ideologie, S. 193.

\(^{29}\) Compare: Alexy: Begriff und Geltung des Rechts, S. 98.
Opponents of the linguistic/conceptual thesis often argue that it requires a comprehensive analysis of the word’s usage for deciding either for or against a positivistic concept of law. The German legal philosopher Biorn Schumacher notes that Hart does not thoroughly examine a German word “Recht” (law) which, unlike its English version, is influenced by ethics. Consequently, Schumacher argues, this diminishes the importance of the linguistic/conceptual argument for the German speaking sphere.\(^{30}\)

The word’s contents and its usage are issues of great importance. Often it expresses the essence of a thing or significant elements which the word denotes. It is worth mentioning that the Georgian word “law”, like the German one, contains connotations of truth and justice. This fact is certainly to be considered a significant factor.

b) Argument from Effectiveness (Effektivitätsargument)

Hart believes that it is naïve to think that incorporating moral elements in the definition of law could lead to a victory over statutory injustice.\(^{31}\) The thesis is called “an argument from effectiveness”.\(^{32}\) Hart does not believe that a narrow concept which does not recognize valid, but morally unjust, norms can strengthen resistance to evil, given a threat coming from the organized power.\(^{33}\)

On the one hand Alexy admits a certain reasonableness to the argument of effectiveness, since the concept of law per se cannot change reality: “For a judge in a lawless state it does not matter whether he/she relies on Hart and refuses to apply extremely unjust law on the grounds of morality or whether he/she acts according to Radbruch’s instructions and legal reasons. In both cases he/she must make sacrifice; willingness depends on other factors rather than definition of law”.\(^{34}\) Nevertheless, Alexy sees a modest practical effect of the non-positivistic concept of law in conditions of weak and unjust regimes, and especially in the initial phases of their development. Besides, he does not have much hope that the judges, who believe a necessary prerequisite for the legal acts adopted by a state is meeting minimal requirements of justice, will successfully resist lawlessness.\(^{35}\)

Alexy admits that Radbruch’s formula can have some effect in a developed lawless state. He calls it a “risk effect,” and it is based on the a judge or other public servant fearing that after the unjust regime collapses, he/she will be punished if a non-positivist approach is generally accepted. This risk may generate or strengthen motivation for a judge not to participate in poor administration of justice or, at least, mitigate the results.\(^{36}\)

\(^{30}\) Schuhmacher: Rezeption und Kritik der Radbruchschen Formel, S. 58.

\(^{31}\) Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (42)

\(^{32}\) Alexy: Begriff und Geltung des Rechts, S. 80.

\(^{33}\) Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (42).

\(^{34}\) Alexy: Begriff und Geltung des Rechts, S. 86. On the Concept and the Nature of Law

\(^{35}\) Alexy: Begriff und Geltung des Rechts, S. 87.

\(^{36}\) In detail see: Alexy: Begriff und Geltung des Rechts, S. 88 ff.; Alexy: Mauerschützen, S. 35.
The views provided above are based on a right evaluation of human physiology and authoritarian (unjust) states’ specifics. The effect of non-positivist concept of law is particularly high in the states called “democratura”.\textsuperscript{37} These states are externally democratic but display numerous signs of unlawful states. Because they are dependent on foreign financial assistance, or for any other reason, they will not dare to openly attack freedom and justice. Hence, a judge has more chances in these countries than in well-developed unlawful states. At the same time, the effect remains modest, since a state system founded on blind obedience as a rule quickly “improves” the bold decisions. Therefore the effect is not widespread, systemic and stable, although ignoring it entirely would have been wrong.

The assessments concerning risk effect are very interesting. Generally speaking, finding heroes in an unlawful country is no easy task. As a rule, individuals won’t endanger their own lives and well-being, hence they prefer to be silent or cooperate with an authoritarian regime. The addressees of the risk effect are clever and pragmatic judges and public servants. On the one hand, they are not bold enough to decisively fight against injustice, but on the other hand they try to avoid or ease prospects of responsibility.

c) Argument from Superfluousness (Unnotigkeitsargument)

Hart describes a case of a German woman who denounced her husband for insulting remarks he had made about Hitler.\textsuperscript{38} Her husband was sentenced to death though he was not executed, but instead sent to the front. In 1949 the woman was charged with illegally depriving a person of his freedom. However, the woman believed that her husband was convicted and punished in compliance with the Nazi laws and therefore she was not guilty of any offence. The Cassation Court held the Nazi laws were unfair.\textsuperscript{39} Hart is doubtful whether the judge acted reasonably. He believes the court would have acted more properly if it had applied a law with retrospective force.\textsuperscript{40}

Alexy calls the above viewpoint an argument from superfluousness and examines it thoroughly relying on the German constitutional-legal order. The 2nd section of the Article 103 of the Basic Law of Germany establishes a principle of “Nulla poena sine lege”, which prohibits adoption of retroactive laws stipulating punishment.

Alexy raises doubts related to making an exception through constitutional changes since, in his view, it would have been legally problematic because of the guarantee for eternity established by section 3 of Article 79. It would have been also practically impossible, as it’s doubtful whether the

\textsuperscript{37} Herman Schwartz; The Struggle for Constitutional Justice in Post-Communist Europe; Tbilisi, 2003, pg. 302);
\textsuperscript{38} In detail see: Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (43 f.).
\textsuperscript{39} In detail see: Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (43 f.).
\textsuperscript{40} It must be noted that Hart erroneously describes the case. He wrongly believes that this ruling of the Cassation Court was conditioned by a fact that the Court did not recognize legal force of the Nazi laws (Alexy: Begriff und Geltung des Rechts, S. 103). However, this fact does not play a significant role in considering the argument from superfluousness.
proposed constitutional change would receive the required number of votes. However, with regards to this counterargument we can say that there are states, including Georgia, where the constitutions of which do not stipulate eternity guarantee. Thus, theoretically it would have been possible to deviate from the “Nulla poena sine lege” principle. This kind of approach would be better than a decision made by any judge of a criminal court. Laws are adopted through democratic procedures in democratic states. They are subject to constitutional control both formally and materially. A court’s judgment definitely lacks this degree of democratic legitimacy. Here we should also underline that in many models, including Georgia-s, the courts’ decisions do not fall under constitutional control. Although even in these circumstances the application of Radbruch’s formula would have been necessary. Let’s theorize how a constitutional amendment permitting an exception could have been formulated. At this moment, an application of Radbruch’s formula modified in a constitutional provision would have been the most optimal decision.

In Alexy’s view, when the fundamental principle of “Nulla poena sine lege” cannot be changed or restricted, the problem arises not with needlessness of the non-positivist approach, but rather with ignoring this principle. Consequently, he is right when he refuses to consider this problem in the frameworks of the argument of superfluousness and focuses on the cases outside the domain of criminal law. As he holds, legal injustice can be solved by the laws with retrospective force, but at the same time he has a question about what a judge should do when a legislator is passive. In such cases, Alexy believes that an application of the non-positivist concept of law is necessary. In the first place he emphasizes the interest of protection of fundamental human rights. In addition, Alexy notes that a ruling which is grounded on extreme injustice does not meet the requirements of justice. It should be noted that Hart ignores issues concerning non-criminal spheres, as well as passivity of a legislator. This factor significantly weakens his argument from uselessness. When there is no retroactive law and a judge deals with an extremely unjust norm, then he/she should not go up against justice and his/her consciousness and should issue a fair decision corresponding to human rights.

d) Argument from Candor (Redlichkeitsargument)

The argument of Candor is based on the thesis that an application of Radbruch’s formula leads to the hidden circumvention of the principle “Nulla poena sine lege” in criminal cases. This argument too is related to the above described case of a woman who denounced her husband. As we have noted, Hart believes that adoption of a retroactive law would be more appropriate. He goes on: “Odious as retrospective criminal legislation and punishment may be, to have pursued it openly

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41 Alexy: Begriff und Geltung des Rechts, S. 98 f.
43 Alexy: Begriff und Geltung des Rechts, S. 105.
in this case would at least have had the merits of candor”. Although Alexy admits that this argument is strong, he develops counterarguments. He thinks that the limiting application of Radbruch’s formula in criminal cases by the principle “Nulla poena sine lege” may be one of the solutions for the non-positivists. In this case, the formula would be fully applicable outside the sphere of criminal legislation. It should be noted, however, that it would not be an optimal solution, since it is criminal legislation in the first place which requires taking justice considerations and application of Radbruch’s formula into account. Because of the specificitiess of criminal law and unusually high risks for human rights, discrimination in this sphere may reach more serious levels than in any other field of law. It is noteworthy that Alexy gives preference to a different counterargument. His thesis is derived from the position that the unfairness of those actions which are punished by Radbruch’s formula, is clear. In the same way, the injustice of those norms which exclude punishment for such actions is evident. Because of the extreme injustice and vividness, everybody who commits criminal action should be aware that the norms which can exclude punishment do not represent law. Alexy decides that an idea of hidden retroactivity is out of place here, “since retroactivity does not change legal status, it rather determines the legal nature at the moment of committing a crime”. This thesis is founded on the appropriate perception of Radbruch’s formula, as Radbruch talks not on the development of the new norms with retroactive force, but rather on application or non-application of existing unjust norms. Clear injustice can also be discerned. Extremely unjust norms intentionally violate fundamental human rights and values such as a right to life, freedom and dignity and inflict great harm on individuals. At the same time, each judge should sensibly deal with Radbruch’s formula. Alexy says that an offender’s belief that extremely unjust law eliminates his/her responsibility plays an important role in this context. But it would be difficult to prove the same idea to someone who was brought up, educated and ideologically “shaped” in closed totalitarian regimes.

Analyzing Hart’s argument from Candor, Schumacher points out that disagreement between Hart and Radbruch can be reduced on the issue of whether a court may not apply or may “devalue” unjust norms. In order to answer this question, the court’s practice should be examined. As noted above, Hart analyzed only one judgment. Hence, his reasoning does not reflect a variety of problems persisting in administration of justice. This thesis is not groundless. Hart should have reasoned on the basis of the examination of problems related to various areas of law. For example, his opinion on the non-application of deprivation of property norms or their classification as not being law by a court because of their extreme unjust nature, would have been be very interesting.

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44 Hart: Der Positivismus und die Trennung von Recht und Moral, S. 14 (44).
45 Alexy: Begriff und Geltung des Rechts, S. 105.
47 Schuhmacher: Rezeption und Kritik der Radbruchschen Formel, S. 60.
V. CONCLUSION

A brief review and evaluation of Hart’s critique has demonstrated that his arguments are surely very strong at times, but they are not sufficiently decisive for concluding that Radbruch’s formula is wrong. Sometimes, Hart seems to deliberately neglect important elements. The counterarguments against his reasoning in legal literature have been mainly logical and appropriate.

A successful application of Radbruch’s formula in administration of justice is of no less importance than theoretical thinking. The formula, like all other great ideas, is simple and universal in time and space. It has been used at different times to consider legal outcomes of essentially different totalitarian regimes as an optimal resolution of a problem. Most likely, the formula will not lose its significance in the future because the unjust legacies of many states worldwide may some day fall under legal scrutiny. At the same time, it’s almost impossible to avoid mistakes while applying the formula, as its practical application is primarily caused by a mostly evaluative reasoning of a judge, which in its turn cannot be at all times flawless. In a modern, free, democratic and lawful state where justice, freedom, dignity and equality have been granted constitutional status, a moral element of law is a constitutional, legal requirement. Lawful state means supremacy of just/fair laws rather than a dominance of lawlessness cast in the legal form. Only just and fair law can get consent from a free and open society which fully agrees on the idea that just law strives to strengthen and protect freedom.

48 Compare:: Dreier: Recht, Moral, Ideologie, S. 191.
Lali Papiashvili

CONSENT SEARCH: WHAT MATTERS AND WHY

“...The constitutional right to privacy represents an integral part of the concept of freedom ... is the base for independent development of every individual”\(^1\). The Constitutional Court of Georgia has stated on numerous occasions that “The right to private life implies the possibility of an individual to lead his/her private life according to his/her own will and be protected from interference by the State or other persons. It protects the choice of a person to exist independently from the outside world, be left alone, as well as to have freedom of choice while deciding the conditions and extent of the relations with other members of the society, ensures free development of a person and gives him/her opportunity to decide independently when, to what extent and by which form to make the facts of his private life public; to exchange and share opinions and impressions”\(^2\).

The right to private life is guaranteed by Article 20 of the Constitution of Georgia and all the basic acts of International Law.\(^3\) However, it does not pertain to absolute rights. The legislation envisages the possibility to restrict it.

The right to privacy is composed of many components. It is linked to the personal autonomy and the so-called right to be let alone\(^4\), which implies ability of every individual to decide with what

\(^1\) Citizens of Georgia Davit Sartania and Aleksandre Macharashvili against the Parliament of Georgia and the Ministry of Justice of Georgia, Decision of the Constitutional Court of Georgia # 1/2/458, 10.06.2009 2012, par.II-4.

\(^2\) Georgian Young Lawyers’ Association and the Citizen of Georgia Tamar Khidasheli against the Parliament of Georgia; Judgments of the Constitutional Court of Georgia # 2/1/484, 29.02.2012, par. II-2; See also Georgian Young Lawyers’ Association and the Citizens of Georgia Ekaterine Lomtatidze against the Parliament of Georgia, Judgment of the Constitutional Court of Georgia #1/3/407,26.12.2007, parII-4; Georgian Young Lawyers’ Association and the Citizen of Georgia Tamar Chugoshvili against the Parliament of Georgia, Judgement #513 Decision of 24 October 2012 on the case, BVerfGE 65, 1[43]

\(^3\) Inter alia Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights, Article 8 of the European Convention on Human Rights and etc

intensity to fall in the center of public attention. Accordingly, the main aspect of right to privacy is the person’s interest to prevent revealing the information connected with private issues and control spreading of such information. Realization of the aforesaid right has particular importance in criminal proceedings, where protection of private information, as well as strict regulation of inviolability of one’s home and restriction of the right to private communication; formation of the administrative practice pursuant to the requirements set by law shall be ensured. "Interference with the right can only be justified in case the legislation envisages the effective mechanisms for protecting from abuse of power. The aforesaid comprises the exhaustive and clear regulation, as well as provision of court control on the necessity and proportionality of restriction."

The legislator is obliged to strike relevant balance between public and private interests. It shall determine the pre-conditions for restriction of the basic right as well as to whom and to how many individuals with what intensity and scale the rights will be restricted. Any interference in the right shall serve the constitutional purpose, be necessary and represent a proportionate means to achieving such purpose.

As mentioned above one of the aspects of the right to privacy represents inviolability of one’s home and possession. “Inviolability of home is the basic right, which in the interests of human dignity and individual’s personal development provides “elementary dwelling space”.

First paragraph of Article 112 of the Criminal Procedure Code of Georgia regulates restriction of this very right and sets out that: “Conducting an investigative action, which restricts private ownership, possession or private life does not require Court decision in case it is conducted with the consent of a co-owner, co-possessor, or a party to a communication”.

The article discusses the issues connected to issuing consent for conducting a search. Particularly, preconditions for giving consent, its limits and the possibility to revoke it. The possibility to conduct a search in case the co-owners/co-possessors have contradictory positions concerning giving consent and conformity of the Georgian legislation with the international standards of right to private life in such a case.

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5 According to the Oxford Explanatory Dictionary right to privacy is interpreted as “a condition in which a person is not disturbed and observed by other persons”. See Marios Koutsias, Privacy and Data Protection in an Information Society: How Reconciled are the English with the European Union Privacy Norms? 2012, C.T.L.R., Issue 8, p. 262
6 See K. Kublashvili Fundamental Rights, 2003, p.109.11
7 Gurgenidze v. Georgia; application #71678/01; 17.10.2006, para. 37; see also Georgian Young Lawyers’ Association and the Citizens of Georgia Ekaterine Lomtatidze against the Parliament of Georgia, Judgment of the Constitutional Court of Georgia #1/3/407, 26.12.2007,par. II-4; M. Nowak, UN Covenant on Civil and Political Rights. CCPR Commentary (Kehl am Rhein, Engel, 2005), pp. 401–402.
8 I. Schwabe Judgments of the German Federal Constitutional Court 2011, p 382
9 Ibid
10 Georgian Young Lawyers’ Association and the Citizen of Georgia Tamar Khidasheli against the Parliament of Georgia” Judgment of the Constitutional Court of Georgia #2/1/484, 29.02.2012,par.II-9;
THE TERRITORY WHICH IS COVERED BY PROTECTION OF ARTICLE 20

Paragraph 2 of Article 20 of the Constitution of Georgia secures inviolability of “home and other possessions”.

Home is a physical space for developing private life by a person, the place of family and other types of relationships. However, a concrete space shall not be said to pertain to home in abstract. Protection shall be afforded only to the place which a person uses de facto and where he has a legitimate expectation that he will not be disturbed by officials and other persons.

“The decisive criterion for determination as to what constitutes home represents the subjective definition of the purpose of life and its objective cognizance”. Accordingly, dwelling represents any closed or roofed immovable-movable property which a person owns, possesses or makes use of. Particularly this may be an apartment, a house, a country-cottage, a yacht which is used for living or a wagon, a tent, a hotel room etc.

Article 20, Para 2 of the Constitution of Georgia protects also any possession. The same formulation can be found in the first paragraph of Article 7 of the Criminal Procedure Code of Georgia, which protects “private ownership and other possession” as well as in paragraph 1, Article 112 of the same code.

The Georgian legislation does not define the meaning of other possession. However, it is clear that the aforesaid comprises dwelling as well the space which is directly connected to the dwelling e.g. auxiliary cellar, garage, yard etc. The issue is to some extent problematic in case of a cellar, auxiliary building or construction, garage that are not placed in the yard of the dwelling house and are territorially distanced from it, or a fenced but not a roofed territory.

There is an opinion expressed in legal literature that the protection envisaged by Article 20 covers a land plot only in case it is directly connected with the house. Therefore, e.g. a garden thrift, vineyard etc. on which the dwelling construction is not placed does not fall within the scope of Article 20. The aforesaid approach is rather questionable as the formulation of the Article itself differentiates the dwelling place from other possession. Accordingly it has to be defined what is meant

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13 Ibid p.620
18 See. Ibid, p.187
under other possession – possession which should have the dwelling character or should directly be connected with the dwelling, or any lawful possession notwithstanding its function. E.g. a store house, working space, garage and etc., which is not directly tied or connected with the dwelling house, protection covers only roofed space [and what type of roofing is meant? E.g. glazing?] or a possession which is fenced and protected from the eyes of the strangers by a fence.

Such an approach to some extent reflects the procedural legislation of the United States which envisages wide interpretation of a “dwelling house” and differentiates the adjacent territory to the house form the open space. In particular, a “dwelling house” implies dwelling units as well as the adjacent territory which is immediately connected with it, in which there are the kind of private relationships, which are associated with home, private life and expectation of privacy. Open space represents any unpopulated or less exploited space which is placed outside the adjacent territory of the house. 19

As the topic of the Article is relatively narrow and does not concern the basis for restricting the right to private life in general, I will only note that in case of narrow interpretation of “other possessions“, in the sphere of regulation of Article 20 will not fall: working space, separately placed building and constructions, cellars and etc. which will unjustifiably curtail the scope of application of Article 20. Accordingly, for the purposes of Article 20 less importance shall be attached to separation of the property from the dwelling house or the actual distance from it, but rather primarily to the subjective and objective criteria of the owner/possessor’s expectation to be left alone towards this unit, in particular person’s subjective expectation of privacy and the readiness of the society to acknowledge such an expectation as reasonable.

Reasonableness of the expectation is to some extent connected to the intensity of the measures carried out to protect the space from interference by other persons. Accordingly if the space which is located in the adjacent fenced yard is not appropriately roofed or protected from the scrutiny of other persons it does not enjoy the right to privacy. The persons who expose property to the public, even if it is discernable only from the air space, cannot argue about the reasonable expectation to privacy.20

19 See. E.g J. Derssler, Alan C.Michaels, Criminal Procedure: vol.1: Investigation. 5th ed., 2010, LexisNexis, p. 64

20 Julian A. Cook, III, “Inside Investigative Criminal Procedure: What matters and Why”, 2012,Wolters Kluwer, p. 34; Florida v Riley US445 [1989] - there is not violation when the police observes from the helicopter the damaged and open places of the greenhouse roof as there does not exist expectation of right to privacy if anything is visible for the public from the place of observation. See. Daniel J.Solove, Paul M.Schwarts, Privacy Law Fundamentals, 2011 IAPP, p 32. Deriving from the diversity of the methods and forms for interfering in the private life by a manner which equals to search, the issue was thoroughly examined in a separate article.
RESTRICTION OF THE RIGHT TO INVOLIABILITY OF HOME AND OTHER
POSSESSIONS WITH THE PERMISSION OF PRIVATE PERSONS

Article 20, Para 2 of the Constitution of Georgia links entering the dwelling apartment or other possession to one of following three preconditions: A court Judgment, urgent necessity prescribed by law or the consent of the possessors.

Article 112 of the Criminal Procedure Code of Georgia singles out as a precondition for absolving from the requirement of a court decision –a permission of certain category of persons, however it does not attach particular attention to the level of factual linkage of such person to a property. For example, consent of one of the co-owners is sufficient for searching a property in joint possession or property under lease or rent, as well as search of items in private ownership of other members of the family. Instead the purpose of the rule should be to guarantee the right to privacy of a specific person with regard to specific property. In particular, as a rule court permission is needed in case of searching a property transferred through rent or lease, this shall ensure the balance between the private and public interests. However, this is not necessary when the owner consents. In such a case at first glance the guarantee envisaged by the Criminal Procedure Code of Georgia can become devoid of sense, as its aim is to protect the private life of the specific individual possessing the property from interference by officials rather than the owner who does not directly use the property. In certain cases such an approach may be justified on the basis of the interests of the owner. For example, in order to check whether his/her immovable property is being damaged or misused or used for criminal activities. However the main purpose of the guarantee should be preserved in such cases as well.

Is it permissible to seize e.g. a computer found at the search place or to use the information obtained as a result of searching such a computer as evidence in court? Does a third party have a reasonable expectation of privacy in case when the information stored in a computer is seized?

It shall be taken into consideration that the consent of a person excludes interference in the right. For that reason getting acquainted with files, hard drives and other electronic storages on the basis of person’s consent as well as legitimacy of a search in general does not require approval by a court.

Accordingly while conducting a search based on consent the following 3 issues are important:

1. Legitimacy of the consent according to the level of association of the person giving such consent to the object of the search;

21 J.-D. Kuhne, Art. 13, in: M. Sachs (Hrsg.), Grundgesetz: Kommentar, Munchen 2003, Rn. 23. However, in such case decisive importance is attached not only to the legal authority of the person giving consent, but the level of practical and real connection to the concrete property for defining legitimacy of consent at the one hand and the limits of consent on the other.


23 Does not require approval of a Court, however it does not exclude examination of lawfulness of the conducted search when one party appeals legitimacy of the information obtained through it
2. Voluntary nature of consent;
3. Limits of consent.

In light of the above mentioned the Courts should examine for at least 3 following circumstances with regard to the searches conducted on consent basis:

1. Voluntary nature of consent and its conscious nature
2. Whether the person has association of such an intensity with the property that bestows him a right to give consent
3. Whether consent has been revoked

According to the case-law when the prosecuting party refers to the court for ex post approval of the search, conducted on the bases of consent of owner or possessor, the court will not examine lawfulness of the search.24

This type of a search is the most desired one for the investigation bodies for the following three reasons: 1. as a rule, while requesting consent for carrying out a search the investigative body is not obliged to prove existence of probable cause that the person may be involved in criminal activities 2. There are no administrative difficulties and risks connected with obtaining and enforcing an order 3. In certain cases consent on search is given by a person, who knows that he hides evidence of a crime. For these reasons in the opinion of the police such kind of a search has particular importance for the investigative purposes.25 With regard to consent search the authority of the investigation is particularly wide. It gives possibility to require conducting a search of any person, at any time (as a rule except the night hours), for any reason. They are not obliged to indicate what they are searching for, nor where they expect to discover an item. They are not obliged to interpret the reason for believing that a particular person can possess accusatory evidences.26 It suffices to explain for investigation of which crime, for what reason and with regard to what they are requesting consent to conduct a search.

From the perspective of private persons, such kind of search is problematic especially because of the following circumstances 1. The majority of the population does not know that they have a right to refuse 2. In most of the cases even the most informed persons feel unsafe in relationship with the police 3. While requesting consent for search by the police the situation frequently bears legal

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24 See e.g. Decision of the Tbilisi City Court of 24.09.2013 app. #11b/7388. Court stated that according to Article 112 of the Criminal Procedure Code, an investigative action restricting private property or possession is conducted on the basis of court permission, unless one party to the communication or even one co-possessor or co-owner consent to conduct an investigative action. Accordingly in such a case, even the investigative action conducted under exigent circumstances, ex ante or ex post courts’ permission is not required... the court noted, that as the possessor of a car voluntarily gives consent to search a car in his possession and present the items, examination of a search conducted on the basis of one of the parties to the communication does not require court control’.


coercion. In such a situation it is unrealistic that even the persons who are well informed about their right to refuse to consent actually do so.\textsuperscript{27} The main problem is that appealing to the constitutional right to privacy can cause additional legal problems like exerting physical influence or administrative detention. For the aforesaid reasons the majority of population “voluntarily” gives consent to the police to conduct a search.\textsuperscript{28}

That is why particular attention should be attached to detailed regulation of such practice by legislation and establishing respective administrative procedure.

\textbf{THE VOLUNTARY NATURE OF CONSENT}

The Criminal Procedure Code of Georgia does not set out criteria for giving consent, accordingly it does not define any specific form of consent [verbal, written and etc], and therefore consent may be expressed in an explicit or implicit form. Conscious consent is not required nor is the obligation to verify legal capacity of a person, for that reason the fact that consent may be given under the influence of alcohol, narcotics, or by a person having psychiatric problems [if psychiatric disorder is not vividly expressed] or by a person being in agitated condition does not render consent unlawful.\textsuperscript{29} For validity of consent legislation does not require giving it in a written form, accordingly if a person refuses to fix his/her consent in a written form this does not render illegal the legally obtained consent.

Consent is voluntary if there is no evidence of coercion or humiliation from the part of the police and the person understands the meaning of the asked questions.

While discussing the issue of voluntary nature of consent it shall be examined whether the person giving consent could freely express his will, or he/she merely obeys the requirement in order to prevent ensuing real or imaginary negative result. The voluntary nature of consent on carrying out a search largely depends on the circumstances in which the consent is requested. Accordingly the courts should discuss all the circumstances and facts regarding consent which took place prior to giving it. These circumstances can conditionally be divided in two groups: 1. the actions taken from the side of the State in order to obtain consent and 2. Personal characteristics of the person giving consent.

\textsuperscript{27} See footnote 25.

\textsuperscript{28} Ibid

\textsuperscript{29} E.g. when consent is required from a driver or a possessor being under the influence of alcohol, who at his home welcomes the officer under the influence of alcohol. See, Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights, Craig Hemmens and Rolando V. Del Carmen (eds.) Rowman and Littlefield Publishers, 2010, p. 164
While deciding the issue, totality of the circumstances test shall be used. The tactic used by the investigative bodies for obtaining consent shall be taken in consideration [using an unconscientious approach], as well as their statements made prior to getting consent and whether the person was arrested at the time of consenting. When consent is given by a person being under restriction of freedom [detained or arrested], the conditions of detention and questioning are also subject to re-examination. The fact of restricted freedom itself does not render consent involuntary.

In case the representative of investigative body demonstrates power, exerts physiological influence on the person, e.g. intimidates him that in case of resistance he will be back with court warrant, deceives – when the investigator knowingly misleads the person and states that the investigative body possess enough evidence to obtain court permission on search and in case the person refuses he will be back with the court warrant, or deceives that he has a court warranty on carrying out a search. As a rule obtaining the consent through such means is illegal. At the same time the measures of influence used by the investigative body can bear different results for different persons depending on the individual characteristics of individuals such as person’s education, physical and mental condition, freedom of expression, emotional condition, motivation. Among the factors which indicate on involuntary character of consent are: mental illness or injury and actions of the defendant prior to giving consent including primary refusal to give permission and requiring the right to lawyer. The consent given while having linguistic difficulties [e.g. foreigner] is generally considered as voluntary by courts.

To establish that consent was involuntary only presence of coercive tactic is not sufficient, as the coercive measure which can exert influence on a person with disabilities may not have the same effect with regard to a more powerful and self-confident person.

Unlike the Georgian legislation and court case-law, the legislation of United States differentiates consent from acknowledgement of investigator’s authority. For example, when at 3 a.m. the policemen entered juvenile’s room and asked him to follow them, “alright” said the boy, and this was considered as acknowledgement of the authority of the policemen rather than voluntary consent. Likewise, when 66 years old black lady was deceived by white policemen who told her, that they

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had a search order, was considered as acknowledgement of the authority of the policemen rather than voluntary consent.\textsuperscript{38}

Can silence or an ambiguous answer to a question be considered as consent? For example, when a person being in the apartment moves away while opening the door only to avoid the policemen bumping into him/her, when a person opens the door and lets the representatives of investigative bodies in, after they threaten to break-up the door or when a person answers to a question of an investigator, that “since you have a certificate of a policeman you are entitled to conduct a search”\textsuperscript{39} and etc. Silence, nodding a head, giving way to the representatives of the police and etc. does not in itself a priori represent consent.\textsuperscript{40}

Notwithstanding the fact that in all the above mentioned cases the US Supreme Court considers that consent was not voluntary, taking a decision only according to the form of an answer will not be correct. The totality of the circumstance of the case test shall be used for defining legitimacy of consent. “… Supporting the voluntary consent through argument that a person unreservedly obeyed the requirement of investigative body does not suffice for the state to pass the burden of proving that the consent was voluntary.”\textsuperscript{41}

Should a person know that he/she has a right to refuse to give consent, before giving it? The Criminal Procedure Code of Georgia (like the Procedural legislation of USA) does not include the obligation for the investigative body to explain that the individual has right to refuse to consent.\textsuperscript{42} The subjective understanding by a person of the right to refuse represents one of the factors, which shall be considered by court in conjunction with other circumstances while assessing voluntary nature of consent. Voluntary nature of consent does not depend on knowledge about the right to refuse. … “investigators who do not have evidences supporting probable cause to conduct a search, but have a suspicion that a person is involved in criminal activities, would otherwise lack the only possibility to obtain important evidence. Even in case when there is no evidence supporting probable cause for search or detention, in court’s opinion consent search is still useful. In particular “if a person consents to conduct a search which proves to be useless, may convince the law enforcers in uselessness of arresting a person … or on the base of order … that conducting a large-scale search is unjustified”.\textsuperscript{43}

“in order for a search conducted on the basis of consent to be considered as voluntary, it would not be practical to use detailed requirements of effective warning” it would also be unrealistic to


\textsuperscript{40} Search And Seizure guide, p. 4


\textsuperscript{42} Like in case of enquiry

oblige the policemen to explain to the detained persons that they are free to walk away before obtaining consent to a search.”

The court also interpreted that the detailed requirements set for refusing to remain silent and to avail oneself of the services of a defender are conditioned by the crucial importance of the right itself for the purposes of delivering justice, as to guaranteeing protection from willful search-seizure is of absolutely different character and is not connected with establishing truth while a court hearing on a criminal case.

The fact that a person was not informed about the possibility not to give consent on search does not render the consent illegal. However consent which is given by a person after informing him about the right represents a powerful factor for demonstrating voluntary nature of consent but not a decisive one.

Accordingly, consent shall be voluntary and not coercive; however unlike the rights guaranteed by other articles of the Constitution of Georgia, in this case it is not necessary for the refusal to be conscious and perceived one. Particularly, unlike waiving the right to a lawyer, which will be considered lawful only in case it is done after given warning regarding the right to the lawyer, in case of search legislation does not require such preconditions. Therefore, for lawfulness of consent it is not necessary for a person to be conscious that he has a right to refuse to conduct a search in absence of a court decision or a resolution of an investigator thereto.

“Consent cannot be a result of explicit or implicit coercion or intimidation”. There is no lucid and univocal answer to a question in what case is consent a result of such influence. For defining it the court uses the test of totality of the circumstances of the case. The fact of demonstration of power is taken into consideration, as well as age of the person, his mental condition, to what extent does his intellectual capacity gives possibility to realize the importance of consent., examination of the outside factors, whereabouts of the person while giving consent, whether his freedom was limited [e.g. he was detained/arrested], whether consent was given after declaring to him that the policemen have a search order. While deciding the matter of voluntary nature of consent the main issue to be considered is morality of the methods and techniques used by the police for obtaining consent.

It is important that consent is lawful even if a person giving consent does not know that he has a right to refuse to give consent. Recently the aforesaid position has once again been supported by the court.

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46 Ibid
47 John L. Worral, Criminal Procedure 2013, Pearson, p. 92
49 Ibid p.93
Is it permissible to conduct a search in absence of a necessary probable cause? Taking into consideration the fact that Article 119 and Article 120 sets out the purpose, grounds and rule for conducting a search. As a rule they are applied to the cases where search was carried out on the basis of given consent. The issue is differently regulated by the legislation of the USA, where conducting a search on the basis of consent is first and foremost considered as a simplified rule for conducting a search, which as a rule does not require probable cause and observance of formal requirements. Particularly, in case of a lawful refusal of a person to avail himself with the right guaranteed by the Fourth Amendment, the police have authority to conduct a search without order or any substantiation, limits of which are only defined by the person giving consent. The principle is that in case of such type of a search the probable cause is not decisive, it is decisive to obtain permission with lawful means.

LIMITS OF CONSENT

As a rule limits of consent and search depends on the essence of the search item. But in case of general consent to conduct a search limits are defined according to what a reasonable person would have implied in the given circumstances.

How lucid should the scope of permission be while requesting such permission? Whether the permission given to search a specific area [e.g. the trunk of a car, a suitcase etc.] extends to the right to search the containers found in that area? For example while giving consent on searching an apartment does an investigative body have a right to search all the places in it? Does the consent confer a right to a person conducting a search to search the electronic storages found in it? [E.g. a computer, a tablet computer or a mobile phone?]

The same standard of meticulousness is not required in case of a search on the basis of consent as in case of search warrant issued by a court r. However it should be objectively possible for the person giving consent to set the limits of a search. As a rule setting of limits becomes possible in case the search object is indicated, or it is stated with regards to which crime is search required or

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52 John L.Worrall, Criminal Procedure 2013, Pearson Pearson, p.92
53 Criminal Procedure and the Supreme Court: a guide to the major decisions on search and seizure, privacy and individual rights, Craig Hemmens and Rolando V. del Carmen (eds.), Rowman and Littlefield publishers, 2010p. 164
54 If the aim of the search – discovering narcotics, had been explained to the defendant before starting a search, accordingly consent was required for searching inter alia the places where logically narcotics can be hidden see. E.g. Florida v Jimeno, 500 U.S. 248(1991)].
when the item of particular search is being identified.\textsuperscript{55} At the same time unlike the search conducted on the basis of a decision a search performed on the basis of permission gives possibility to a person giving permission to revoke his consent or restrict the scope of a search at any stage of a search. The so called open field doctrine represents an exception. Paragraph 5 of Article 120 represents a partial analogy of the doctrine. According to the aforesaid paragraph “all the other objects comprising information which may have the importance of an evidence for the case or which explicitly indicates to other crime. As well as an item, document or substance comprising such information and has been removed from civil circulation.”\textsuperscript{56}

The limits of permitted search are defined pursuant to limits of the permission. Accordingly, limits of search cannot exceed the limit of consent.

The US Supreme Court has stated on numerous occasions that the correct standard for evaluating limits of consent is objective reasonableness, which implies that while defining the limits it shall be taken in consideration what a typical reasonable person would have concluded about the limits on the basis of the particular circumstances of the case. Will a “typical/ordinary reasonable person” while giving consent to conduct search of a particular area consider that consent comprises searching all the containers, electronic storages and etc.? If an investigative body requires permission to conduct a search in order to find a concrete type of computer and finds one with such outward characteristics will it be permissible to look through and conduct search inside the computer on the basis of the primary consent?

Pursuant to Article 119 of the Criminal Procedure Code of Georgia search is carried out in order to seize an item, a document or substance comprising information and having importance for the case, if there is a reasonable ground to believe that it is stored in certain place, certain person and search is necessary for finding it. Despite the fact that the Georgian legislation does not regulate this issue in details, deriving from the purposes enshrined by the case law of USA and Article 119 of the Criminal Procedure Code of Georgia consent on performing a search implies consent on searching of a specific area as well as of all the containers found in that area in which an object having importance for the case may be found. There should be an exception when a person giving consent explicitly and clearly consents to search a specific area without opening any container found in it.

Limits of consent are defined according to the legal status of the person giving consent and the boundaries which he sets to the investigative body. Accordingly a person cannot confer a right to search area which is outside the area under his ownership. At the same time this person can give permission to search the entire area or only a part of it. E.g. “you can look around” does not mean that the police can open everything and look into every corner.\textsuperscript{57} It is impermissible when a representative of an investigative body indicates that he wishes to see specific type of items and on the

\textsuperscript{55} E.g. while conducting a search in connection with the crime envisaged by Article 260 of the Criminal Code the police has a rights to seize the mutilated corpse found in the apartment (which clearly indicated to commission of other crime) and etc.

\textsuperscript{56} E.g. while conducting a search in connection with the crime envisaged by Article 260 of the Criminal Code the police has a rights to seize the mutilated corpse found in the apartment (which clearly indicated to commission of other crime) and etc.

\textsuperscript{57} John L. Worrall, Criminal Procedure 2013, Pearson, p. 93
basis of this consent avails himself of silence from the side of the person giving consent and carries out general search.

The Criminal Procedure Code does not explicitly define the limits of consent, however paragraph 7 of Article 120 of the Code envisages the authority of an investigator to open closed storage, dwelling and repository, when a person refuses to open them. Refusal may be conditioned by objective and subjective circumstances. Notwithstanding the fact that the aforesaid may derive from the legitimate purposes of investigation, the investigator should be obliged not only to make a note in the search record whether a person resisted ... but also to reflect the factual circumstances, which on the basis of urgent need establish a substantiated assumption for conducting a search of the area. In such a case it should be necessary for the entire search to be ex post confirmed by Court.

It is interesting to discuss the relation of paragraph 7 of Article 120 with the search conducted on the basis of consent given by persons defined in Article 112, particularly, how permissible it is to use the aforesaid authority while conducting search on the basis of consent. Article 120 stipulates a norm regulating a general rule of conducting a search. It applies to all types of searches of an area. However, with regards to the area, searching of which is refused by a person defined by Article 112, the investigative body shall ensure ex post examination of lawfulness of the conducted search by court. In case of a contrary interpretation consent given by persons envisaged by Article 112 would only have the meaning of conferring a right to enter the area and not the right to define limits of search.

**CONSENT OF THE THIRD PARTIES**

For the consent of the third party to be legitimate it shall be issued by an authorized person. As a rule the issue arises when consent is given by third party with regard to the area where defendant has expectation of privacy and as a result of the conducted search is found incriminatory evidence.

The case law of the USA, as well as that of the European Court of Human Rights strictly define the limits of authority of the third parties while conducting a search on the basis of given consent. As a rule the authority of the third parties is limited to the right to permit searching only the property which is at the same time in their active and immediate use. Particularly, in case of co- possession when a part of the dwelling is in the exclusive use of the co-possessor e.g. a private room, a store-room, a table and etc. It is prohibited to search this place on the basis of consent given by other co-possessor. For searching such an area a court order/investigator’s resolution or consent of the person in whose exclusive use is the place/item is required. Accordingly, the investigative body has

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58 See e.g. United States v Davis, 332 F.3d 1163[9th Cir 2003]; United States v Jimenez 419,F.3d[1st Cir. 2005]
an obligation to use reasonable discretion. It is not permissible to search a handbag of a woman co-
possessor with the consent of a man co-possessor, even in case the handbag is placed in the area of common usage.\textsuperscript{59}

Similarly a third party has a right to give consent on conducting search of a technique only in case he has a common interest or authority with regard to it. At that time search shall be limited to the area towards which the third party has the aforesaid authority. In case of searching a computer discovering encrypted or password protected files [or existence of other mechanism of security] abolishes the common authority concept. When a person had obtained password before the consent was given [or other possibility of opening the files] are exceptions. Networked computers may also enjoy immunity from permitted search as the system administrators may have access to the majority of files but not to all the files. The same principle applies to the members of the family. Consequently while deciding lawfulness of consent in such a case the most important issues are physical control and restricted accessibility. In other words if a computer is in common use of a family but the common use of the computer is limited with the initiative of suspected member of the family [e.g. encryption, using a stenography and etc.] other members of the family do not have right to give consent. At the same time for defining limits and lawfulness investigators are obliged to assess the totality of the circumstances of the case.\textsuperscript{60}

Accordingly pursuant to the case law of USA consent given by the third party is lawful in case the person giving consent enjoys factual and indisputable authority.\textsuperscript{61} While defining the authority of the third party to give consent the court first of all examines the nature of relationship between the defendant and the third party as well as the authority of the third party with regards to the property.\textsuperscript{62}

For the purposes of a search with consent common authority is defined not pursuant to the legal norms on ownership, but according to common usage by those persons who as a rule have common access to the property, can control it for the main purposes to the extent that there arises a reasonable assumption that any of the co-possessors have the authority to give consent and the others bear the risk that one of the co-possessors may give consent on searching the property in their common use. For the legitimacy of consent a right to enter the territory of the property does not suffice. For example consent of the porter, registrar to search a room at the hotel does not represent legitimate consent as the common use of the room is not present;\textsuperscript{63} Consent of employees of a college to search the area where students live, consent of one lessee instead of other;\textsuperscript{64} however

\textsuperscript{59} Walter P. Singoreli, Criminal Law, Procedure and Evidence, 2011, CRC Press, p. 237
\textsuperscript{61} Mastering Criminal Procedure Vol 1, The Investigation Stage/ Peter J. Henning.. [et.al] Carolina Academic Press, 2010, p. 158
\textsuperscript{62} Ibid
\textsuperscript{64} John L. Worrall, Craig Hemmens, Lisa Nored, Criminal Evidence, an introduction. 2nd ed., 2012, Oxford University, p. 150
Consent of the driver of a car is lawful and sufficient for searching the entire car, even if a driver is not the owner of the car.\textsuperscript{65}

Therefore for giving consent the third parties should have “common authority” with regards to the area. They can give consent on searching e.g. common kitchen, bathrooms and etc but not the bedroom which is only under one’s use.\textsuperscript{66} Accordingly, the third party can give consent on searching in case he enjoys common authority on the computer [e.g. it is in common usage].\textsuperscript{67}

As a rule the following regulations apply with regards to the thirds parties:\textsuperscript{68}

**Spouses** – spouses have equal rights on common property and each of them can give consent to search property acquired during their marriage, however the rule applies when both of the spouses physically attend the process of requiring consent and one of them refuses to consent. Unlike Article 112 of the Criminal Procedure Code of Georgia the police of the USA do not have a right to act on the basis of one spouse.\textsuperscript{69} One spouse can give consent to search a personal computer of another spouse in case they jointly use it and it is not protected by password.\textsuperscript{70}

**Parents and children** – both parents can equally give consent to search items of their juvenile children, not vise-versa. At the same time, the case law is not consistent while deciding the issues with regards to consent given by parents to search items of their juvenile children, particularly in a number of cases court held that parents do not have a right to give consent to search items belonging to their children, in case they take part in common thrift - e.g. pay a rent of the room, expenses for nutrition and etc. and express reasonable expectation of privacy.\textsuperscript{71} In case parents give consent to search a computer of their juvenile child the location of the computer, degree of dependence of the juvenile upon parent and etc. is taken into consideration.\textsuperscript{72}

**Room co-renters, co-owners and co-possessors:**- any co-renter/possessor of a room has right to give consent to search the entire house or apartment except the places towards which a person refusing to give consent has reasonable expectation of privacy, e.g. individual bedroom. The co-renter of the room who does not attend this moment bears the risk of a consent given by other co-renter. The burden of risk principle is also used in case of co-owners and co-possessors.\textsuperscript{73}

\textsuperscript{65} Ibid
\textsuperscript{66} John L. Worrall, Craig Hemmens, Lisa Nored, Criminal Evidence, an introduction. 2nd ed., 2012, Oxford University, p. 150
\textsuperscript{67} See United States v Mannion , 54 Fed Appx 372(4th Cir.2002) ; United States v Adjani 452 F.3d 1140[9th Cir 2006]
\textsuperscript{68} Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights, Craig Hemmens and Rolando V. Del Carmen (eds.,) Rowman and Littlefield Publishers, 2010, p. 165
\textsuperscript{69} Ibid. Georgia v Randolph 547 U.S.103[2006]
\textsuperscript{73} Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights, Craig Hemmens and Rolando V. Del Carmen (eds.,) Rowman and Littlefield Publishers, 2010 p.166
Renter and tenant: - A renter can give consent to search only the area which is in common usage, however he cannot give consent to search the private residence of the tenant, even if he has a right to enter the property; fix it or check its damages/condition.\textsuperscript{74}

Hotel personnel and hotel guests – during the period a hotel room is rented, its status equals to the home of the guest. Therefore, the personnel of the hotel do not have a right to give consent to the police on searching a hotel room.\textsuperscript{75}

Employee and employer – employer can search the office of the employee for the purposes connected with work activities but cannot give consent to the police to search the area where employee has a reasonable expectation of privacy in the office or at his working desk. Whether the employee can give consent to search the property of employer depends on his working status and as a rule not on the limits of authority. However if he had been entrusted to manage the business of the employer for a long time, some courts consider that he has a right to give consent.\textsuperscript{76}

Accordingly, the less/seldom contact exists between the person and property; the less is the possibility to appeal to infringement of the right to privacy while searching the area.\textsuperscript{77}

REGULATION OF DIFFERENT POSITIONS CONCERNING GIVING CONSENT TO SEARCH

As a rule consent given by the third party is not disputable if the process of giving consent is not attended by other co-owner or co-possessor. But how is the matter settled in case a person who refuses to consent attends the moment of requesting it and other co-owner/co-possessor gives consent? For example is it lawful to search an apartment which is in common ownership of the spouses when: 1. Husband who is at work refuses to consent, and wife who is at home consents?\textsuperscript{78} 2. wife who is not at home gives consent, however husband who is at home does not;\textsuperscript{79} 3. Both of the spouses are at home, the police had arrested husband in accordance with the rule prescribed by the criminal procedure code and placed him in a car of the patrol police car, asked him to give consent to search but he refused, as a result of which search was conducted on the basis of the

\textsuperscript{74} Ibid
\textsuperscript{76} Ibid.
\textsuperscript{78} See .e.g. United States v. Hudspeth, 518 F.3d 954[8th cir. 2008]
\textsuperscript{79} United States v. McKerrell, 491 F. 3d 1221 [10th Cir. 2007]
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consent given by wife;  
4. While requesting consent to search both spouses are at home, husband refuses to consent but wife consents, is a search conducted on the basis of such consent as well as the seized evidence lawful?

The US Supreme Court noted that refusal of the co-user who is physically present while requesting consent renders a search conducted without warrant unlawful and unreasonable. However it shall be mentioned that importance shall be attached to refusal only when it is explicitly and unequivocally expressed.

The issue is similarly resolved when the defendant does not consent to conducting a search, however other co-owners/co-possessors consent. However in such a case there should be present two preconditions: 1. Defendant should be present at the place where search is conducted; 2. Refusal of the defendant shall be explicitly expressed. Defendant should unequivocally refuse giving consent. Standing in silence without clearly protesting the process of the search does not suffice for asserting that he was against conducting it.

Accordingly the refusal of the defendant is not taken into consideration in case he is detained and is in the place of restriction of liberty. In that case consent given by spouse is enough.

The issue of regulating consent of co-possessors, friend and “family” in a wide sense is particularly interesting. Giving consent by a girlfriend to search a bedroom who also uses it is permissible as the room is in common use. According to the court’s interpretation the co-possessors who have right to give consent are those who jointly use property, who have common access or control over the majority of purposes to the extent that it is reasonable to admit that any of the co-possessors has right to give consent on conducting a search and the other co-possessor envisage the risk that one of them can give consent to search the entire area.

How the matter is settled when the authority of each of the co-possessor with regards to the common area envisaged by Article 112 of the Criminal Procedure Code is not quite clear to the investigator? For example investigative body acquires consent from a lady who opens the apartment with her keys and explains to the investigator that she is there to take her items from the apartment of her ex-boyfriend. Is her consent effective? The court held that in such a case a search conducted on the basis of consent without the court order shall be performed according to the doctrine of reasonably meant authority derived from the circumstances - i.e. search will be lawful in case consent

80 On the basis of State v St. Martin, 334 Wis. 2d 290, 800 N.W. 2d 858 (2011)
86 John L. Worrall, Criminal Procedure 2013, Pearson,p. 93
is acquired from the person who has a right to give consent according to the reasonable belief of the policeman, even if the belief proves to be incorrect. The police are only required to reasonably assess the facts before them. In the Court’s opinion the reasonableness test implies: whether the facts at hand of the police at the moment of entering property for conducting a search ... would have given a ground to believe that the person giving consent has authority on the property.\(^\text{87}\) However such belief shall be based on prior examined and established information, as well as in the case of pressing need –on the reasonableness test with regards to particular circumstances and conditions. Therefore, the aforesaid approach facilitates to permissibility of a “reasonable mistake”.\(^\text{88}\)

The question is to what extent should an investigative organ examine the authority of a particular co-possessor of a particular area? Is the fact of indicating a particular person as a co-possessor in a document [E.g. a renter in a rent contract, as a lessee and etc.?] or in the testimonies of the neighbors? Or indication of the person as an owner in extract from the public registry’s office and etc.? Does the statement of the possessor or the fact of having a key of the respective area\(^\text{89}\) suffice for checking the authority? Importance shall be attached to the length of possession by the moment of requiring consent or the real content of possession and the limits of practical usage of the respective area?

Therefore, the legislation regulating the rule for giving consent by the third party is still being developed. However, while discussing this issue the main factor for the court shall be objective reasonableness. The aforesaid excludes the standard of subjective intention and requires defining to what extent would a reasonable person have believed that the person giving consent had the authority to do so and whether the search conducted by the police was in line with the consent.

**REVOCATION OF THE GIVEN CONSENT**

A person giving consent can revoke it or limit its scope at any moment of the search before it is completed. It can be done before starting a search or in the process of conducting it without giving any reasons. Intention of revocation shall be expressed explicitly in words, by action or through both methods [e.g. refusal to open a container or a door]. In case consent is expressed in action or both in action and words, action shall be explicitly contrary to the consent given before.\(^\text{90}\) Nonetheless refusal to sign consent in written form after giving consent orally does not represent revocation of

\(^{87}\) Ibid, p. 94

\(^{88}\) Leslie W. Abramson, Acing Criminal Procedure, 3rd ed., West, 2013

\(^{89}\) See. e.g. Illinois v Rodrigues 497,U.S.177[1990]

\(^{90}\) See. e.g. State v Smith 782 N.W.2d 913(2010)
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Consent. In case consent is revoked before completing a search, it shall be terminated forthwith. However, any evidence obtained before revoking consent can be used for prosecution purposes.

According to paragraph 3 Article 112 “decision on search or seizure is ineffective in case the investigative action has not been started in 30 days”. However, the procedural legislation does not set the period of operating consent for conducting a search on its basis. For what period is consent effective? Does the aforesaid imply that consent is given without any time limits and envisages possibility to conduct search during several days?

As a rule consent without indicating time limit comprises implied restriction of time: a search shall start and be performed forthwith at the first reasonable opportunity. At the same time as a rule consent is of one time character and implies conferring a right to the subject conducting search to perform a search of the property in his ownership/possession only once. Accordingly in case it becomes necessary to enter the same territory again for continuing-completing a search as a rule the consent shall be requested every time of entering the territory. However, as conducting such a search depends on the subjective will of the person giving consent, in some cases it may imply conferring right to conduct a search repeatedly, which shall explicitly be indicated in consent. E.g. while conducting a search in a drugstore when all the documents, medications/storages which are of interest to the investigation cannot be searched in one day.

CONCLUSION

“The will of a person to avoid the noise of the outside world, the conditions disturbing privacy and to go to a place where one can develop and find oneself accords with the condition that “interference and restriction shall be strictly interpreted when it is connected with home”.

Any restriction of the right enshrined in Article 20 of the Constitution requires particularly cautious approach. On its side the aforesaid requires strict and meticulous regulation of the restriction cases as well as clarity and scrupulousness of the legislation itself.

Unfortunately, the legislation of Georgia and the respective case law with regards to giving consent does not limit the third parties e.g. the authority of the co-owners and co-possessors according to intensity of using particular property. The aforesaid gives opportunity to acquire consent on

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92 See. e.g. United States v Ho, 94 F.3d932[5th Cir.1996]
94 I.Schwabe, Judgments of the German Federal Constitutional Court 2011, p 231
search through a simplified rule, even in cases when the prime user of the search object is categorically against conducting it. [e.g. on the basis of consent of the second possessor of property]. At the same time notwithstanding the fact that the third party is conferred with the right to give consent to conduct a search, additional regulation is needed for cases when co-owners/ co-possessors of an area having equal rights, who at the moment of requesting consent are in the area of which is required by investigator [e.g. in an apartment] have different positions. For example one of them explicitly expresses that he is against giving consent. Despite the fact that the investigative body shall not be obliged to require permission from all the co-owners/co-possessors having equal rights, the decisive importance shall be attached to refusal of one of the co-owners/co-possessors in case he also attends the process of giving consent. The investigative body shall bear the burden of proving the reason for disregarding requirement of a person having equal rights to protect inviolability of right to respect his home and privacy and what was the reason for not restricting this right e.g. on the basis of pressing need.

The cases where the process of requesting consent to conduct a search is attended by persons having different authorities [e.g. an owner and a possessor] and one of them gives consent to conduct a search and the other refuses are not regulated. On the basis of the formulation in force at present in such cases investigative body has a right to conduct a search; however it is disputable whether the purpose of the rule for requesting consent is observed in such a case.

The legislation in force at present discusses all these cases in single headed way and establishes that in any case [notwithstanding the position of the persons having right with regards to the area and the intensity of the right of ownership/possession towards a particular area] –despite any connection with the area or attendance of the moment of requesting consent – even if there are contrary positions, it is possible to conduct a search without a court order or a resolution of an investigator, if the investigative body succeeds in obtaining consent of one of the co-owners or co-possessors.

The deficiency of the existing legal regulation poses a real risk of restricting the right to privacy guaranteed by the Constitution of Georgia and the International acts, while not envisaging any effective mechanism of appealing the legitimacy of such restriction. Even if the admissibility of the evidence obtained on the basis of such a search or the search itself will be appealed, according to the wording of the criminal procedure code in force there will be no basis for granting a motion as Article 112 of the criminal procedure code blankly indicates to co-owner, co-possessor and the party to communication and does not make the requirement to inform about the right on refusing to give consent and legitimacy of consent [voluntary and conscious nature] obligatory. Such provision in the legislation creates a possibility to manipulate the owners/possessors and confers a right to the investigative body to ignore the persons who potentially could be against giving consent. The legislation in force neither provides for the following:

96 See. e.g. State v Ransom 212 P.3d 203[Kan.2009]; State v Stark , 846 N.E2d 673[Ind.Ct.App.2006]
1. The criteria for legitimacy of the consent given by the third parties;

2. Any indication to the permissible limits of search at all;

3. Any norms regulating a rule in case of contrary positions of the persons authorized to give consent and considers it possible to conduct a search on the basis of consent given by one of the persons envisaged by Article 112 of the criminal procedure code, notwithstanding the connection intensity of the latter with the property;

4. Any limits of consent given by the third parties. It implies the possibility to give consent with regards to any area in common usage or ownership. Inter alia consent of the owner in case of transferring on the basis of a rent or lease e.g. on searching an area in usage of the tenant, which contradicts not only the case law of the European Court of Human Rights but the purpose of this Article itself.
Historically, the scope of constitutional protections for fundamental rights has evolved to keep pace with new social norms and new technology. Internet speech is on the rise. The First Amendment protects an individual’s right to speak anonymously, but to what extent does it protect a right to anonymous online speech? This question is difficult because the government must balance the fundamental nature of speech rights with the potential dangers associated with anonymous online speech, including defamation, invasion of privacy, and intentional infliction of emotional distress. While lower courts have held that there is a right to anonymous online speech, they have not yet adopted a common standard. Meanwhile, to simplify the confusion and protect the rights of those who are injured by anonymous online speech, state legislatures are seeking to restrict some or all anonymous online-speech rights.

This Note explores the history of speech regulation, with a special focus on the history of anonymous online speech, and the justifications for protecting speech rights. It then discusses the judicial standards under which courts require disclosure of anonymous speakers and the current legislative proposals to restrict speech rights. Next, this Note suggests that legislatures should not restrict speech rights, and should instead expand the remedies available to those injured by harmful speech. This Note also suggests that courts should adopt a summary judgment standard that requires plaintiffs to provide evidence demonstrating that the anonymous speaker has committed a tort before requiring the speaker to disclose his or her identity.
INTRODUCTION

Anonymous speech has played an integral role in American history — both proponents and opponents of ratification of the U.S. Constitution used anonymous speech to convey their arguments to the general public. The Supreme Court has implicitly and explicitly recognized that the right to free speech includes the right to speak anonymously. However, the expansion of the internet is stretching the outer limits of anonymous speech rights. While the internet allows speakers to reach a broad audience quickly, it also allows speakers to cause harm through destructive speech. Common problems associated with anonymous online speech include defamation, tortious interference with business, and copyright infringement. Although the Supreme Court has held that free speech rights apply on the internet, it has not yet addressed the scope of anonymous online-speech rights.

So far, the Fourth and Ninth Circuits have held that there is a constitutional right to speak anonymously but have not adopted a standard to define the scope of that right. For example, some jurisdictions require the plaintiff to meet a summary judgment standard before the court will allow disclosure of a commenter’s identity. In other jurisdictions, the plaintiff may need to win on a balancing test that weighs the interest of disclosure against the interest in anonymity or merely show good-faith before he can discover the commenter’s identity.

2 Alexander Hamilton, James Madison, and John Jay wrote the Federalist Papers under the pseudonym of “Publius” to promote acceptance of the U.S. Constitution. See ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, FEDERALIST PAPERS (Goldwin Smith, ed. 1901). The Anti-Federalists, who opposed the ratification of the Constitution, also wrote under pseudonyms, using the names Brutus, Cato, and Centinel. See HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST (1981).

3 See, e.g., Watchtower Bible & Tract Soc’y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150, 166–67 (2002) (finding a law that required a permit to distribute pamphlets door-to-door was unconstitutional, because it infringed upon the speaker’s First Amendment rights); McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 341–42 (1995) (“[T]he anonymity of an author is not ordinarily a sufficient reason to exclude her work product from the protections of the First Amendment.”); Talley v. California, 362 U.S. 60, 65 (1960) (holding that a regulation prohibiting the distribution of anonymous handbills was unconstitutional).

4 See, e.g., Doe v. Cahill, 884 A.2d 451 (Del. 2005).

5 See, e.g., Quixtar Inc. v. Signature Mgmt. Team, LLC, 566 F. Supp. 2d 1205 (D. Nev. 2008) (noting that the plaintiff alleged that the defendant unlawfully interfered in the plaintiff’s business through an online smear campaign using anonymous postings).


8 Compare SIO3, Inc. v. Bodybuilding.com, LLC, 441 F. App’x 431, 433 (9th Cir. 2011) (vacating the district court’s decision to apply the summary judgment standard, because the district court had not identified “the nature of the speech in question”), with In re Anonymous Online Speakers, 661 F.3d 1168, 1177 (9th Cir. 2011) (noting that the district court did not abuse its discretion in applying a summary judgment standard). The Fourth Circuit addressed the issue of anonymous online speech in Peterson v. National Telecommunications and Information Administration, 478 F.3d 626, 633–34 (4th Cir. 2007), but did not address the substantive scope of the right to anonymous speech, instead finding that the right to anonymity was not challenged because the petitioner lacked standing to challenge the constitutionality of the act. For a discussion of the various standards that courts have adopted, see infra Part III.A.

9 E.g., Doe v. Cahill, 884 A.2d 451 (Del. 2005).


11 E.g., In re Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26 (Cir. Ct. 2000).
Several state legislatures have also tried to address the scope of protections available to anonymous speakers, but only one state has succeeded in passing legislation that outlines the standard by which an anonymous speaker’s identity can be disclosed to the interested party.

Two states have passed legislation that restricts the anonymous speech rights of convicted sex offenders. The government, however, cannot restrict the right to free speech without complying with due process requirements of the Fifth Amendment because it is a fundamental right.

Moreover, individuals need sufficient notice of what speech is protected.

The First Amendment prohibits the government from enacting a law that “abridge[s] the freedom of speech,” but such a right is not absolute and is subject to countervailing interests. For example, the government has imposed restrictions on speech that may incite imminent lawless action, fighting words, speech before a hostile audience, obscenity, and defamation. Although anonymous speech rights may be limited in certain contexts, the Supreme Court has consistently rejected attempts to restrict anonymous speech in order to prevent the identification of anonymous speakers.

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12 See infra Part III.B.
15 See U.S. CONST. amend. V.
16 See FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012) (“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”).
17 U.S. CONST. amend. I.
19 See Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (holding that a state statute that prohibited speech that advocated violence, rather than the incitement of violence, was unconstitutional, because it infringed upon speakers’ right to free speech).
20 See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In Chaplinsky, the Court affirmed the conviction of a speaker who violated a state law that prohibited any person from addressing offensive, derisive, or annoying words to any other person, because the law was not unconstitutionally vague. Id. at 574.
21 See Feiner v. New York, 340 U.S. 315, 318–21 (1951) (upholding the constitutionality of a statute that prohibited speech that may cause a breach of the peace because the state has the power to prevent the outbreak of violence).
22 See New York v. Ferber, 458 U.S. 747, 763–64 (1982) (affirming constitutionality of a state statute that restricted the sale of pornography depicting children because the First Amendment does not protect child pornography and the law was not overbroad or vague); Miller v. California, 413 U.S. 15, 24 (1973) (holding that states may restrict the sale of pornographic "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value").
23 See Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (holding that states may determine the standard for liability for newscasters who make defamatory statements regarding private individuals); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that a publisher that makes an honest mistake of fact regarding the conduct of a public official cannot be held civilly liable, because the First Amendment protects the free discourse of ideas).
mous online speech may contain elements of speech that may be restricted, it also includes many protected areas of speech, including political speech and other expressive activities that may not be restricted. Thus, it is necessary to evaluate the extent to which the justifications for restricting speech apply to an online context and how such regulation can be shaped to prevent chilling protected elements of anonymous speech.

This Note proceeds in four parts. Part I discusses U.S. Supreme Court jurisprudence relating to speech regulations, civil liability that may curtail speech rights, and the history of anonymous speech in traditional contexts. Part II explores the arguments for and against strengthening anonymous speech rights in an online context. Part III discusses the various standards that courts use when determining whether to grant a subpoena request to disclose the identity of an anonymous speaker. Lastly, Part IV argues that courts should require plaintiffs to meet a modified summary judgment standard before allowing the disclosure of an anonymous speaker and that the legislature should not seek to ban anonymous online speech.

I. LEGAL LANDSCAPE OF ANONYMOUS ONLINE SPEECH PROTECTION

In the United States, the First Amendment protects the right to free speech, which is considered a fundamental right.24 Despite the Amendment’s broad language that “Congress shall make no law . . . abridging the freedom of speech,”25 there is a near universal acceptance that the right to free speech includes some limits.26 This part discusses the legal landscape of anonymous speech. Part I.A considers the standard of review of speech regulations, focusing on defamation and commercial speech. Part I.B then examines the history of anonymous speech regulation.

A. Speech Regulation Standards

The standard of scrutiny that the court applies in determining the constitutionality of a law often depends on the type of regulation and its relationship to the aims of the First Amendment.27 A thresh-

24 See, e.g., Sullivan, 376 U.S. at 269–70 (discussing U.S. Supreme Court cases that considered the fundamental nature of free speech rights); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (discussing how the right to free speech is a “fundamental principle of the American government”).
25 U.S. CONST. amend. I.
26 See SHIFFRIN & CHOPER, supra note 17, at 2. The most common example is that there is no right to falsely announce that there is a fire in crowded theater. Id.
27 Cf. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (stating that there is a narrow presumption of constitutionality when legislation restricts a right protected by the first ten amendments).
old question is whether the regulation seeks to proscribe limits on speech or activity. If the law seeks to regulate speech, then the court must determine whether the legislation discriminates based on the content of the speech, whether the legislation is sufficiently specific to give individuals notice of their rights, and whether it limits only unprotected areas of speech. The standard of review that the court applies depends, in part, on the type of regulation. This section discusses the standards for content-based regulation, the overbreadth and vagueness doctrines, and commercial speech.

1. Content-Based Regulations

Content-based regulations, which prohibit speech based on the ideas or subject matter of the speaker’s message, are presumptively unconstitutional and subject to strict scrutiny. Under the strict scrutiny standard, the government must prove that such regulations are narrowly tailored to serve a compelling governmental interest. The Supreme Court has found that the government may restrict “fighting words” and words that will incite imminent lawless action, because the government has a compelling interest in maintaining public order and such restrictions do not significantly restrict a speaker’s ability to convey a message. The government, however, does not have a compelling interest in regulating speech “in order to maintain what [it] regard[s] as a suitable level of discourse within the body politic.”

Content-neutral regulations that restrict speech are subject to intermediate scrutiny because such regulations are less likely to discriminate against certain viewpoints or suppress public dialogue. Under intermediate scrutiny, the government must show that the law is substantially related to an important governmental interest. While content-neutral regulations can be innocent and have a minimal effect on speech, such as through reasonable time, place, and manner restrictions, content-neutral

29 See id. at 376–77.
30 See R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). Strict scrutiny is a standard of review that courts use to evaluate the constitutionality of government action when it deprives an individual or group of individuals of a fundamental right. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 554 (4th ed. 2011). Strict scrutiny requires that the government show it has a compelling interest and that the means used are narrowly tailored or necessary to achieve those ends. Id.
31 See, e.g., R.A.V., 505 U.S. at 395 (finding that an ordinance that regulates speech based on the hostility of content was invalid, because it is not narrowly tailored to serve the compelling government interest of protecting groups that have been historically subject to discrimination).
32 See Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (establishing the “fighting words” doctrine under which the government may permissibly proscribe speech that may result in a breach of the peace).
33 See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (holding that speech may be regulated if it is reasonably calculated to incite “imminent lawless action and is likely to incite or produce such action”).
34 See O’Brien, 391 U.S. at 381; Chaplinsky, 315 U.S. at 572.
38 See id.
laws may restrict a broader range of speech than content-based regulations.\textsuperscript{39} Thus, a court is likely to review with greater judicial scrutiny a law that restricts the use of all anonymous speech, because it would significantly infringe upon speakers’ ability to exercise their First Amendment rights.\textsuperscript{40}

2. Doctrines of Overbreadth and Vagueness

Furthermore, any regulations on speech must be specific and have a defined scope.\textsuperscript{41} A law is unconstitutionally vague when “a reasonable person cannot tell what speech is protected and what is permitted.”\textsuperscript{42} The limits must be clearly defined both to prevent arbitrary and discriminatory application of the law, and to ensure that individuals have sufficient notice of their rights.\textsuperscript{43} The overbreadth doctrine is used to invalidate laws that impose greater restrictions than are constitutionally permissible.\textsuperscript{44} These doctrines are particularly relevant in the context of anonymous speech regulation because the regulations must be specific enough to avoid restricting protected speech while being clear enough to give individuals notice of the permissible bounds of their rights.\textsuperscript{45}

3. Commercial Speech Regulation

Commercial speech is entitled to less protection than other forms of speech.\textsuperscript{46} The Supreme Court laid out the test for regulating commercial speech in \textit{Central Hudson Gas & Electric Corp. v. Public Service Commission}.\textsuperscript{47} While there is no clear definition of commercial speech, Professor Erwin Chemerinsky describes commercial speech as a type of advertisement that refers to a specific product and was made with an economic motivation.\textsuperscript{48} Under this standard, speech may be limited

\textsuperscript{39} Id.
\textsuperscript{40} See id.; see also Sharkey’s, Inc. v. City of Waukesha, 265 F. Supp. 2d 984, 994 (E.D. Wis. 2003) (holding that content neutral laws “by no means receive a free pass under the First Amendment” (quoting Clarkson v. Town of Florence, 198 F. Supp. 2d 997, 1006 (E.D. Wis. 2002))).
\textsuperscript{41} See SMOLLA, supra note 36, § 6:2.
\textsuperscript{42} See CHEMERINSKY, supra note 29, at 970.
\textsuperscript{43} See id.
\textsuperscript{44} See id. at 972; see also SMOLLA, supra note 36, §§ 6:3–6:4.
\textsuperscript{47} Id.
\textsuperscript{48} See CHEMERINSKY, supra note 29, at 1125; see also Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983) (finding a pamphlet to constitute commercial speech because it was an advertisement, referred to a single product, and the speaker had an economic motivation for the speech, but noting that any individual factor was not dispositive).
or proscribed if the speech concerns lawful activity and is not misleading, there is a substantial
government interest, the regulation directly advances the government interest, and the regulation
is narrowly tailored.\textsuperscript{49} The \textit{Central Hudson} test has since been modified, and now—although osten-
sibly still intermediate level review—it more closely resembles strict scrutiny.\textsuperscript{50}

Courts have not yet developed a clear standard for identifying when anonymous online speech
is commercial.\textsuperscript{51} In some cases, courts have found anonymous speech that interferes with busi-
ness practices or involves copyright infringement to constitute commercial speech.\textsuperscript{52} In other cases,
courts have found anonymous speech to be purely expressive and therefore not considered com-
mercial speech.\textsuperscript{53} Whether the classification of speech is relevant to determining the appropriate
level of protection that courts and legislatures should afford speech will be discussed below.\textsuperscript{54}

\section*{B. Speech Torts}

Although the Constitution restricts the ability of the government to regulate speech, speakers
may be held liable for the consequences of their speech in private actions. Speech may give rise to
tort actions for defamation, invasion of privacy, and intentional infliction of emotional distress. This
part discusses these speech torts and their applicability to online speech.

\subsection*{1. Defamation}

Defamation is a tort that allows a plaintiff to bring a civil action to recover damages when he suf-
fers reputational harm due to a defendant’s speech.\textsuperscript{55} Defamation includes the torts of libel, which
occurs when the speech is written, and slander, which occurs when the speech is spoken.\textsuperscript{56}

\textsuperscript{49} See \textit{Cent. Hudson Gas \\& Elec. Co.}, 447 U.S. at 566.

\textsuperscript{50} See, e.g., Thompson v. W. States Med. Ctr., 535 U.S. 357, 360 (2002) (finding that a federal law restricting the ability of drug providers
to advertise their drugs was unconstitutional because the government did not have a sufficient interest in regulating commercial speech
in that context); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 562–66 (2001) (stating that strict scrutiny did not apply to a law restricting
commercial speech, but conducting a thorough analysis of the state’s justification to find the law unconstitutional); Greater New Orleans
prohibition on speech unrelated to consumer protection must be reviewed with “special care”).

\textsuperscript{51} Cf. \textit{In re Anonymous Online Speakers}, 661 F.3d 1168, 1177 (9th Cir. 2011) (“We need not, however, decide if the speech at issue here
constitutes commercial speech under the Supreme Court’s definition in \textit{Central Hudson}.”).

claim where there was a low speech interest).

\textsuperscript{53} E.g., Dendrite Int’l, Inc. v. Doe, No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (rejecting a subpoena request for an anonymous com-
menters’ identity, because the plaintiff failed to show harm from an allegedly defamatory comment, and allowing the discovery would
chill the commenter’s speech rights).

\textsuperscript{54} See infra Part IV.

\textsuperscript{55} CHEMERINSKY, supra note 29, at 1078; see also Ryan M. Martin, \textit{Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking

\textsuperscript{56} W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 771 (5th ed. 1984). Libel originated as a crime, while slander could only be
To prove defamation at common law, the plaintiff must show that the defendant made a false, defamatory comment regarding the plaintiff and that the comment was published. A defamatory comment is one that injures the plaintiff’s reputation or diminishes “the esteem, respect, good-will or confidence in which the plaintiff is held.”

In *New York Times Co. v. Sullivan*, the Supreme Court added a mens rea element that requires plaintiffs to prove that the publisher acted “with actual malice” when making a statement about a public official. This requirement means that the publisher knew the falsity of his statement or acted recklessly with regard to the truth. However, a speaker who expresses an opinion, as determined by a court, cannot be held liable for defamation. Although *Sullivan* applied only when the plaintiff was a public official and the defamatory comment related to his or her official conduct, the Court has extended the rule to apply to all public figures.

Defamation is more likely to occur online than in print because there is less editorial oversight in online speech and because online speakers are not bound to the same professional and social mores that restrict journalists’ and identified speakers’ practices. Defamation in an online context can be difficult to prosecute because in many cases it is obvious that the individual speaker is expressing his or her opinion rather than making a statement of fact. For example, in *Doe v. Cahill*, the court found that readers of a news website would not take seriously comments that criticized a public official’s performance as a city councilman, because readers would understand the comments to be opinion. Given the generally informal nature of the internet, it is possible that a broad reading of “opinion” will hinder plaintiffs’ ability to bring successful defamation claims.
2. Invasion of Privacy

Privacy torts may also lawfully restrict speech rights. These torts stem from a general right to privacy, which Samuel Warren and Louis Brandeis characterized as a “general right of the individual to be let alone.”

Warren and Brandeis derived this right from the torts of defamation, invasion of property rights, and breach of implied contract. The privacy torts include unreasonable intrusion, public disclosure of private facts, false light, and appropriation. This section will discuss these torts and their relationship to speech rights.

a. Unreasonable Intrusion

The right to privacy protects an individual's right to be protected from unreasonable or offensive intrusion into her private affairs and concerns. This right protects both physical privacy and other intrusions, such as the prohibition on eavesdropping, restrictions on persistent, unwanted telephone calls, and prying into some forms of personal records. The Second Restatement of Torts states that an individual will be liable for unreasonable intrusion if he intentionally intruded upon the solicitude or seclusion of another and the intrusion is highly offensive to a reasonable person. While this tort is used in the internet context primarily to prevent information gathering that reasonable people would find offensive, it is also relevant to the concept of anonymous online speech. An individual may have a claim against a speaker who publicizes a private fact that does not have public concern and the disclosure of which a reasonable person would find offensive.

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68 The right to privacy from governmental intrusion developed in the line of cases started by Griswold v. Connecticut, 381 U.S. 479 (1965), is conceptually distinct from the right discussed in this Note.
70 Id. at 193–95.
71 See William L. Prosser, Privacy, 48 CALIF. L. REV. 383, 389 (1960); see also Patricia Sánchez Abril, Recasting Privacy Torts in a Spaceless World, 21 HARV. J.L. & TECH. 1, 8–9 (2007) (noting that Prosser’s four categories of privacy torts have been incorporated into modern American jurisprudence); Maayan Y. Vodovis, Note, Look over Your Figurative Shoulder: How To Save Individual Dignity and Privacy on the Internet, 40 HOFSTRA L. REV. 811, 816–17 (2012) (noting that there are four recognized categories of privacy torts at common law).
72 KEETON ET AL., supra note 55, at 854.
73 The right to physical privacy includes the right to physical solitude, seclusion, and protection of the home. Id.
74 Id. at 854–55.
76 See Vodovis, supra note 70, at 817.
77 See Abril, supra note 70, at 9.
b. Public Disclosure of Private Facts

Another category of privacy torts that is relevant in an online context is public disclosure of private facts. The exact requirements of the information that must be disclosed and the circumstances of the disclosure are debated. For example, Prosser argues that to recover damages, a plaintiff must prove public disclosure of private facts that would be “highly offensive and objectionable to a reasonable person of ordinary sensibilities.” The Second Restatement includes an additional requirement that there is no public interest in the disclosure of the information. Professor Hill, on the other hand, advocates for a more nuanced test that balances the extent of the disclosure with the character of the material that is disclosed. All standards, however, agree that the disclosure must be “highly offensive and objectionable to a reasonable person of ordinary sensibilities.”

This tort reflects the tension between a speaker’s First Amendment right to anonymous speech and others’ common law rights and informational privacy interests. While some commentators suggest that online speech should be given greater protection despite its sometimes offensive nature, courts have generally applied a consistent standard to online- and offline-speech torts. Such consistent treatment, however, may be problematic because anonymous online speech may pose unique harms, as discussed below in Part II.B.

c. False Light

False light in the public eye occurs when an individual’s speech or conduct characterizes another in an untrue manner or is deceptive. This may, for example, include attributing articles or opinions to the speaker, unauthorized use of another’s name on a petition, or filing suit on behalf of another.
er. As with defamation, in a false light claim the plaintiff must prove that the defendant acted with knowledge that the facts were wrong or acted with reckless disregard for the truth. Unlike defamation, however, some states do not require the plaintiff to prove that there was an injury to his reputation. Frequently, statements that give rise to a false light claim may be defamatory and give rise to an action for libel or slander.

Nevertheless, the two actions protect different interests. Defamation actions protect an individual’s reputation, while false light actions protect the plaintiff’s right to be left alone.

d. Appropriation

Appropriation occurs when a defendant uses the plaintiff’s name or likeness for the defendant’s advantage or benefit. Merely using another’s name or publishing some aspects of another’s person or property is insufficient unless it identifies a specific individual who can be recognized by others. Appropriation may conflict with the First Amendment when an individual wants to use an image or likeness for disseminating the news or for publicity. Appropriation oftentimes occurs in cases of copyright infringement — and thus courts may give such speech less protection than they give to other forms of speech — but the Supreme Court has held that the First Amendment may protect some forms of appropriation.

3. Intentional Infliction of Emotional Distress

The tort for the infliction of emotional distress developed from a recognition that, in some cases, speech could cause significant injury.

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88 See KEETON ET AL., supra note 55, at 863–64.
90 See SMOLLA, supra note 36, § 24:3.
91 See Flowers v. Carville, 310 F.3d 1118, 1132–33 (9th Cir. 2002) (allowing the plaintiff to maintain both false light and defamation claims); KEETON ET AL., supra note 55, at 864. But see Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1113–15 (Fla. 2008) (holding that Florida does not recognize a false light invasion of privacy tort because the overlap with defamation is too great).
92 See KEETON ET AL., supra note 55, at 864.
93 See id.; SMOLLA, supra note 36, § 24:3.
94 See RESTATEMENT (SECOND) OF TORTS § 652C (1977); see also KEETON ET AL., supra note 55, at 851; SMOLLA, supra note 36, § 24:4.
95 See KEETON ET AL., supra note 55, at 852–53.
96 See Ann-Margret v. High Soc’y Magazine, 498 F. Supp. 401, 404–06 (S.D.N.Y. 1980) (finding that the right to free speech transcends the right to privacy where a defendant used an image of the plaintiff that had appeared in a popular movie); SMOLLA, supra note 36, § 24:4.
97 Cf. SMOLLA, supra note 36, § 24:4.
98 See Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576–78 (1977) (holding that a plaintiff, whose performance was recorded and replayed on the news without his consent, may maintain an action against the broadcasting company, but noting that there are some cases in which the First Amendment would protect appropriation).
Although the tort originated from cases where the mental distress was associated with another tort, such as assault, battery, or false imprisonment, courts created an independent action for purely mental distress. An intentional infliction of emotional distress claim requires the plaintiff to prove that the defendant acted intentionally or recklessly, the conduct was extreme and outrageous, and it caused the plaintiff to suffer distress that no reasonable person could be expected to endure. In these cases, the injury must be significant; a plaintiff cannot recover against mere insults, indignity, annoyance, threats, or rough language. Although intentional infliction of emotional distress oftentimes may arise from speech, Professor Smolla argues that courts should not mischaracterize defamation or invasion of privacy claims as intentional infliction of emotional distress, because it would disrupt the First Amendment balances inherent in defamation or invasion of privacy claims.

C. Anonymous Speech Regulation

As with all other forms of speech, the Supreme Court has recognized that the right to anonymous speech is not absolute. This part considers the development of the right to anonymous speech and the areas in which the Court has curtailed the right to anonymous speech.

1. Legal Support for Anonymous Speech Rights

Individuals in the United States have been exercising their right to speak anonymously since the time of the nation’s founding. The Supreme Court cited the history and importance of anonymous speech — particularly in the context of political speech — in *Talley v. California*, in which the Court held unconstitutional a city ordinance that prohibited the distribution of anonymously printed handbills. In *Talley*, the State argued that the restriction was not content based and was aimed at furthering a compelling government interest—preventing fraud, false advertising, and libel. The Court held that while these were valid purposes, the ordinance was unconstitutional because it was not narrowly tailored to serve those ends as the ordinance was overbroad and would proscribe
protected areas of speech. The Court instead suggested that regulations specifically addressing fraudulent speech, false advertising, and libel would be more likely to be found constitutional.

The Supreme Court expanded the protections for anonymous speech in *McIntyre v. Ohio Elections Commission*, when it held unconstitutional a state law prohibiting the distribution of campaign literature that did not contain the name and address of the individual or organization issuing the literature. The Ohio Supreme Court had distinguished *McIntyre* from *Talley* on the grounds that the Ohio regulation at issue in *McIntyre* was limited to speech that was “designed to influence voters in an election,” whereas the California ordinance in *Talley* restricted any distribution of anonymous pamphlets. The Court held that there was a strong interest in allowing anonymous political speech and that this provision should be subject to exacting—or strict—scrutiny because it was content based and involved an infringement on political expression. In the Court’s opinion, this was a standard that the State failed to meet.

The Supreme Court has also recognized the right of anonymity in the context of the right to freedom of association. In *NAACP v. Alabama ex rel. Patterson*, the Supreme Court held that the government may not compel organizations to disclose the identities of their members because it may restrain members’ freedom of association. Although not directly applicable to the issue of anonymous speech, this case establishes that anonymity is a right that may be necessary to protect other fundamental rights.

Although the Supreme Court has not yet addressed the issue of anonymous speech rights in an online context, the Court has held that traditional First Amendment rights apply online. In the case *In re Anonymous Online Speakers*, the Ninth Circuit needed to determine whether a plaintiff could obtain a subpoena to reveal the identity of anonymous commenters who had been accused of tortiously interfering with the plaintiff’s business by launching a smear campaign. The court held that online speech “stands on the same footing as other speech”—there is “no basis for qualifying

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109 Id. at 62–64.
110 Id. at 64.
111 514 U.S. 334, 342 (1995) (“[A]n author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”).
112 Id. at 357.
113 Id. at 344.
114 See id.
115 Id. at 346 (citing Meyer v. Grant, 386 U.S. 414, 420 (1988)).
116 Id. at 357. The Supreme Court affirmed the right to anonymous speech more recently in *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150 (2002), when it struck down a law that prohibited individuals from going door-to-door, finding that the law may chill ordinary neighborly conduct.
118 Id.
119 Id. at 462.
120 See *Reno v. ACLU*, 521 U.S. 844, 870–72 (1997) (applying constitutional protections to invalidate a portion of the Communications Decency Act that prohibited indecent communications because the Act was not content neutral).
121 661 F.3d 1168 (9th Cir. 2011).
122 Id. at 1172–73.
the level of First Amendment scrutiny that should be applied’ to online speech.\textsuperscript{123} Nevertheless, the court found that the anonymous online speakers’ identities could be disclosed because their speech was not political speech and thus was subject to a lower level of protection.\textsuperscript{124}

2. Regulation of Anonymous Speech

The Court has curtailed the right to anonymous speech through disclosure requirements in campaign finance laws that require individuals to disclose the amount of money they have contributed to political parties or candidate’s campaigns. In \textit{Buckley v. Valeo},\textsuperscript{125} the Supreme Court reviewed the constitutionality of the Federal Election Campaign Act of 1971 and the 1974 amendments.\textsuperscript{126} The Act imposed a maximum contribution limit and required disclosures of contributions and expenditures over a certain threshold.\textsuperscript{127} Challengers of the Act argued that the law restricted individuals’ First Amendment rights, because campaign contributions are a form of expression and allow individuals to show support for a certain candidate or issue.\textsuperscript{128} The challengers also argued that the disclosure requirements infringed upon their freedom of association.\textsuperscript{129}

The Court, however, rejected these arguments, finding that, although donations are a form of expression and restrictions on them may infringe upon some speech rights, the restrictions did not undermine the ability of citizens to engage in meaningful debate about the candidates and the relevant issues.\textsuperscript{130} The Court also found that the disclosure requirements did not violate individuals’ First Amendment rights because the government was able to show that the disclosure served a legitimate governmental interest in maintaining the integrity of the political process, deterring corruption, and enforcing the caps on independent expenditure limits.\textsuperscript{131}

The Supreme Court reaffirmed the government’s ability to require disclosure in \textit{Citizens United v. Federal Elections Commission}.\textsuperscript{132} In one issue determined in \textit{Citizens United}, the Court determined that the disclaimer and disclosure requirements of the Bipartisan Campaign Reform Act\textsuperscript{133} did not

\textsuperscript{123} \textit{Id.} at 1173 (quoting \textit{Reno}, 521 U.S. at 870).
\textsuperscript{124} \textit{See infra} Part III.A for a discussion of the standards used by various courts in deciding whether to issue a subpoena to reveal the identity of an anonymous online commenter.
\textsuperscript{125} \textit{424 U.S. 1} (1976).
\textsuperscript{127} \textit{2 U.S.C.} § 434(f) (2006). The Federal Election Campaign Act of 1971 created the Federal Election Commission and requires candidates and political committees to disclose their contributions, \textit{id.} § 434, limits the contributions individuals can make to candidates, \textit{id.} § 441a(a), imposes caps on presidential candidates’ expenditures, \textit{id.} § 441a(b), and imposes other caps on election spending, \textit{id.} § 441a(a).
\textsuperscript{128} \textit{Buckley}, 424 U.S. at 14.
\textsuperscript{129} \textit{Id.} at 11.
\textsuperscript{130} \textit{See id.} at 29.
\textsuperscript{131} \textit{Id.} at 29.
\textsuperscript{132} \textit{130 S. Ct.} 876, 913–15 (2010).
violate the First Amendment because, although the requirements may burden speech, they did not prevent speakers from conveying their message. However, the Court found that the regulation suppressing political speech on the basis of the speaker’s corporate identity and barring independent corporate expenditures violated the First Amendment. In contrast, the Court upheld the disclaimer and disclosure requirements because it determined that the government’s interest in providing the electorate with necessary information to make informed decisions justified the burden it imposed on speech.

II. LEGAL AND POLICY IMPLICATIONS OF ANONYMOUS ONLINE-SPEECH PROTECTIONS

Although the right to anonymous speech is not absolute, the reasons for restricting anonymous speech—such as those advanced in *Buckley* and *Citizens United*—may not be applicable to anonymous online speech because the same countervailing justifications for restrictions may not be present. The Supreme Court has specifically held that *Buckley* does not operate to restrict anonymous speech rights in other contexts because the justification in *Buckley* was limited to avoiding the appearance of corruption and to enforce campaign finance restrictions.

To determine the degree of protection that courts should afford anonymous online speakers, it is necessary to examine the justifications for protecting free speech. Part II.A discusses the historic justifications for free speech protection, focusing on the importance of anonymous speech. Part II.B explores the countervailing justifications for restricting anonymous speech.

A. Rationales for Protecting Anonymous Online Speech

Historically, speech has been protected because it promotes the free exchange of ideas, which is necessary to discover the truth, self-govern, check governmental power, and protect individual

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135 *Id.* at 913.
136 *Id.*
137 *Id.* at 914.
138 See McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 354 (1995) ("Required disclosures about the level of financial support a candidate has received from various sources are supported by an interest in avoiding the appearance of corruption that has no application to this case.").
139 The truth-seeking function of speech, or the notion of a “market place of ideas,” derives from Justice Oliver Wendell Holmes’s dissent...
Anonymity in Cyberspace: Judicial and Legislative Regulations

Anonymity in Cyberspace: Judicial and Legislative Regulations

autonomy and liberties. These same concerns apply to speech on the internet and can be used to justify extending First Amendment protections to anonymous online speakers. The internet represents a new medium of communication and anonymous bloggers may be considered “the modern- day equivalent of the revolutionary pamphleteer who passed out news bulletins on the street corner.” As such, commentators argue that those speakers should not be required to disclose their identities unless the plaintiffs can show that they may have a legitimate claim against the speaker. Courts and commentators agree that anonymous online speech should be protected because the values inherent in promoting free speech continue to apply in an online context, the justifications that exist for restricting anonymous speech in other contexts do not apply to online speech, and the government should protect speakers’ legitimate expectations of privacy.

Although Buckley v. Valeo upheld disclosure requirements, at least one scholar has suggested that courts reconsider the disclosure requirement in light of technological developments and increased concern for privacy.

Professor Amy Sanders argues that anonymous commenters have an expectation of privacy that should not be defeated unless there is a compelling reason or unless the commenter agreed to disclosure when posting on the website. Courts recognize that if government actions diminish speakers’ expectations of privacy, speakers are more likely to restrain their speech, thereby resulting in a chilling effect that deprives individuals of their rights to speak anonymously.

Proponents of broad speech protection argue that anonymous speech helps promote the truth-seeking function by allowing individuals to express themselves without fear that they may be har-


See Nickerson, supra note 83, at 869–70.

See Reno v. ACLU, 521 U.S. 844, 870 (1997) (extending First Amendment protection to online speech).


See Reno, 521 U.S. at 870 (holding that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to [the internet]”).


See White v. Baker, 696 F. Supp. 2d 1289, 1310–11 (N.D. Ga. 2010) (holding that a law that would require the plaintiff to disclose his online identity would chill his right to anonymous online speech); Doe v. Cahill, 884 A.2d 451, 462 (Del. 2005) (“[A]llowing a defamation plaintiff to unmask an anonymous defendant’s identity through the judicial process is a crucial form of relief that if too easily obtained will chill the exercise of First Amendment rights to free speech.”). But see Clay Calvert et al., David Doe v. Goliath, Inc.: Judicial Ferment in 2009 for Business Plaintiffs Seeking the Identities of Anonymous Online Speakers, 43 J. MARSHALL L. REV. 1, 15 (2009) (discussing how the internet can be harmful when abused by anonymous speakers).
assed, socially ostracized, or that they may lose their jobs. Furthermore, they argue, anonymity helps ensure that the merits or value of the speaker’s message is not discounted, stereotyped, or prejudged on the basis of the speaker’s characteristics.

Commentator Mike Godwin notes that online speech and the internet can help promote pluralism by allowing individuals to reach a broader audience.

Proponents of free speech note that broad speech rights provide a check on government power because they allow citizens to voice their grievances or note when public officials behave in a manner that is unacceptable to their constituents. Anonymous speech advances that interest by allowing citizens to voice their concern without fear of direct or indirect reprisal.

Furthermore, protecting the privacy interests of anonymous speakers helps to advance their individual autonomy by “enabling people to engage in unconventional activities and express unpopular ideas without fear of retaliation.” The ability of individuals to express their opinions and inner thoughts may give those individuals a sense of intrinsic satisfaction because they can explore new ideas and new identities.

In balancing the interests between speakers and those who may be harmed by speech, commentators have argued that the government should take a pragmatic approach by offering greater protection to the speakers and allowing individual companies or website administrators to take responsibility for restricting such speech. Since website administrators—as nongovernmental actors—are not bound by First Amendment limitations, they may be in a better position to vindicate the rights of those who might be harmed by anonymous speech. As discussed below, however, such an approach may lead to other significant problems.

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151 See Brenner, supra note 55, at 743–44 (“[T]he less we know about the author of online content, the more difficult it is for us to assess the merits of what she says.”); Martin, supra note 54, at 1220 (citing IAN C. BALLON, E-COMMERCE AND INTERNET LAW: TREATISE WITH FORMS § 1:06 (2004)).
152 See MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 298 (1998) (discussing how the rise in internet speech can lead to “radical pluralism”).
154 See, e.g., Solove, supra note 141, at 1199.
155 Id.
156 Lidsky & Cotter, supra note 149, at 1568–69.
157 Id. at 1577, 1582–86 (arguing that there is a fundamental assumption that audiences of speech are rational and capable of self-governance, and that the Supreme Court’s decision in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), is an example of this assumption).
158 For example, The New York Times allows anonymous or pseudonymous comments on its website but requires users to register their email addresses and reserves the right to moderate or remove comments. See Comments & Readers’ Reviews, N.Y. TIMES, http://www.nytimes.com/content/help/site/usercontent/usercontent.html (last visited Apr. 19, 2013). Other websites may require the individual to sign in with a social media account, such as Facebook or Twitter. See Comments and Discussion, WASH. POST, http://www.washingtonpost.com/wp-srv/interactivity/policy/discussion_faq.html (last visited Apr. 19, 2013) (allowing commenters to post through either social media applications or a registration system).
159 See infra notes 349–52 and accompanying text.
B. Rationales for Restricting Anonymous Online Speech

Despite the compelling reasons for allowing anonymous online speech, there are nonetheless strong arguments for restricting such speech. First, protecting anonymous online speech may not advance traditional free-speech goals because it is not the type of speech that the Supreme Court contemplated in *Talley* and *McIntyre*. Second, ubiquitous anonymous speech may actually restrict the free discourse of ideas. Third, it may increase antisocial behavior that adversely impacts minority groups.160

Scholars cite to these countervailing interests to suggest that the government should adopt lower protections for anonymous online speech.161

Although the values underlying speech are to discover truth, promote self-governance, and promote individual liberty, in practice, commentators note that most anonymous online speech has low speech value and is thus entitled to lesser protection.162 A narrow reading of *Talley* and *McIntyre* suggests that the Supreme Court was protecting political privacy rather than creating a broad right to anonymity.163 Anonymous online speech, by contrast, includes a broader range of speech that may not be political in nature or promote self-governance and democratic principles.164 Professor James Gardner argues that anonymity allows individuals to act disingenuously and to escape accountability for their actions and opinions, which is antithetical to a healthy political system.165 As such, the interests of others who may be harmed by anonymous online speech justify certain restrictions on anonymous speech.166

Professor James Gardner points out that anonymous online speech may not help promote the free discourse of ideas because internet forums tend to attract like-minded individuals, which may merely reinforce individuals’ comments and beliefs.167 This group polarization can hinder the free discourse of ideas and inhibit the truth-seeking function of speech because individuals with competing viewpoints are not directly engaging with one another in an attempt to persuade others or to discover the truth, but rather merely espousing similar views.168 Because empirical evidence sug-
gests that anonymity may increase antisocial behavior, Professor Gardner suggests that deterring some speech may in fact be desirable.  

Moreover, Professor Danielle Citron argues, the rights of anonymous online speakers should be curtailed to the extent that those rights conflict with those of disadvantaged and vulnerable groups. Those in favor of broad speech protection for anonymous online speakers argue that anonymity protects individuals from being harassed for their opinions.

However, Professor Citron notes that those advocates fail to recognize that the internet has become a “breeding ground[]” for intolerant and extremist groups. These anonymous speakers attack members of traditionally disadvantaged groups and can escape reprisal through their anonymity.

Although current First Amendment jurisprudence does not permit the government to impose categorical prohibitions on hate speech, anonymity precludes speakers from the scrutiny and social sanctions that they would face if they made the speech in person. Protecting those who might be injured by harmful speech provides justifications for adopting a flexible disclosure standard for anonymous speakers.

Additionally, Professor Daniel Solove suggests that anonymous speech rights should be curtailed because they often infringe upon the privacy rights of others. Although speech that is of public concern is given a great deal of protection, private speech—like gossip—is given much less protection. Professor Solove argues that anonymous internet speech should get less protection because it often relates to private concerns.

Professor Citron posits that restricting the right of private-concern speech will improve the exchange of ideas and promote political, social, and economic equality. When speakers attack and inspire a sense of fear in others based on issues of private concern, Professor Citron believes that those victims are more likely to leave the online forum than to use additional speech to challenge the attackers’ position, contradicting the underlying premise of the truth-seeking rationale of free speech.

169 Id. at 947.
170 See Citron, supra note 159, at 93–95 (discussing the role of anonymity in civil rights).
171 See, e.g., Lidsky & Cotter, supra note 149, at 1570–73; Martin, supra note 54, at 1220; Nickerson, supra note 83, at 847–48.
172 See id. at 66 (discussing how the structure of the internet allows individuals to escape social stigma for abusive acts).
173 See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992) (holding a city ordinance that prohibited bias-motivated disorderly conduct facially unconstitutional, because it was a content-based regulation of a category of speech that was not otherwise subject to regulation, such as fighting words).
174 See Brenner, supra note 55, at 745 (discussing how anonymity allows individuals to engage in antisocial behaviors).
175 See Calvert et al., supra note 148, at 14–15; Citron, supra note 159, at 94.
176 Solove, supra note 141, at 1198–99.
178 Solove, supra note 141, at 1198.
179 Citron, supra note 159, at 99–104.
180 Id. at 101.
Finally, anonymous speech increases search costs.\textsuperscript{182} When individuals are associated with their ideas, it helps the public to evaluate the veracity of those messages and to learn of the speakers’ potential biases, allowing the public to make more informed decisions as to whether to accept the speaker’s message.\textsuperscript{183} Although the public may learn of these circumstances or biases through other mechanisms, knowing the speaker’s identity helps lower search costs, making it easier to reach a determination regarding the truthfulness or accuracy of a statement.\textsuperscript{184}

III. CURRENT SPEECH REGULATIONS

Courts and legislatures have both recognized the tension between protecting anonymous speech rights and guarding against the dangers of unrestricted anonymous online speech. Courts have had to determine whether to grant plaintiff subpoena requests seeking to identify allegedly tortious anonymous speakers. Meanwhile, several state legislatures have passed or attempted to enact legislation that would ban or restrict anonymous online-speech rights. Part III.A discusses the various standards that courts have adopted for granting such subpoena requests. Part III.B considers the various laws that state legislatures have proposed to ban or restrict anonymous online speech.

A. Subpoena Standards for Identity Disclosure

Courts today are faced with the task of determining the appropriate level of protection for anonymous speakers accused of tortious speech. Speakers can communicate anonymously on the internet in a variety of fora, including blogs, chat rooms, message boards, and websites.\textsuperscript{185} Under the Communications Decency Act,\textsuperscript{186} the Internet Service Provider (ISP) or website host is not considered to be the speaker or publisher of any material that was provided by another user.\textsuperscript{187} Thus, they cannot be held civilly liable for “violent, harassing, or otherwise objectionable” material, regardless

\begin{itemize}
  \item \textsuperscript{182} See Brenner, supra note 55, at 743–44.
  \item \textsuperscript{183} See McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 382–83 (1995) (Scalia, J., dissenting) (discussing how allowing anonymous speech makes it easier for people to be untruthful, thus making it more difficult for voters to discover the truth); Amy Constantine, Note, What’s in a Name? McIntyre v. Ohio Elections Commission: An Examination of the Protection Afforded to Anonymous Political Speech, 29 CONN. L. REV. 459, 469–70 (1996).
  \item \textsuperscript{184} See Lidsky & Cotter, supra note 149, at 1565–66 (analogizing trademarks to authorial identity to demonstrate that individuals may rely on the author’s reputation as a proxy for the statement’s reliability).
  \item \textsuperscript{185} Susanna Moore, The Challenge of Internet Anonymity: Protecting John Doe on the Internet, 26 J. MARSHALL J. COMPUTER & INFO. L. 469, 470 (2009). Situations in which speakers identify themselves, such as through social media, are beyond the scope of this Note.
\end{itemize}
of whether the content is constitutionally protected.\textsuperscript{188} As such, claimants challenging the content on a website must bring a suit directly against the person who posted the objectionable material on the website.

Currently, to obtain the identity of an anonymous speaker, a potential plaintiff must first subpoena the website administrator for the speaker’s registration information or Internet Protocol address (IP address).\textsuperscript{189} Then, the potential plaintiff would need to contact the appropriate ISP to obtain the actual identity of the speaker based on the IP address.\textsuperscript{190} This stage may require a second subpoena.\textsuperscript{191} This process is controversial because it allows plaintiffs, oftentimes corporate actors, to initiate lawsuits and obtain discovery of speakers’ identities without allowing the anonymous commenters an opportunity to challenge the subpoena request.\textsuperscript{192}

Frequently, individuals and businesses that are harmed by anonymous speech may be motivated to initiate lawsuits by a desire to silence their critics rather than by a desire to obtain redress for actual harm.\textsuperscript{193} These lawsuits are oftentimes referred to as “Strategic Lawsuits Against Public Participation,” or SLAPP suits.\textsuperscript{194} To prevent legal process from being used to chill speech, several states have enacted anti-SLAPP statutes.\textsuperscript{195}

This section reviews the various standards that courts have applied when determining whether to grant a subpoena for the identity of an anonymous speaker and discusses commentators’ responses to these standards.\textsuperscript{196}

\textbf{1. Good Faith Standard}

Of the various standards, Virginia has adopted the least protective standard for granting subpoenas to reveal the identity of potential anonymous online speakers. In \textit{In re Subpoena Duces Tecum to America Online},\textsuperscript{197} a trial level court adopted the good-faith standard in a case where a corporate plaintiff sued individuals for publishing “defamatory material misrepresentations and confidential

\textsuperscript{188} Id. § 230(c)(2)(A).
\textsuperscript{190} See Sony Music, 326 F. Supp. 2d at 558–59; Cahill 884 A.2d at 454–55; Moore, supra note 184, at 472.
\textsuperscript{191} See Sony Music, 326 F. Supp. 2d at 558–59; Cahill 884 A.2d at 454–55; Moore, supra note 184, at 473.
\textsuperscript{194} Id. at 416.
\textsuperscript{195} Id. Twenty states have enacted anti-SLAPP laws: California, Delaware, Florida, Georgia, Indiana, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, and Washington. Id. at 416 n.50.
material insider information.” Under the good-faith standard, a court will grant a subpoena if the court is “satisfied by the pleadings or evidence supplied to that court,” the requesting party has a legitimate, good-faith belief that the speech was actionable, and the requested information is necessary to advance the claim. The Virginia Supreme Court reviewed this case, but did not render a decision on the discovery standard used by the trial court. The Virginia legislature adopted the trial court’s standard and has codified it into law.

The Virginia trial court recognized that a low threshold for obtaining the identity of speakers would limit the free speech rights of anonymous speakers. The court reasoned, however, that the potential dangers from revealing the plaintiff’s confidential information were greater than the anonymity interests of online speakers. Furthermore, the court reasoned that the state had a compelling interest in protecting companies from such wrongful conduct. Thus, the court decided to adopt a good-faith standard for subpoena disclosures.

Proponents of the good-faith standard argue that traditional libel law and the remedies it provides are not suited to addressing the challenges of an online context and, thus, different standards should be applied for online libel as opposed to traditional print libel. Specifically, they argue, internet speech has greater permanence, reaches a broader audience, and thus can have a larger impact. They believe that adopting a less demanding test for disclosing the identity of the anonymous online speakers would help enforce current libel laws by making it easier for plaintiffs to bring claims for defamation.

Professor Michael Vogel argues that additional standards at the subpoena stage create unnecessary challenges for plaintiffs because the current Federal Rules of Civil Procedure provide sufficient protection to anonymous speakers. Professor Vogel notes that plaintiffs searching for an anonymous speaker are unlikely to waste resources and effort unless they believe that they have a viable legal claim, because initiating a lawsuit can be time consuming and cumbersome. Furthermore, plaintiffs are unlikely to pursue false claims, because they may be subject to Rule 11 sanctions.

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198 Id. at 26–27.
199 Id. at 37.
202 Id. at 20 Va. Cir. at 35.
203 Id.
204 Id.
205 Id.
207 See Brenner, supra note 55, at 745–46; Martin, supra note 54, at 1234.
208 See Constantine, supra note 182, at 470 (arguing that liberal disclosure laws are necessary to enforce the law).
210 Id. at 854.
211 See id. at 855; see also FED. R. CIV. P. 11(c); 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1338 (3d ed. 2004). Rule 11 of the Federal Rules of Civil Procedure requires lawyers to certify that any claim, defense or legal contention they make in a pleading or written motion to the court is warranted by existing law or a nonfrivolous reason for extending the law. See
Sophia Qasir

Thus, Professor Vogel argues, it is unnecessary to provide additional legal protections for anonymous speakers, and a good-faith subpoena standard adequately balances the interests of anonymous speakers with potential victims of anonymous speech.212

Opponents of the good-faith test find that the good faith standard is the least exacting standard and criticize it as insufficient to protect the rights of anonymous speakers because it is too easily satisfied.213 These opponents argue that the good-faith test does not establish a practical or reliable standard of determining the plaintiff’s actual reasons for filing the lawsuit, essentially depriving the defendant of any right to anonymity.214

Furthermore, they believe that the good faith standard fails to provide courts with any guidance as to how the standard should be applied or what amount of pleading or evidence is necessary to “satisfy” the court that a commenter’s identity should be disclosed.215

2. Balancing Test Standards

In Columbia Insurance Co. v. Seescandy.com216 the Northern District of California established the prima facie test for granting a subpoena in a case where the defendant allegedly committed trademark infringement under federal and California law.217 Under the prima facie standard, a court should grant a subpoena that reveals the identity of a defendant if the plaintiff: identifies the party with specificity,218 makes a good-faith effort to locate the individual and complies with service of process,219 can withstand a motion to dismiss,220 and has filed a discovery request that explains why the information is sought and identifies a limited number of persons on whom discovery process might be served.221 The key difference between this test and the good-faith standard is that the Seescandy test requires the plaintiff to provide notice and withstand a motion to dismiss, while the good-faith standard has no such requirement.222

FED. R. CIV. P. 11(b)(2); see also 5A WRIGHT & MILLER, supra, § 1334.

212 See Vogel, supra note 208, at 855.
213 Calvert et al., supra note 148, at 41; Martin, supra note 54, at 1228.
214 See, e.g., Solers, Inc. v. Doe, 977 A.2d 941, 952 (D.C. 2009) (“The good faith test . . . may needlessly strip defendants of anonymity in situations where there is no substantial evidence of wrongdoing, effectively giving little or no First Amendment protection to that anonymity.”); Calvert et al., supra note 148, at 41.
215 See, e.g., Moore, supra note 184, at 474 (theorizing that “satisfied by the pleading” likely did not include a substantive review of the plaintiff’s claims).
216 185 F.R.D. 573 (N.D. Cal. 1999).
217 Id. at 576; see also Sony Music Entm’t, Inc. v. Does 1–40, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004) (applying a balancing test in a case alleging copyright infringement for illegal use of file-sharing programs because even though “file sharing is not engaging in true expression,” it is still “entitled to First Amendment protection”).
219 Id. at 579.
220 Id. at 579–80.
221 Id. at 580.
222 Compare id., with In re Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (Cir. Ct. 2000).
In *Seescandy*, the Northern District of California recognized that the need to provide redress to injured parties must be balanced against the right of individuals to speak anonymously online. The court also recognized that if the standard for revealing subpoenas is too low, individuals could use the discovery process to harass or intimidate individuals who have committed no wrongful act. By requiring the plaintiff to show that it could survive a motion to dismiss, the court believed that it could minimize or prevent the use of discovery in harassing or intimidating anonymous online speakers.

After reviewing *Seescandy*, the Appellate Division of the Superior Court of New Jersey adopted a more demanding version of the prima facie test in *Dendrite International, Inc. v. Doe*. That case arose when anonymous speakers posted allegedly defamatory comments regarding a corporation on a Yahoo! message board. The court held that it would grant the plaintiff’s subpoena request if (1) the plaintiff attempted to notify the anonymous posters that they were subject to a subpoena or application for disclosure, (2) the plaintiff identified the statements that constitute actionable speech, (3) the court determined that the plaintiff had a prima facie case against the John Doe defendant that was supported by an evidentiary showing, and (4) the court balanced the defendant’s First Amendment right to anonymous speech against the necessity of disclosure for the plaintiff’s action to proceed.

Although both the *Dendrite* test and the *Seescandy* test require the plaintiff to identify the defendant, attempt to notify the plaintiff of the pending action, and demonstrate a prima facie case, the *Dendrite* court interpreted the motion to dismiss standard as being more flexible than did the district court in *Seescandy*. The *Dendrite* court indicated its belief that the First Amendment concerns in *Seescandy* were less serious than those in *Dendrite*, because *Seescandy* involved a trademark infringement suit while *Dendrite* involved an allegation of defamation; therefore, the *Dendrite* court adopted a test that more strongly considered the First Amendment concerns. The *Dendrite* test interpreted the *Seescandy* test’s motion-to-dismiss prong as a “flexible, non-technical, fact-sensitive mechanism” to ensure that plaintiffs do not abuse the judicial system to harass online speakers or chill online speech. Thus, the court held that it was appropriate for the trial court judge to require evidence of the plaintiff’s prima facie case when deciding whether to dismiss the case.

Proponents of the *Dendrite* balancing approach believe that it does not state the right to anonymous speech too broadly, and that it establishes a standard that plaintiffs can potentially meet.

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223 *Columbia Ins. Co.*, 185 F.R.D. at 578.
224 Id.
225 Id. at 578–79.
227 Id. at 763.
228 Id. at 760–61; see also Moore, *supra* note 184, at 478–80.
229 Cf. *Dendrite*, 775 A.2d at 771.
230 Id. at 767.
231 Id. at 771.
232 Id. at 760.
as demonstrated by cases in which courts have granted plaintiffs’ discovery requests.\textsuperscript{233} They also believe that the various prongs of \textit{Dendrite} adequately consider the interests of both parties by looking at the sufficiency of the plaintiff’s case, which helps to protect the defendant’s anonymity unless there is a valid justification.\textsuperscript{234}

Professor Vogel has criticized the \textit{Dendrite} balancing test because it grants the trial court judge too much discretionary power, since the test requires the judge to look to the merits of a potential claim.\textsuperscript{235}

Furthermore, he argues, the trial judge’s determination is reviewed on an abuse of discretion standard, which makes it very difficult for the appellate court to reverse the lower court’s determination.\textsuperscript{236} This discretionary power can essentially deprive the plaintiff of his right to seek redress because the lawsuit cannot proceed without determining the identity of the defendant.\textsuperscript{237}

\subsection*{3. Summary Judgment Standard}

In \textit{Doe v. Cahill},\textsuperscript{238} the Delaware Supreme Court established the summary judgment standard—one of the most demanding standards for granting a subpoena—to decide whether disclose an anonymous online speaker’s identity.\textsuperscript{239} The \textit{Cahill} standard requires a plaintiff to “support his defamation claim with facts sufficient to defeat a summary judgment motion,”\textsuperscript{240} make reasonable efforts to notify the defendant, and “submit sufficient evidence to establish a prima facie case for each essential element of the claim in question.”\textsuperscript{241} The court noted, however, that the plaintiff would not be required to provide evidence for those elements for which it would be impossible to obtain evidence without knowing the defendant’s identity.\textsuperscript{242} For example, in a public figure defamation case, the plaintiff would be required to “prove that: (1) the defendant made a defamatory statement; (2) concerning the plaintiff; (3) the statement was published; . . . (4) a third-party would understand the character of the communication as defamatory . . . [and] that (5) the statement is false.”\textsuperscript{243} The plaintiff would not be required to prove that the defendant made the statement with

\begin{itemize}
  \item \textsuperscript{233} See, e.g., Lidsky & Cotter, \textit{supra} note 149, at 1601–02 (including a balancing prong in their test to determine whether to grant a subpoena request); Mazzotta, \textit{supra} note 195, at 862–63; Moore, \textit{supra} note 184, at 483.
  \item \textsuperscript{234} Mazzotta, \textit{supra} note 195, at 862–63 (discussing how balancing tests give courts the greatest discretion to consider the specific facts of the case); Moore, \textit{supra} note 184, at 484.
  \item \textsuperscript{235} Vogel, \textit{supra} note 208, at 809.
  \item \textsuperscript{236} \textit{Id.}
  \item \textsuperscript{237} \textit{Id.} at 809–10.
  \item \textsuperscript{238} 884 A.2d 451 (Del. 2005).
  \item \textsuperscript{239} \textit{Id.} at 457.
  \item \textsuperscript{240} Moore, \textit{supra} note 184, at 477.
  \item \textsuperscript{241} Cahill, 884 A.2d at 463 (citing \textit{In re Asbestos Litig.}, 799 A.2d 1151, 1152 (Del. 2002)).
  \item \textsuperscript{242} \textit{Id.} at 463.
  \item \textsuperscript{243} \textit{Id.}
actual malice.\textsuperscript{244} The court denied the plaintiff's subpoena request, holding that any viewer would understand that the comment was intended as an opinion and would be unlikely to believe the veracity of the comment.\textsuperscript{245}

In \textit{Cahill}, a public figure had filed a defamation and invasion of privacy claim to seek the identity of an anonymous commenter from a Delaware state news blog.\textsuperscript{246} At the trial level, the Superior Court of Delaware had adopted \textit{America Online}'s good-faith standard.\textsuperscript{247} However, the Delaware Supreme Court rejected this approach as insufficient to protect the rights of online speakers.\textsuperscript{248} The court discussed the unique features of speech on the internet\textsuperscript{249} and analogized online speech with the "modern equivalent of political pamphleteering."\textsuperscript{250} Thus, the court held that its standard for granting a subpoena must reach the appropriate balance between anonymous free speech rights and the rights of individuals against defamation.\textsuperscript{251} The court found that the summary judgment standard would best achieve this balance.\textsuperscript{252}

The court rejected the good-faith standard because it believed that plaintiffs would be able to meet that standard too easily, which might cause plaintiffs to harass defendants and chill online speech.\textsuperscript{253} The court rejected the motion to dismiss standard because the threshold for a Federal Rule of Civil Procedure 12(b)(6)\textsuperscript{254} motion was merely a pleading standard that required the plaintiff to provide the opposing party with notice of the claims against it, and thus, was also insufficient to protect the free speech rights of anonymous online speakers.\textsuperscript{255} Although the court approved of \textit{Dendrite}'s heightened standard for granting subpoenas, it found that the standard was too convoluted and unnecessarily complex.\textsuperscript{256} Thus, the court adopted the summary judgment standard, finding that it properly balanced the interests of anonymous online speakers with those of individuals who might be harmed by such speech.\textsuperscript{257}

\textsuperscript{244} Id. at 464.
\textsuperscript{245} Id. at 465 ("The 'reasonable reader, looking at the hundreds and thousands of postings about the company from a wide variety of posters, would not expect that [the defendant] was airing anything other than his personal views . . . ." (quoting Global Telemedia Int’l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1268 (C.D. Cal. 2001))).
\textsuperscript{246} Id. at 454. The comments criticized Cahill’s performance as a city councilman, stating that “[a]nyone who has spent any amount of time with Cahill would be keenly aware of such character flaws, not to mention an obvious mental deterioration.” Id. (emphasis omitted). Another comment stated that “Gahill [sic] is as paranoid as everyone in the town thinks he is.” Id. (alteration in original) (emphasis omitted).
\textsuperscript{248} Cahill, 884 A.2d at 454.
\textsuperscript{249} Specifically, the court notes that online speech is “less hierarchical and discriminatory than in the real world because it disguises status indicators such as race, class, and age.” Id. at 456 (internal quotation marks omitted).
\textsuperscript{250} Id. at 456.
\textsuperscript{251} Id.
\textsuperscript{252} Id. at 457.
\textsuperscript{253} Id. at 457–58.
\textsuperscript{254} FED. R. CIV. P. 12(b)(6). A defendant makes a Rule 12(b)(6) motion when the defendant believes that the plaintiff, in their complaint, “fail[ed] to state a claim upon which relief can be granted.” Id.; see also 5B WRIGHT & MILLER, supra note 210, § 1355.
\textsuperscript{255} Cahill, 884 A.2d at 458–59.
\textsuperscript{256} See id. at 461.
\textsuperscript{257} Id.
Critics of the Cahill standard argue that balancing tests are important to address the various speech concerns implicated by a particular lawsuit, and that a summary judgment standard does not fully consider the potential free speech concerns. They note that a plaintiff may be able to meet the summary judgment standard, but “the harm done by revealing the speaker’s identity may far outweigh the damage of the libel.”

The Cahill summary judgment standard has also been criticized for increasing legal uncertainty. Some courts interpret the Cahill standard as less demanding than Dendrite, while other courts interpret the Cahill standard as more demanding than Dendrite. Furthermore, by adopting a procedural label, the court created confusion because the standard does not actually adhere to the strict procedural definitions of the term summary judgment.

Professor Malloy criticizes the Cahill standard because it fails to account for the inherent characteristics of online speech. Although courts have thus far sought to treat speech on the internet in the same manner as traditional forms of speech, Malloy notes that online speech is inherently different from traditional forms of speech, because it is more pervasive, permanent, and accessible. For example, defamation requires defendants to make an untrue statement of fact and for readers to view the statement as fact. By finding that readers are likely to interpret the statements on blogs as the speaker’s opinion, rather than as a factual assertion, Professor Malloy argues that the Cahill court failed to consider that the opinion of others may nevertheless injure the plaintiff’s reputation or cause him or her to suffer adverse consequences. Following this reasoning, the Cahill standard—which uses a general defamation standard—is not properly suited to online speech, because it is almost impossible for plaintiffs to obtain redress for statements made by anonymous commenters.

258 See, e.g., Mobilisa, Inc. v. Doe, 170 P.3d 712, 720 (Ariz. 2007) (“[R]equesting the court to balance the parties’ competing interests is necessary to achieve appropriate rulings in the vast array of factually distinct cases likely to involve anonymous speech.”); Ashley I. Kissinger & Katherine Larsen, Untangling the Legal Labyrinth: Protections for Anonymous Online Speech, 13 NO. 9 J. INTERNET L. 1, 19 (2010).
260 See Kissinger & Larsen, supra note 257, at 18.
261 Compare Krinsky v. Doe, 72 Cal. Rptr. 3d 231, 242–43 ( Ct. App. 2008) (adopting the Cahill standard because the Dendrite standard “required too much” and the motion to dismiss standard was too low), with Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 456–57 (Md. 2009) (adopting the test from Dendrite, because the summary judgment standard would set the bar too high and “undermine personal accountability and the search for truth”).
262 Kissinger & Larsen, supra note 257, at 18–19.
263 Malloy, supra note 66, at 1190.
264 Id. at 1192; see also Solove, supra note 141, at 1197.
265 See supra Part I.B.1.
266 Malloy, supra note 66, at 1190–91.
267 Id. at 1191–92.
4. 2TheMart Test

Courts have recognized that a different standard should apply for obtaining the identity of a commenter when he is sought as a witness rather than as a defendant, but have not delineated the distinction. In Doe v.

2TheMart.com, Inc., the Western District of Washington established a test for granting subpoenas to identify potential witnesses. Under this test, the plaintiff must clearly show that (1) the subpoena was issued in good faith, (2) the information sought related to a core claim or defense, (3) the information is directly and materially relevant to that claim or defense, and (4) such information cannot be obtained from other sources. Given that this holding applies only to witness disclosure, this standard has not received much attention from other courts or academics.

B. Legislative Proposals Seeking To Restrict Anonymous Online Speech

The issue of anonymous online speech has received significant media attention that has motivated state legislatures to propose legislation that would ban or restrict anonymous online commenting. Virginia, the only state that has passed legislation that addresses the standard for disclosing the identity of an anonymous commenter, has adopted the good-faith test.

However, this section will focus on legislative proposals from Georgia, California, New Jersey, and New York that sought to ban or limit anonymous speech rights.

Georgia was the first state that sought to enact legislation restricting the use of false identities online. In 1996, it passed Act 1029, which made it unlawful for “any person . . . [to] knowingly . . . transmit any data through a computer network . . . if such data uses any individual name, trade name, registered trademark, logo, legal or official seal, or copyrighted symbol to falsely identify
The American Civil Liberties Union (ACLU) challenged the Act in court, arguing that it was unconstitutional under the First Amendment because it created an impermissible content-based restriction and limited individuals’ right to speak anonymously. A district court found that the ACLU would be likely to prevail in its challenge to the law and therefore granted a preliminary injunction prohibiting enforcement of the Act. Although Georgia state courts have not yet addressed the constitutionality of this Act, in practice, it has not been used to restrict or regulate anonymous online speech.

Ten years later, the New Jersey legislature introduced a bill that would have required an operator of a computer service or an ISP to “establish and maintain reasonable procedures to enable any person to request and obtain disclosure of the legal name and address of an information content provider [i.e., speaker] who posts false or defamatory information about the person on a public forum website.” Any person who is damaged as a result of false or defamatory written messages may sue an ISP that fails to comply with this provision for compensatory and punitive damages. However, the bill did not define the circumstances under which it would be “reasonable” for an ISP to disclose a commenter’s identity. The New Jersey bill was withdrawn in February of 2007 and no subsequent legislation has been proposed thus far.

In March 2012, the New York State legislature proposed the Internet Protection Act, which takes a similar approach as New Jersey to address anonymous online commenting. The bill’s purpose, based on statements by sponsoring legislators, is to lower the incidence of cyberbullying. The original version of the bill in the state assembly and the current version being considered by the state senate require that:

A web site administrator upon request shall remove any comments posted on his or her web site by an anonymous poster unless such anonymous poster agrees to attach his or her name to the post and confirms that his or her IP address, legal name, and home address are accurate. All web site administrators shall have a contact number or e-mail address posted for such removal requests, clearly visible in any sections where comments are posted.

277 Id. at 1234–35 (“[T]he Court concludes that plaintiffs are likely to succeed on their claim that the act is void for vagueness, overbroad, and not narrowly tailored to promote a compelling state interest.”).
280 Id.
284 S.B. 6779.
After receiving significant public hostility toward the bill, the State Assembly revised the bill to allow only targets of anonymous posters to request that the comments be removed, and to require web site administrators to “make a good faith effort to determine that comments regarding a victim are factually based . . . and not opinions.”

The New York and New Jersey proposals are somewhat analogous to the notice and take-down provisions under the Digital Millennium Copyright Act (DMCA). The DMCA shields ISPs from liability if, after being notified by the copyright holder of the infringing nature of the work, they remove the material from their websites. Although the New Jersey and New York proposals operate differently, they also create incentives for ISPs to remove certain material from their websites. Some commentators have advocated for imposing more liability on ISPs as a way to address the problems of online defamation. They argue that notice and take-down procedures are the most efficient and cost-effective mechanisms to regulate defamatory online speech. However, it is unclear whether such procedures can be adequately designed to restrict defamatory speech, while continuing to protect legitimate free speech interests of online speakers.

Other states have sought to limit the anonymous speech rights of a narrower category of speakers, namely convicted sex offenders. In 2012, California passed Proposition 35, which, among other things, requires convicted sex offenders to register “[a] list of any and all Internet identifiers established or used by the person” and “[a] list of any and all Internet service providers used by the person” with the Department of Justice.

This law will effectively abolish the right to anonymous speech for convicted sex offenders. The ACLU and the Electronic Frontier Foundation filed a lawsuit the day after California voted to approve Proposition 35. The Northern District Court of California granted plaintiff’s motion for a prelimi-
nary injunction, but it has not yet ruled on the constitutionality of the Proposition. The State filed an appeal with the Ninth Circuit Court of Appeals on February 12, 2013. The Ninth Circuit may be guided by legal developments in Georgia. The Georgia state legislature passed a law that also required convicted sex offenders to register information about their online identity. However, the Northern District of Georgia declared the law unconstitutional because the statute was vague and not narrowly tailored to accomplish a legitimate state interest.

IV. CREATING A COMPREHENSIVE LEGAL STANDARD

Judicial subpoena standards and legislative regulations restricting anonymous speech approach the issue of anonymous speech from different angles. Subpoena standards allow judges to make individualized determinations based on the particular facts of the case, but this leads to the patchwork of approaches that courts have so far taken. Such discordant standards create uncertainty regarding individuals’ speech rights as speakers’ rights will be affected both by the underlying action and applicable law. In contrast, legislative standards may create more uniformity, but the legislature may impose categorical restrictions on a narrow type of speech, such as defamation or fighting words. If the legislature wants to establish broader content-based speech regulations, those regulations must be narrowly tailored to serve a compelling state interest to be deemed constitutionally permissible. Part IV.A analyzes the aforementioned judicial standards and concludes that the government should adopt the Cahill standard, which requires plaintiffs to meet a summary judgment standard before obtaining disclosure. Part IV.B discusses how the legislature should expand the legal rights for victims of defamation and online harms to balance the protection of anonymous speech with the problems it may cause.

300 Baker, 696 F. Supp. 2d at 1309–12.
301 See supra Part III.A.
302 See supra notes 18–23 and accompanying text.
303 See supra notes 29–30 and accompanying text.
A. Subpoena Disclosure Standard

In reality, anonymous online commenting does not reflect the historical notion that anonymous speech promotes democratic principles by allowing freedom of participation as envisaged in *Talley* and *McIntyre*. Yet, many of the justifications for restricting anonymous speech used in *Buckley* and *Citizens United*—such as protecting the integrity of the political process and providing citizens with the information they need to make informed political decisions—are not present to the same extent in anonymous online speech. Because anonymous online speech “is, on average, less valuable than nonanonymous speech,” it should be afforded an intermediate degree of protection when parties seek to identify these speakers. The standard that best accomplishes this aim is the summary judgment test established by the Delaware Supreme Court in *Cahill*. The *Cahill* standard should be adopted because it offers the highest level of protection for anonymous speakers and thus advances speakers’ free speech rights, is the most straightforward to apply, and is preferable to the alternative tests.

*Cahill* requires plaintiffs to meet a high burden—proving a prima facie case or meeting a summary judgment standard—before they can discover an anonymous speakers’ identity, thereby affording the greatest level of protection for anonymous speakers. It is important to protect anonymous speakers’ rights to avoid creating a chilling effect on online speech.

Under a marketplace of ideas theory for free speech rights, various ideas will compete and the truth will ultimately prevail. Although some critics argue that speech on the internet has a higher potential for causing injury, it is important to note the context of speech when determining whether injury will result. For example, readers are less likely to trust the veracity of a college gossip website than that of a reputable website. Thus, the mere existence of speech will not necessarily cause injury.

Anonymous speech rights also help promote the truth-seeking function of free speech protections by allowing individuals to disclose information without fear of reprisal. If the disclosure standard is too low, it will allow individuals or critics to obtain a speaker’s identity for the purpose of

304 See supra notes 104–05, 114 and accompanying text.
305 See supra Part I.C.2.
306 See supra note 146 and accompanying text.
307 See Lidsky & Cotter, supra note 149, at 1559; see also supra notes 161–63, 169–72 and accompanying text.
308 See supra Part III.A.3.
309 For a discussion of the *Cahill* standard, see supra notes 239–44 and accompanying text.
310 See supra notes 239–40 and accompanying text.
311 See supra Part II.A.
312 See supra note 138 and accompanying text. But see Scot Wilson, *Corporate Criticism on the Internet: The Fine Line Between Anonymously Speech and Cybersmear*, 29 PEPP. L. REV. 533, 540–42 (2002) (arguing that the “free marketplace” interpretation of anonymous online speech is limited because of the difficulty in drawing a line between lawful and defamatory speech).
313 See Malloy, supra note 66, at 1190; see also supra notes 169–72 and accompanying text.
314 See supra notes 64–66 and accompanying text.
315 See supra Part II.A.
harassment or intimidation. Statistically, plaintiffs are unlikely to prevail in a defamation suit and most John Doe subpoenas are sought by corporate plaintiffs trying to silence their critics. To prevent needless disclosure of an anonymous speaker’s identity, courts should not require disclosure unless there is sufficient evidence to suggest that the plaintiff will win on the merits of the case. Otherwise, speakers may be wary of making statements if they believe that the message can be traced back to them, creating a chilling effect on speech. This type of scenario may arise in situations where an employee wants to reveal information about his employer that may be of important public interest, but fears employer retaliation.

The Cahill summary judgment test better protects anonymous speech, because it is more straightforward and easier to apply than Dendrite’s multifactored balancing test. The fifth prong of the balancing test in Dendrite, which seeks to balance the protections of speech and its potential harm, is redundant because the same balancing is inherent in the summary judgment test. Additionally, the balancing test creates ambiguity, which makes it more difficult for plaintiffs to raise meritorious claims, because plaintiffs will be unsure when they have a valid legal claim. Uncertainty in outcome may deter some plaintiffs from litigating their cases, thereby preventing them from accessing justice and allowing speakers to continue making potentially defamatory comments. The summary judgment standard includes an inherent balancing test because it permits disclosure only when a plaintiff has a viable legal claim.

The summary judgment test may protect less speech than a balancing test because it does not protect speakers when the speaker’s interest in maintaining anonymity exceeds the plaintiff’s interest in pursuing a viable legal claim. However, the summary judgment standard is preferable, because a balancing test would grant anonymous online speakers greater speech protections than they would have in other speech contexts.

The summary judgment test is also preferable to the good-faith standard, because the good-faith standard is too easily satisfied, allowing disclosure even in situations where the speaker may have an important anonymity interest. The good-faith standard gives plaintiffs an incentive to file suits to discover the identity of the commenter even if the plaintiff lacks a legal claim. This standard essentially deprives defendants from saying anything derogatory about another person, because such comments would likely be sufficient to create a “good-faith” belief that the speech is action-
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able. Yet, the Supreme Court has held that speech cannot be restricted merely because it may be offensive. Thus, the good-faith test fails to afford anonymous speakers adequate protection. The good-faith standard comes from an early case addressing online anonymity but has not received much traction, with modern courts instead choosing to adopt a balancing test or summary judgment standard.

Professor Susanna Moore argues that the Cahill standard is too demanding because it is impossible for plaintiffs to prove malice without knowing the identity of the defendant. Professor Moore, however, fails to note that the Cahill standard only requires the plaintiff to prove the elements that are within their control and thus would not be required to prove malice to obtain the subpoena. Yet, this provision leads others to criticize Cahill for purportedly adopting a procedural approach while relaxing certain requirements, thereby confusing potential litigants. This argument is technical and does not address the merits of the Cahill test. As a practical matter, it would be impossible for the plaintiff to provide all the evidence necessary to support his claim without knowing the defendant’s identity. In choosing among the various standards, requiring the plaintiff to provide as much evidence as possible—as the Cahill standard requires—is the next best alternative to ensure that the litigation is not frivolous or being raised for malicious purposes.

Some critics of the Cahill test argue instead that Dendrite’s notice requirement, which requires plaintiffs to notify the speaker of the pendency of the subpoena request, provides greater protection for anonymous speakers because it allows them to defend themselves. Professor Moore, in particular, argues that it is fairer to place the burden on the plaintiff than on the ISP, because the plaintiff has a greater interest in the litigation and thus is more likely to give notice than a disinterested party. These commentators, however, provide no reason that the notice requirement cannot be applied to the summary judgment standard. In Cahill, the court specifically included a notice requirement, thereby demonstrating that a notice requirement can be adopted without changing the nature of the standard.

Despite the criticism of the summary judgment standard, it remains the best standard for protecting anonymous online speech. Some individuals may abuse their anonymity rights, but lowering the standard for disclosure is unlikely to have a significant impact unless the speaker can be

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327 See supra note 34 and accompanying text.
328 Calvert et al., supra note 148, at 40; see supra Part III.A.2–3.
329 See Moore, supra note 184, at 481.
330 See supra notes 241–44 and accompanying text.
331 See supra note 261 and accompanying text, see also Kissing & Larsen, supra note 257, at 18–19.
332 See Lidsky & Cotter, supra note 149, at 1598; Moore, supra note 184, at 483.
333 See Moore, supra note 184, at 438–84 (“ISPs cannot be expected to carry the burden of notification on behalf of their users without a clear mandate or incentive to do so.”).
334 Cf. id. (recognizing that the Cahill standard also includes a notice requirement but failing to explain why the Dendrite standard is better with respect to the notice requirement).
336 See supra Part II.B.
subjected to legal sanctions to deter future misconduct. Thus, courts should adopt the summary judgment standard for deciding when to reveal an anonymous speaker’s identity.

Additionally, states should adopt a summary judgment standard to permit the disclosure of an anonymous speaker’s identity regardless of the underlying dispute. The Ninth Circuit and Professor Clay Calvert argue that the standard for disclosing the identity of the speaker should depend upon the nature of the underlying litigation.337 However, the summary judgment standard inherently accounts for the nature of the underlying suit by allowing discovery only when the plaintiff provides evidence to prove wrongdoing by the speaker.338 Imposing different standards for various types of speech, while preferable in theory, would create problems in practice by creating uncertainty in an area of the law that should be clear.339

B. Legislative Responses

The government should not seek to ban anonymous online speech because, despite those who would abuse the right, anonymous online speech serves many legitimate interests. Since most legislation that restricts the right likely will be found unconstitutional,340 legislatures should instead regulate anonymous online commenting indirectly by redefining the set of harms for which individuals may seek redress.341

Individual states should not try to address the problems associated with anonymous online commenting by imposing restrictions or bans on such speech, because any law they adopt would likely create a dormant commerce clause problem.342 If one state tries to regulate the internet, it would create jurisdictional problems because the legislation would inherently implicate activity in other states.343 Even national regulation of anonymous speech may be legally problematic because of its international implications.344

Legislatures should not seek to create a take-down procedure analogous to those for copyright infringement under the DMCA, because there is an inherent difference between the values that

337 See In re Anonymous Online Speakers, 661 F.3d 1168, 1177 (9th Cir. 2011) (“[W]e suggest that the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes.”); Calvert et al., supra note 148, at 47–48.
338 See supra notes 250–51 and accompanying text.
339 See supra note 44 and accompanying text.
340 See supra Part I.A.
341 See supra Part I.B.
342 The Dormant Commerce Clause problem occurs when one state’s laws or regulations implicate activity in other states and is problematic because it may lead to protectionist regulation by the states and undermine the national market. See Brown-Forman Distillers Corp. v. N.Y. Liquor Auth., 476 U.S. 573, 580 (1986).
underlie free speech and those that support copyright law. Copyright laws are meant to protect the economic interests of those who produce expressive works. In contrast, the First Amendment protects the freedom of expression. Although removal of content may restrict some speech, the Supreme Court has rejected First Amendment challenges in copyright infringement cases. It is reasonable for courts to err on the side of restricting the dissemination of infringing material, because the interest of the copyright owner may be lost if it is not enforced in a timely manner. However, the First Amendment is meant to protect expression, and that right would be undermined if ISPs or website administrators were required to remove speech.

Moreover, determining copyright infringement is an objective assessment that the ISP can resolve, while speech regulation is more subjective and harder to define. Anonymous online speech includes a broader range of speech, much of which the government cannot restrict. An ISP or website administrator could not be expected to reasonably know whether speech may be restricted, which is likely to result in an overregulation of speech. Additionally, unfamiliarity with the legal standard for permissible speech regulation could cause unequal application of the law, because each website administrator could adopt different standards for take-downs.

Further, the determination would be subject to the individual biases of the website administrator. This unequal application of a statute would prevent the creation of clear standards, which, in turn, is likely to deter protected speech.

The proposed bill from New York illustrates other constitutional defects of laws that seek to limit anonymous speech through the use of take-down procedures because both versions of the bill are vague, overbroad and underinclusive. The proposed laws are vague because they fail to put speakers on notice of what speech is protected and to provide guidelines for when website administrators should remove speech. Although the Assembly version is more specific and instructs administrators to “make a good faith effort to determine that comments regarding a victim are factually based,” it fails to explain what actions are required for a good-faith effort. Furthermore, both versions of the bill are underinclusive because by addressing only instances of anonymous at-

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345 See supra Part II.A (discussing the values underlying free speech protection).
347 See supra notes 141, 149 and accompanying text.
349 See supra notes 153–55 and accompanying text.
350 See supra Part I.A.
351 See supra note 42 and accompanying text.
352 See supra notes 40–44, 283–85 and accompanying text.
353 See supra notes 40–42, 283–85 and accompanying text.
355 The ambiguity caused by this good-faith standard would be analogous to the problems caused by Virginia’s good-faith standard for granting a disclosure subpoena. See supra notes 213–14 and accompanying text.
tacks, they fail to address instances of cyberbullying—the bill’s stated purpose—that are conducted publicly or through identifiable social media profiles. 356

The New York proposal that the state senate is considering is content neutral, because it requires an administrator to remove all anonymous comments upon request, without regard to the content of the speech. 357

Thus, the regulation would be subject to intermediate scrutiny, requiring that the law be substantially related to an important governmental interest. 358 While the bill’s goal of combating cyberbullying is an important government interest, 359 the law is not substantially related to that aim because it restricts nonbullying speech. 360 The law is unconstitutionally overbroad because it may result in the restriction of speech that is otherwise constitutionally permissible. 361 Instead, the legislature should adopt a different solution that is more narrowly tailored to achieve the law’s ends without infringing upon First Amendment rights. 362

Online speech falls into many categories, each subject to its own standard of scrutiny. 363 Thus, any legislation seeking to regulate anonymous online speech would need to differentiate between the various types of speech. 364

The New York State Assembly, perhaps realizing this, revised the bill to limit its application to defamatory speech. 365 This proposal, however, is content based because it requires website administrators to remove comments upon request based on the speaker’s message. 366 As such, the law is subject to strict scrutiny and must be narrowly tailored to serve a compelling government interest. 367 Even assuming that the government’s interest in ending defamatory online speech is compelling for the purposes of the First Amendment, the regulation is likely unconstitutional because it is overbroad. 368 Governments may regulate defamatory speech because the reputational interest of the target of the speech exceeds the speaker’s interest in the speaker (which is low, because such...
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speech is oftentimes an issue of private, rather than public, concern. The government, however, may not regulate speech merely because it is offensive or distasteful.

The New York bill essentially requires website administrators to remove postings upon the request of the target of the speech, which is likely to result in the removal of speech that, while offensive, fails to meet the specific legal requirements for defamation.

Given the constitutional difficulties in shaping legislation to restrict anonymous online speech, the legislature should seek alternative solutions to address the issue of cyberbullying and other forms of harmful online speech.

CONCLUSION

The right to free speech, including the right to anonymous speech, is a fundamental right guaranteed by the Constitution. Though the government may restrict certain forms of speech through regulation, and other types of speech by imposing civil liability for harmful speech, those regulations and restrictions must be justified based on the severity of the limitation being imposed. As more speech is disseminated through the internet, the government must find a way to balance the interest of speakers with that of individuals who may be harmed by defamatory or hateful speech. Courts have adopted various standards for granting subpoena requests to allow discovery of anonymous speakers’ identities. Appellate courts should adopt the summary judgment standard, because it best protects individuals’ speech rights without making it impossible for plaintiffs to seek redress for their injuries.

Despite their concern for the potential harms arising from anonymous online speech, legislatures should not seek to ban anonymous speech. Instead, they should redefine defamation in an online context to account for the differences between online speech and other traditional mediums of speech. This would expand the remedies available to potential victims of harmful speech and allow them to bring suit when the interests of the victims exceed the free speech interests of the speaker.

370 See supra note 34 and accompanying text.
372 See supra Part I.A.
I. INTRODUCTION: WHAT DOES ARMAGEDDON HAVE TO DO WITH BETTY SIMMONS?

For the most part we do not first see, and then define, we define first and then see.  

Walter Lippmann

Betty Simmons was nine years old when she accompanied Sarah Prince, her aunt and guardian, to distribute religious literature on the streets of Brockton, Massachusetts. Mrs. Prince did not ordinarily permit Betty to engage in preaching activity on the streets at night, but on the evening of December 18, 1941, she reluctantly yielded to Betty’s entreaties and (perhaps more difficult to

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resist) her tears. For Mrs. Prince and Betty were Jehovah’s Witnesses, for whom street preaching is a religious duty. For Betty, street preaching was work commanded by the Lord, but it was work that she loved to do. It was a way of worshipping God. For the legislators of Massachusetts, however, Betty’s religious work was something else entirely: a violation of the state’s child labor laws. These statutes prohibited children from selling or offering to sell — any newspapers, magazines, periodicals or any other articles of merchandise of any description . . . in any street or public place.

Criminal sanctions were imposed on parents and guardians — who compel or permit minors in their control to engage in the prohibited transactions. Sarah Prince was convicted on several counts, and, for the most part, the judgment of the trial court was affirmed by the Supreme Court of Massachusetts. Mrs. Prince appealed to the United States Supreme Court.

The case of Prince v. Massachusetts is well known for its conclusion that — the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. In Prince, the Court stressed that the state, acting as parens patriae — acting, that is, in its capacity as protector of those unable to protect themselves — is responsible for the general welfare of young people. As parens patriae (literally, as parent of the country), the state may protect children against the misconduct of their own parents and guardians. The state’s parens patriae authority, according to the Prince Court, is — not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience. Pointing to a number of state regulations (such as child labor and compulsory schooling laws) that interfered with religious parenting rights, the Court rejected Mrs. Prince’s contention that such regulations can be justified only by a clear and present danger to the child. While a regulation of adult religious activity might require the state to show that it had a truly compelling justification, no such showing was necessary where children are involved. — The state’s authority over children’s activities, the Court insisted, — is broader than over like actions of adults. Thus, the Court concluded that the state was required to show only that it had a legitimate (not a compelling) interest to promote the public’s health, welfare, or safety, and that it had used a means—here, a restriction on commercial activity by children — reasonably related to its purpose

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4 Id. at 161–62.
5 Id. at 161.
6 Id. at 162–63.
7 Id. at 172 (Murphy, J., dissenting).
8 Id.
10 Prince, 321 U.S. at 160 (1944).
11 Id. at 166.
12 Id.
13 Id. at 166–67.
14 Id. at 166.
15 Id. at 166–167.
16 Id. at 167–168.
17 Id. at 168.
(not the least restrictive means possible). Child labor laws served —the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens. For the Court, it was simply too late to doubt that legislation designed to protect children is within the state’s police power, —whether against the parent’s claim to control of the child or one that religious scruples dictate contrary action. Mrs. Prince was not entitled to an exemption from the general law of the state regulating child labor.

Its focus on the welfare of the child notwithstanding, the Prince Court managed to ignore the real child whose welfare was the central issue of this landmark case. For one thing, no one on the Court suggested that Betty may have been too young to choose such a strong religious commitment. Writing for the Court, Justice Rutledge noted that —Betty believed it was her religious duty to perform this work and failure would bring condemnation to everlasting destruction at Armageddon. On this point, the Court’s four dissenting justices agreed with the majority: Betty wanted to accompany her aunt, motivated to engage in missionary evangelism by her love of the Lord. Mrs. Prince’s brief to the Court also stressed that Betty —desired to serve Almighty God. Her service was freely given to the Lord. In Mrs. Prince’s words:

[Betty] was serving Jehovah God and not her guardian, not any man, not the society or any earthly institution. The girl desired to pay her vows unto her God. Since she was thus serving Jehovah it cannot be said that she was working for any creature on earth. No man or government has authority to punish a child or another creature because the child is permitted to serve Jehovah God.

From this point of view, Betty’s street preaching was not child labor at all.

No constitutional truism is more universally accepted than Justice Jackson’s famous assertion, in West Virginia State Board of Education v. Barnette, that —no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. In Barnette, the Supreme Court protected school chil-

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18 Id. at 170–71.
19 Id. at 165.
20 Id. at 168–69.
21 Id.
22 Id. at 163.
23 See id. at 171–72 (Murphy, J., dissenting).
24 Brief for Appellant at 34, Prince, 321 U.S. 158 (No. 98).
25 Id.
26 319 U.S. 624, 642 (1943); cf. Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (—The „establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and
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dren against the action of local authorities, who, by compelling the flag salute and pledge, had — transcended constitutional limitations on the authority of the state. The injury caused by such a compelled statement of belief was a grievous one, a blow to the intellectual and moral personhood of the young children. The compulsory flag salute and pledge — required affirmation of a belief and an attitude of mind. By forcing the children to utter what was not in their minds, the state had invaded — the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

In the catalogue of opinions not subject to official prescription, religion occupies a privileged place. The Constitution’s commitment to religious freedom arises from the assumption that religious principles are uniquely the dictates of conscience. Because religion is, as James Madison put it, — the duty which we owe to our Creator . . . it can be directed only by reason and conviction, not by force or violence. Not, that is, by the state. Even a benign expression of religious views by the state — may end in a policy to indoctrinate and coerce, calling into question the voluntariness, and thus the genuineness, of belief.

—A state-created orthodoxy, the Court has said, — puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

But, for children, the threat to freedom of belief and conscience is no less grave when it comes from private orthodoxies, and the injury to the child caused by private coercion is no less grievous. The realm of intellect and spirit is invaded when children are forced to believe what other people believe, or kept from believing what other people do not believe, even if — and, perhaps, especially when — those others are their parents or religious mentors. Yet children are left legally unprotected from most forms of private religious coercion. Indeed, where the religious upbringing of vice versa.}

27 Barnette, 319 U.S. at 642.
28 Id. at 633.
29 Id. at 634.
30 Id. at 642. On the First Amendment as protective of individual dignity, see, for example, Cohen v. California, 403 U.S. 15, 24 (1971) (— The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.) (emphasis added); cf., e.g., Stephen Arons & Charles Lawrence III, The Manipulation of Consciousness: A First Amendment Critique of Schooling, 15 HARV. C.R.-C.L. L. REV. 309, 312 (1980) (— The first amendment is . . . a statement of the dignity and worth of every individual.); Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 879 (1963) (— [E]xpression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted. Hence suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man’s essential nature.); Abner S. Greene, The Pledge of Allegiance Problem, 64 FORDHAM L. REV. 451, 483 (1995) (— Compelling people through threat of legal sanction to say words that they don’t want to say is as much an affront to dignity as many other laws the Court has invalidated.).
33 Id.
children is involved, freedom of belief can lose its customary meaning. Somehow, Betty’s fear of—everlasting destruction—showed that her evangelical desires were the product of free choice. The Court did not pause to consider whether Betty’s religious training had left her unable to choose—freely to choose, or freely to reject—the religious commitments of her guardian. Theologically, we might wonder how free a young child can be to make religious choices when the consequences of choosing wrongly are so stark. More relevant to the Court’s work, we should wonder what it means for the psychological welfare of a child to believe that her own conduct—or, in Betty’s view, misconduct—could bring about her everlasting destruction.

The Supreme Court did not stop to think about such things. It held against Mrs. Prince on the dubious basis that street preaching was dangerous work for children. But the Court chose to overlook a real risk of harm to Betty: the threat posed by a religious regime that makes genuine choice and real faith difficult, if not impossible. Or perhaps it should be said not that the Court ignored this harm, but that it could not see it. The Court could not see the possibility that Betty’s obedience was the product not of choice, but of the loss of choice, of childlike surrender to a familial authoritarianism. The danger of emotional maltreatment was hidden in plain sight, but the Court could not challenge the cultural norm that parents have the right to form the religious beliefs of their children. The Court was incapable of asking, What does Armageddon have to do with Betty Simmons?

II. A TALE OF TWO LIBERTIES

Sarah Prince rested her case on two liberties: the right of religious freedom (as guaranteed by the Free Exercise Clause of the First Amendment) and the right to parent (under the Due Process Clause of the Fourteenth Amendment). This combination of constitutional claims, as the Court observed, was an especially tough bulwark against state regulation: —The parent’s conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. From Mrs. Prince’s point of view, the state of Massachusetts had struck a blow at the parent’s right of religious mentorship. It was abundantly clear to Mrs. Prince that the state did not have the authority to interfere with this most sacred of religious duties and most natural of rights. The family was —the backbone of all orderly governments, she argued; it was the source of a child’s moral and social values.

35 Id. at 165.
36 Brief for Appellant, supra note 23, at 16.
The family preceded and transcended the authority of the state. —The family and home are institutions in their own right[,] Mrs. Prince argued. They do not depend upon government for their creation. Long before organized government was established these institutions prevailed to secure the perpetuation of humanity. The role of the democratic state, accordingly, is —to protect and conserve the parental authority over children . . . regardless of how misguided others may think that appellant [i.e., Mrs. Prince] is in the spiritual education of the child and the practice of preaching according to the dictates of her conscience. Mrs. Prince could not follow the dictates of her conscience if she allowed Betty to stray from the true path. Really, then, for Mrs. Prince, there were not two liberties at stake; rather, the right of religious freedom and the right to parent were inseparably wound together. The state could not strike at one without damaging the other.

Mrs. Prince would lose this battle, but the struggle to secure religious parenting rights, though a prolonged one, would be largely successful, and that success would be due in no small part to the idea that religious parenting joins two indefeasible rights in indissoluble union. Today, religious parenting rights enjoy a special constitutional protection from state regulation. State action that burdens religious parenting is subject to heightened judicial scrutiny (the kind of scrutiny that Mrs. Prince argued for), subject, that is, to the —strict scrutiny that is strict in theory but most often fatal in fact. This is a degree of protection that neither the right of religious freedom nor the right to parent enjoys by itself.

Strict scrutiny is usually reserved for state action that impinges upon an individual’s fundamental rights (or discriminates against a group on impermissible grounds). Most laws receive a far more deferential review. Under —rational basis review, courts presume the constitutionality of legislation. The party trying to overcome this presumption must show (1) that the law serves no legitimate purpose, or (2) that the means employed by the law has no rational relation to the law’s stated goal. Under a strict scrutiny standard, the court will presume that a law is unconstitutional. To overcome that presumption, the state must show (1) that the law serves a compelling purpose, and (2) that the means employed by the law are as narrowly tailored as possible to achieve the law’s stated goal. Because the hurdle of strict scrutiny is so difficult to clear, the level of review employed by the court can easily determine the outcome of a case.

Separately, neither the right of religious freedom nor the right to parent would trigger strict scrutiny. The Supreme Court has said, in Employment Division, Department of Human Resources of

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37 Id. at 17.
38 Id.
39 Id. at 18, 40.
41 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 720 (3d ed. 2009).
42 Id.
43 Id. (citing Pennell v. City of San Jose, 485 U.S. 1, 14 (1988); U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, 175, 177 (1980); and Allied Stores of Ohio v. Bowers, 358 U.S. 522, 527 (1959)).
44 Id. at 719.
Oregon v. Smith, that state action restricting religious practice is constitutionally permissible unless it directly targets religious practice or discriminates against religious groups. Nor do parents have a fundamental right to direct the upbringing of their children. The Supreme Court has used loose language about the fundamental right to parent, and this language has led to confusion among lower courts, but, as Justice Scalia has correctly observed, there is little support for the notion that the right to parent is a — substantive constitutional right, let alone a fundamental one. Combined, however, these rights form a constitutional firewall that shields parents from state interference in the religious upbringing of their children. For the Supreme Court also has said, in Wisconsin v. Yoder, that when the interests of parenthood are combined with a free exercise claim, — more than merely a reasonable relation to some purpose within the competency of the State — is required to sustain the validity of the State’s requirement under the First Amendment. In these hybrid cases, strict scrutiny is warranted despite the fact that state action does not target religion or impinge upon a fundamental right.

The — hybrid rights doctrine survived Smith, though its scope was less than precisely defined. The Court did make clear that the doctrine was an exception to general constitutional principles. But in the universe of religious parenting cases, the exception easily swallows the rule. Because such cases are hybrid by definition, strict scrutiny becomes the norm, and the result is the creation of a separate sphere of the law where the government’s ability to enforce the law is subject to an individual’s religious beliefs. In this sense, the Yoder Court did more than rescue Amish parents from state educational requirements. It created a private right to ignore generally applicable

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46 494 U.S. 872, 879 (1990) (— [F]ree exercise does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

47 Troxel v. Granville, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting) (— Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children — two of them from an era rich in substantive due process holdings that have since been repudiated. ) (citing Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925); and Meyer v. Nebraska, 262 U.S. 390 (1923)); see also, e.g., Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 461 (2d Cir. 1996) (— The Supreme Court, however, has never expressly indicated whether this “parental right,” when properly invoked against a state regulation, is fundamental, dispensing strict scrutiny, or earns only a rational basis review. Our reading of the appropriate caselaw convinces us that rational basis review is appropriate. ); Brown v. Hot, Sexy and Safer Prod., 68 F.3d 525, 533 (1st Cir. 1995) (— [T]he Supreme Court has yet to decide whether the right to direct the upbringing and education of one’s children is among those fundamental rights whose infringement merits heightened scrutiny. ); Baker v. Owen, 395 F. Supp. 294, 299 (M.D.N.C. 1975) (— We reject Mrs. Baker’s suggestion that this right is fundamental, and that the state can punish her child corporally only if it shows a compelling interest that outweighs her parental right. We do not read Meyer and Pierce to enshrine parental rights so high in the hierarchy of constitutional values. In each case the parental right prevailed not because the Court termed it fundamental and the state’s interest uncompelling, but because the Court considered the state’s action to be arbitrary, without reasonable relation to an end legitimately within its power. Nor has the Court subsequently spoken of parental rights as fundamental; on the contrary, its references to them lend support to the view that they are not. ) (citations omitted), judgment aff’d 423 U.S. 907 (1975) (per curiam). Broad claims are made for Meyer and Pierce, see, e.g., Richard W. Garnett, Taking Pierce Seriously: The Family, Religious Education, and Harm to Children, 76 NOTRE DAME L. REV. 109, 143 (2000) (describing Pierce as a — ringing endorsement of religious freedom and of limited government dominion over citizens ), but these seminal due process cases lend no support to the contention that the right to parent is fundamental.


49 See Smith, 494 U.S. at 881 (suggesting a history of strict scrutiny review for — Free Exercise Clause [claims] in conjunction with other constitutional protections and for free speech cases also involving freedom of religion, but determining that Smith — does not present such a hybrid situation)

50 See Smith, 494 U.S. at 881–82.

51 See id. at 888 (applying strict scrutiny — across the board would be — courting anarchy ).

52 See id. at 886 (compelling interest test would produce — a private right to ignore generally applicable laws ).
law. Though the Court appeared to step back from the implications of the decision by limiting its holding to the unique facts of the case, the spirit of strict scrutiny, once summoned, would not be easily cabined. *Yoder* became the precedential port from which a wealth of religious parenting cases would be launched, thus requiring courts to apply a rationale that contradicted constitutional tradition and common sense.

Where a hybrid claim is involved, the power of the parent may be limited by the state only—if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. This harm standard protects religious parenting rights at too great a cost: It sacrifices the best interests of the child in order to bolster parental authority. It is a cost that children should not be asked to bear. The Supreme Court famously said as much to Sarah Prince:

> While parents may be free to become martyrs themselves, —it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

### III. A GUARANTEE OF FREE CHOICE

In *West Virginia State Board of Education v. Barnette*, Justice Jackson wrote that public education is not free if its faithful to the ideal of secular instruction and political neutrality will not be partisan or enemy of any class, creed, party, or faction. Really, though, Jackson was not advocating ideological neutrality. His words are a call to *individual freedom of mind* in preference to officially disciplined uniformity. Education is to nourish the —free mind of the child. For the happily pre-postmodern Jackson, the freedom to think for oneself is not just another form of official discipline. It is the liberal and liberating ideology at the heart of our constitutional order.

The Supreme Court has consistently put its faith in intellectual independence. Freedom of mind is supported by specific constitutional guarantees, such as the freedoms of speech and religion; and, taken together, these liberties guarantee what constitutional law scholar Laurence Tribe has

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53 See *Yoder*, 406 U.S. at 229, 233 (―[T]he power of the state, as *parens patriae*, to extend the benefit of secondary education to children regardless of the wishes of their parents cannot be sustained against a —free exercise claim of the nature revealed by this record.‖) (emphasis added); *id.* at 236 (observing that the Court’s judgment would apply to —few other religious groups or sects).  
54 See *Smith*, 494 U.S at 885 (―To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs . . . contradicts both constitutional tradition and common sense.‖).  
57 *319 U.S. 624, 637 (1943); cf. *Everson v. Bd. of Educ. of Ewing Twp.**, 330 U.S. 1, 23–24 (1947) (Jackson, J., dissenting) (The public school —is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion.‖).  
58 *Barnette*, 319 U.S at 637 (emphasis added).
described as — a capacious realm of individual conscience . . . a sphere of intellect and spirit’ constitutionally secure from the machinations and manipulations of government. Or, as Justice Stewart more simply said, — The Constitution guarantees . . . a society of free choice.

The Prince Court set these principles to work. While — the custody, care and nurture of the child reside first in the parents, and while parents enjoy the right — to give [children] religious training and to encourage them in the practice of religious belief, neither rights of religion nor rights of parenthood are beyond limitation. To guard the general interest in youth’s well-being, the Court maintained, the state may limit parental authority in things affecting the child’s upbringing, including matters of conscience and religious conviction. The state’s wide range of power is directed to ensure the welfare of both the child and society. Indeed, properly understood, the child’s interest and the general interest are one and the same. For its continuance, the Court explained, — [a] democratic society rests . . . upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.

But what does that imply? What is — healthy, well-rounded growth? What does — full maturity mean? The Court’s answer was decidedly non-authoritarian: — It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens. A democratic society rests on a model of maturation that takes as its norm the individual’s full capacity to make free and independent choices. This capacity, as the Supreme Court has affirmed on many occasions, is both the presupposition and the product of our First Amendment freedoms. The guarantee of a society of free choice — presupposes the capacity of its members to choose.

It follows, then, that it is a primary duty of parents to nourish this capacity. It does not follow that parents need abandon the role of religious mentor and guide (not that it would be possible: non-mentoring would itself be a form of mentoring); it would hardly be practical, or helpful to children,
to adopt some ideologically neutral model of parenting. In a democracy, political theorist William Galston writes, —parents are entitled to introduce their children to what they regard as vital sources of meaning and value, and to hope that their children will come to share this orientation. For many, the most vital source of meaning and value is their religious faith, and it should go without saying that parents may introduce their children to what they regard as spiritually true, and to hope that their children will come to share a similar religious orientation.

But this simple proposition raises surprisingly tough questions about the parent-child relationship. Parents may introduce their children to vital sources of meaning, but what limits, if any, can be placed on this introduction? Parents may hope that their children will come to share their values, but how far can parents go to make this hope a reality? If, as it seems, Galston writes with some caution, there is good reason for it, because, as he also observes, children have freestanding intellectual and moral claims of their own, claims that —imply enforceable rights of exit from the boundaries of community defined by their parents. If not the mere creature of the state, the child is more than a placid reflection of the parental image. In a liberal democracy, the care of children resides first in the parents, but not first and last.

If children have a right to leave behind the boundaries set by their parents, then they must be able to exercise that right freely. They must not be disempowered from making their own intellectual and moral claims in the first place. What must be protected is the child’s future right to make

69 Cf. Stanley Ingber, Socialization, Indoctrination, or the “Pall of Orthodoxy”: Value Training in the Public Schools, 1987 U. ILL. L. REV. 15, 16 (1987) (―The image of an individual unimpeded by any preconditioning . . . is a fiction. People acquire their values because of innumerable influences upon their lives: the influence of parents; of the family church; of the schools they were required to attend; of their relatives, friends, and neighbors; of writers; and of many others. By thus being indoctrinated into society the individual obtains the frame of reference necessary for actively making decisions, rather than passively receiving impulses.‖). The same reasoning applies to the state as educator. Cf. Richard Arneson & Ian Shapiro, Democratic Autonomy and Religious Freedom: A Critique of Wisconsin v. Yoder, in DEMOCRACY’S PLACE 137, 160 (1996) (―Even if it were somehow possible for an educational regime to abstain from inculcating values in the child, this would not be sensible; for the vacuum left by abstaining educators would be filled by other causal influences . . . . At any rate, the phenomenon of choice of values by an individual, which we associate with attainment of autonomy, always presupposes a context in which some standards and values are at least provisionally fixed and guide choice.‖).
71 Id. at 104 (―At a minimum, the children’s freestanding religious claims imply enforceable rights of exit from the boundaries of community defined by their parents. I would add that the exit rights must be more than formal. Communities cannot rightly act in ways that disempower individuals—a intellectually, emotionally, or practically—from living successfully outside their bounds.‖). On exit rights within intimate relationships, see also SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 136–38 (1989).
72 See Pierce v. Soc’y of Sisters, 268 U.S. 510, 535 (1925) (―The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.‖); cf. Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (―In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.‖).
73 The idea that the child’s capacity to form dissenting beliefs should be protected from ideological coercion by state actors finds broad support from First Amendment theorists. On the First Amendment and the protection of belief formation as well as expression, see, for example, Ingber, supra note 68, at 16 (―To allow officials to inculcate values is to admit that free speech protects expression only so long as the speaker has been conditioned to say what those in authority accept. In a society of such preconditioned speakers, freedom of speech is virtually irrelevant.‖); Nadine Strossen, “Secular Humanism” and “Scientific Creationism”: Proposed Standards for Reviewing Curricular Decisions Affecting Students’ Religious Freedom, 47 OHIO ST. L.J. 333, 370 (1986) (―A second reason why the minds of public
those claims; what must be secured is the child’s present opportunity to develop the capacity to make those claims. Ideally, it would be part of the parent’s task to safeguard the child’s right to moral autonomy; but where the transmission of religious belief is involved, it is acceptable for parents to enforce spiritual conformity from their children, demanding (often in a loving and compassionate voice) uncritical obedience toward religious authority. It is only natural for parents to want a child to embrace their values, to believe their beliefs, and the legal system, as it ought, leaves parents free to transmit their religious values; but parents abuse that freedom when they give children no real opportunity to embrace other values and to believe other beliefs.

Young children lack the capacity to assert, or to choose not to assert, a personal religious identity. Those who mentor a child, therefore, assume a fiduciary duty to protect his or her prospective religious autonomy. This caretaking is no easy task. Parents may find it troublesome enough when a child does not live by their political or cultural values. But the questioning or outright rejection of parental religious values is likely to occasion a more profound disappointment. Religious principles are dictates that run deeper than politics and culture. Nonetheless, religious freedom for the parent ought not to come at the cost of spiritual servitude for the child, and courts ought not to treat school students should be especially shielded from governmental influence is that, due to their youth, the students are relatively impressionable and susceptible. Consequently, to maintain the integrity of the process by which public school students form their own beliefs, it is especially important to insulate them from any potentially coercive governmental influence. Society has a significant stake in preserving the free minds of its youth, because it depends upon them to defend and maintain this country’s democratic, civil libertarian institutions and traditions. (footnotes omitted); Tyll van Geel, The Search for Constitutional Limits on Governmental Authority to Inculcate Youth, 62 TEX. L. REV. 197, 261 (1983) (―[I]t would make a mockery of the protection of an adult’s freedom of belief if the government could pre-condition his beliefs by indoctrinating him during childhood.‖); Arons & Lawrence III, supra note 29, at 312 (―Free expression makes unfettered formulation of beliefs and opinions possible. In turn, free formulation of beliefs and opinions is a necessary precursor to freedom of expression . . . . The more the government regulates formation of beliefs so as to interfere with personal consciousness, the fewer people can conceive dissenting ideas or perceive contradictions between self-interest and government-sustained ideological orthodoxy. If freedom of expression protected only communication of ideas, totalitarianism and freedom of expression could be characteristics of the same society.‖).


75 Cf. Ira C. Lupu, Home Education, Religious Liberty, and the Separation of Powers, 67 B.U. L. REV. 971, 976–77 (1987) (―The legal tradition of authorizing parents to speak for their offspring need not become a device by which children are made to disappear. Children, not fully competent to make decisions because of insufficient awareness of the decisions’ long-term consequences, are normally subject to parental control. Parents are presumptively trustworthy decisionmakers for their children because parents generally feel affection for their young and are knowledgeable about their interests. Custodial power of this sort is never absolute, however, for it is based on a theory of fiduciary obligation. If the custodian mistreats his ward, public or private remedies designed to protect the child may be available.‖) (footnotes omitted). On the same principle, see JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN’S RIGHTS 62–101 (1998) (arguing that the law should grant parents a legal privilege to care for children only in ways consistent with their best temporal interests); Arneson & Shapiro, supra note 68, at 138 (―[T]he relationship between parents and children is best thought of as one of trusteeship.‖); Barbara Bennett Woodhouse, Out of Children’s Needs, Children’s Rights: The Child’s Voice in Defining the Family, 5 BYU J. PUB. L. 321 (1994) (urging reform of family rights discourse by making children’s needs the basis of parental authority); Barbara Bennett Woodhouse, Hatching the Egg: A Child-Centered Perspective on Parents’ Rights, 14 CARDOZO L. REV. 1747 (1993) (considering how a parental rights orientation undermines the nurturing values necessary to children’s welfare). See generally Jeffrey Shulman, The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?, 89 NEB. L. REV. 290 (2010); Elizabeth S. Scott & Robert E. Scott, Parents as Fiduciaries, 81 VA. L. REV. 2401 (1995). But see THOMAS H. MURRAY, THE WORTH OF A CHILD 61 (1996) (―[P]arenthood as stewardship still has its shortcomings as a model for parent-child relations. As a description of a relationship, it connotes disinterestedness, selflessness, a sort of benign but emotionally distant concern for the welfare of the child. This fits poorly with the intensity, love, and intimacy we prize between parents and children.‖).
parental rights as though they could be divorced from parental duties. Like adults, children must be free to seek, as well as to find, a spiritual home.

Compelled religious belief is an affront to the child’s dignity and worth. When children are forced to believe, they are required, by the dictates of someone else’s conscience, to forego the intellectual openness that —plays a vital role in the process of becoming an autonomous individual. Such disrespect for the child can only beget habits of hypocrisy and meanness. Yet we permit parents to impose a presumed religious identity upon a child without the child’s consent or understanding. We permit religious parents to raise and educate their children in ideologically segregated enclaves. We permit parents to inculcate religious beliefs contrary to their children’s declared preferences. Under the mantle of rights —parental rights, rights of religious freedom, or the especially potent comp-

76 Cf. James G. Dwyer, Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights, 82 CALIF. L. REV. 1371, 1389 (1994) (noting that court decisions subsequent to Yoder —have continued to advance an interpretation of free exercise rights that effectively treats children as non-consenting instruments or means to the achievement of other persons’ ends, rather than as persons in their own right, with interests of their own that are deserving of equal respect ). For a parentalist point of view, see, for example, Karen Gushta, Should Big Brother Shape Your Child’s Soul?, STOP THE WAR ON CHILDREN (April 2011, 7:32 AM), http://stopthewaronchildren.wordpress.com/2011/04/08/should-big-brother-shape-your-child%28%E2%80%99s-soul/ (—[T]here are those who want to take away the right of custodial parents to determine what influences and ideas their children should be exposed to. This is the heart of education, which by definition is intended, directed learning. The issue at stake is not „who owns the soul of the child,’ but who has the right to shape it. ).

77 Cf. Jennifer Nedelsky, Reconceiving Autonomy: Sources, Thoughts and Possibilities, 1 YALE J. L. & Feminism 7, 10–11 (1989): To become autonomous is to come to be able to find and live in accordance with one’s own law.

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I speak of —becoming autonomous because I think it is not a quality one can simply posit about human beings. We must develop and sustain the capacity for finding our own law, and the task is to understand what social forms, relationships, and personal practices foster that capacity. I use the word —find to suggest that we do not make or even exactly choose our own law. The idea of —finding one’s law is true to the belief that even what is truly one’s own law is shaped by the society in which one lives and the relationships that are a part of one’s life. —Finding also permits an openness to the idea that one’s own law is revealed by spiritual sources, that our capacity to find a law within us comes from our spiritual nature. From both perspectives, the law is one’s own in the deepest sense, but not made by the individual; the individual develops it, but in connection with others; it is not chosen, but recognized. —One’s own law connotes values, limits, order, even commands just as the more conventional use of the term does. But these values and demands come from within each person rather than being imposed from without. The idea that there are commands that one recognizes as one’s own, requirements that constrain one’s life, but come from the meaning or purpose of that life, captures the basic connection between law and freedom—which is perhaps the essence of the concept of autonomy. The necessary social dimension of the vision I am sketching comes from the insistence, first, that the capacity to find one’s own law can develop only in the context of relations with others (both intimate and more broadly social) that nurture this capacity, and second, that the —content of one’s own law is comprehensible only with reference to shared social norms, values, and concepts.

(footnotes omitted): WILLIAM J. SHEARER, THE MANAGEMENT AND TRAINING OF CHILDREN 269 (1904) (—We must not forget that the great object of training is not merely to make children obedient. It is not to make them behave. It is not to keep them quiet. It is not to make them admired by others . . . . The great purpose of training is to make out of each what the Almighty evidently intended him to be. What He intended is not always an easy matter to determine. The only way it can be determined is by carefully studying the peculiarities of each mind, heart and body with which every child is gifted. ).

78 John H. Garvey, Children and the First Amendment, 57 TEX. L. REV. 321, 346–49 (1979). Garvey identifies four ways in which free speech performs an instrumental role in the child’s growth toward autonomy: (1) —by permitting the individual to experience the satisfaction that results from self-expression ; (2) by —offering occasions for practice in skills of rational discourse ; (3) by —showing the young the potential of speech to accomplish good or bad results ; and (4) by —allowing receipt of information important for the child’s development. Id.


80 See, e.g., Zumo v. Zumo, 574 A.2d 1130, 1149 (Pa. Super. Ct. 1990) (—Moreover, even if the children had expressed a personal religious identity it is not clear that the children would have had any constitutional right to resist, or to be protected from, attempts by either parent to exercise their constitutional rights to inculcate religious beliefs in them contrary to their declared preferences prior to their legal emancipation. ).
bination of the two—we so circumscribe the child’s spiritual autonomy that, for many children, the freedom to choose or not to choose religious belief comes to exist more in principle than in fact.81

In his “parentalist manifesto,” Stephen Gilles allows that the state has a duty to protect children from all forms of educational coercion.

The same goal—ensuring the liberty of individuals—requires the state to protect its citizens . . . [N]o one in a liberal society may coerce another’s choice of values or beliefs unless somehow privileged to do so. The baseline for defining coercive behavior (or sufficient justifications) may shift as one moves from state action to private conduct, but the core principle still holds: in a liberal society, all authority is limited, and all coercion requires reasoned justification.82

It might be argued that parental religious mentoring is less likely to be injurious than state compulsion, but why should the baseline for defining coercive behavior shift as one moves from state action to private conduct? With equal force, it might be argued that coercion is likely to be more effective, and the injury it inflicts deeper, when the child is compelled to believe by those closest to him. Children are no less captive to private educators—all the more so when cut off from ideas contrary to those of home or community; and religious mentorship presents a specially effective form of force, bringing with it, as it does, the imprimatur of divine authority and the specter of divine disapproval.

The state that protects the freedom of adults to choose a religious (or non-religious) path must also ensure that the freedom of children to choose a religious (or non-religious) path will not be taken from them. The dictates of conscience are as compelling to the child (and future adult) as they are for the parent. Indeed, the commitment to individual choice may be the best guarantee of a society with rich and robust religious traditions. Children are natural religious seekers. As young adults, some will choose new spiritual paths, and some will choose to abandon religious ways altogether; but many will find their faith in traditional places, arriving where they started. For religious freedom to flourish, however, these choices must be genuine ones, based on knowledge and experience gathered, as it were, —out of a multitude of tongues, religious and secular.83 In a liberal democracy, the binding power of moral commandments depends on individual acceptance.84

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81 Cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (—Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. ).
83 Keyishian v. Bd. of Regents, 385 U.S. 589, 683 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y 1943)); see also Associated Press, 52 F. Supp. at 372 (—[N]either exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all. ). But see Stanley Fish, Children and the First Amendment, 29 CONN. L. REV. 883, 884 (1997) (—[W]ithout „authoritative selection,’ education, whether public or private, would be impossible. ).
84 See GALSTON, supra note 69, at 28 (maintaining that it is a matter of great importance for Jews —to live in a society that permits them to live in accordance with their understanding of an identity that is given rather than chosen, and that typically is structured by commandments whose binding power does not depend on individual acceptance ); cf. MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT: AMERICA
Who Owns the Soul of the Child?: An Essay on Religious Parenting Rights and the Enfranchisement of the Child

IV. THE MORAL PERSONHOOD OF THE CHILD

For the *Yoder* majority, mandatory secondary schooling was objectionable because it would take Amish adolescents —away from their community, physically and emotionally, during the crucial and formative adolescent period of life. In what sense, then, did the Court consider this period crucial and formative? It is during this period, the Court says, that the children —*must* acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. During this period, children —*must* learn to enjoy physical labor. During this period, —the Amish child *must* also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. For the Amish child, the adolescent period is crucial and formative not in the sense that the child is forming his or her identity; rather, the child labors under a number of —musts, all of which are crucial if the child is to conform successfully to communal religious traditions. The *Yoder* decision turns upside-down the nature of adolescence, ignoring what is really important about this stage of development—the increasing independence from adult guidance, the defining of a self by reference to new ideas and by association with unlike peers, the preparation for intelligent

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85 *Yoder*, 406 U.S. at 211.
86 *Id.* (emphasis added).
87 *Id.* (emphasis added).
88 *Id.* (emphasis added).
89 *Cf.* Arneson & Shapiro, supra note 68, at 172 (—[T]he Amish defendants themselves seemed to have a lively appreciation of the fact that early adolescence is a crucial period for defining one’s identity and one’s relation to the values taught as authoritative in one’s childhood. If the development of children’s minds from ages fourteen to sixteen is not consequential, what is the fuss about? ).
participation in the democratic process; even the adolescent’s own quest for spiritual meaning—and consigns the young adult to a life of —idiosyncratic separateness. (It was no mean feat of legal analysis for the Court to find that the —limitations accompanying the Amish way of life are —self-imposed.)

In general, the Supreme Court sees the liberty interests of the parent and child as —inextricably linked. The child is not, however, without independent constitutional standing to challenge deprivations of educational opportunity. Though the Supreme Court has seen the need to act —with sensitivity and flexibility to the special needs of parents and children, it is undisputed that —whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone. And with respect to many due process claims, the Court has concluded —that the child’s right is virtually coextensive with that of an adult. Even against parents, the child is not beyond the protection of the Constitution. Indeed, the due process protections from which the right to parent arises also work on behalf of the child’s independent educational interests. Thus, the Court has read Meyer v. Nebraska and Pierce v. Society of Sisters as protecting children against state efforts to enforce intellectual homogeneity. It is the child’s due process rights that, in part, explain why —state-operated schools may not be enclaves of totalitarianism.

Students in school as well as out of school are —persons under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

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91 The idea that the classroom is the seedbed of democratic virtues is one of our most enduring national themes. See generally, e.g., EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY (1997); LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE COLONIAL EXPERIENCE 1607–1783 415–71 (1970); AMY GUTMANN, DEMOCRATIC EDUCATION (1987); STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY (2000).


93 Yoder, 406 U.S. at 226.

94 Id. at 225.


97 Bellotti v. Baird, 443 U.S. 622, 634 (1979); cf. May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) (—Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State’s duty towards children. ).

98 In re Gault, 387 U.S. 1, 13 (1967).

99 Bellotti, 443 U.S. at 634.


102 Id. at 511.

103 Id. at 511.
The law of parent-child relations accepts as a starting point the longstanding legal presumptions (1) that —parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions, and (2) that —natural bonds of affection lead parents to act in the best interests of their children. The Court has had numerous opportunities to test the currency of these legal presumptions. In Parham v. J.R, the Court considered the constitutionality of mental health laws permitting parents to admit children to hospitals for treatment. On behalf of the children, it was argued that

the constitutional rights of the child are of such magnitude and the likelihood of parental abuse is so great that the parents’ traditional interests in and responsibility for the upbringing of their child must be subordinated at least to the extent of providing a formal adversary hearing prior to a voluntary commitment.

But the Court thought that this argument swept too broadly.

Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure. Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments . . . . We cannot assume that the result in Meyer v. Nebraska and Pierce v. Society of Sisters would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school. The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents’ authority to decide what is best for the child.

The Court rejected the —statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children . . . . Absent evidence that rebuts the traditional presumptions in favor of parental control, parents retain —a substantial, if not the dominant, role in the [commitment] decision. Still, the Court did not walk away from the interests of children, adding that —the child’s rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized.

105 Id. at 584.
106 Id. at 584.
107 Id. at 602.
108 Id. at 603–04 (citations omitted).
109 Id. at 603.
110 Id. at 604.
111 Id.
The Court walked a careful line between the interests of child and parent, and it noted that—experience and reality may rebut what the law accepts as a starting point...\textsuperscript{111}

Sometimes, experience and reality do rebut legal presumptions. The liberty interests of children and parents are not always compatible; there will be points of collision where the protection of children’s needs and rights has to come at the cost of parental authority. This is often the case, for instance, in the area of medical decision-making. The law generally pays homage to the medical choices that parents make for their children, but in some circumstances minors can get care without their parents’ consent, and, in fact, without their parents’ knowledge.\textsuperscript{112} In many states, unemancipated minors are allowed by law to consent to treatment for substance abuse, for venereal disease (including testing for HIV and sexually transmitted diseases), and counseling for mental health problems, sexual abuse, and family planning.\textsuperscript{113} Minors can get birth control, including prescription contraceptives, without parental consent or notification; a pregnant minor may consent to prenatal care as well as labor and delivery services.\textsuperscript{114} Information about these medical services remains confidential.\textsuperscript{115} And where statutory protection is lacking, the mature minor doctrine may operate to shield the child’s medical decision-making rights from the religious beliefs of his or her parents.\textsuperscript{116}

It is true that there are practical concerns at work here. The worry is that parents will object to these services, thus discouraging adolescents from seeking treatment important to their health and to the welfare of society as a whole. So, to protect these interests, legislators have provided minors with what amounts to a parental bypass option.\textsuperscript{117} But to cast these decisions as medical, not ethical—itself a value-laden judgment—too easily dismisses the moral and religious concerns of parents. The truth is that the state has wrested control from parents over some of a young person’s most intimate and morally problematic personal decisions.

In fact, the Supreme Court has applied a mature minor doctrine to the most value-laden of medical decisions. The legal struggle to guarantee a woman’s right to terminate a pregnancy has put the Court squarely in the business of defining the allocation of moral authority between parent and child. In \textit{Planned Parenthood of Central Missouri v. Danforth}, the Court held (among other things) that the state could not justify legislation that required a minor to obtain the consent of a parent as a condition for abortion during the first trimester.\textsuperscript{118}

\textsuperscript{111} Id. at 602.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 418–19.
\textsuperscript{115} Id.; see also Parents United for Better Schools, Inc. v. Sch. Dist. of Phila. Bd. of Educ., 148 F.3d 260, 269–70 (3d Cir. 1998) (interpreting federal law to extend confidentiality to minors’ consent for reproductive services).
\textsuperscript{116} On the evolution of the mature minor doctrine, see, for example, Lawrence Schlam & Joseph P. Wood, \textit{Informed Consent to the Medical Treatment of Minors: Law and Practice}, 10 HEALTH MATRIX 141, 144–52 (2000).
\textsuperscript{117} Id.; see also Hartman, supra note 111, at 416–22.
\textsuperscript{118} 428 U.S. 52 (1976).
The Court made the customary nod toward *Meyer*, *Pierce*, and *Yoder*, but finally rejected chronological age as a constitutional yardstick by which to measure whether a minor can independently make the abortion decision: —Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.\textsuperscript{119}

On this doctrinal platform, the Court held that —the safeguarding of the family and of parental authority was not a state interest sufficiently significant to justify conditioning the minor’s access to abortion on parental consent.\textsuperscript{120} In *Bellotti v. Baird*, the Court struck down a law that required a minor seeking an abortion to either (1) obtain the consent of her parents, or (2) notify them of any proceedings by which the minor sought to obtain judicial consent for an abortion.\textsuperscript{121} The *Bellotti* Court did its best not to challenge the core presumptions governing the relations of parent and child. Typically, the Court made the point that there were several good reasons why the state may reasonably limit a minor’s freedom to make independently —important, affirmative choices with potentially serious consequences.\textsuperscript{122} In the context of abortion, however, none of these reasons was reason enough to require parental notification. The Court based its decision on the unique nature of the abortion decision.\textsuperscript{123} Unlike countless other decisions (like the decision to marry, for example), the abortion decision cannot be postponed; unlike few other situations, the consequences of denying a minor the right to make this decision would be —grave and indelible.\textsuperscript{124} Given what the Court described as the —profound moral and religious concerns associated with the abortion decision,\textsuperscript{125} it would be unrealistic to think that some parents would not make (all too emphatically) clear their objection to the minor’s decision.

\textit{[M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents’ efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.}\textsuperscript{126}

In this context, the Court seems to have accepted the —statist notion that governmental power should supersede parental authority in \textit{all} cases because \textit{some} parents abuse and neglect children . . . .\textsuperscript{127} The presumption that parents act in the best interests of their children has been reversed. Or, perhaps, the presumption is meaningless when there is no way to agree about where the child’s

\textsuperscript{119} Id. at 74.
\textsuperscript{120} Id. at 75; cf. *Carey v. Population Surv. Int*!, 431 U.S. 678, 719 (1977) (declaring that a state may not use police power to enforce its concept of public morality as it pertains to minors).
\textsuperscript{121} 443 U.S. 622, 625 (1979).
\textsuperscript{122} Id. at 635.
\textsuperscript{123} Id. at 442–44.
\textsuperscript{124} Id. at 642.
\textsuperscript{125} Id. at 640.
\textsuperscript{126} Id. at 647.
best interests lie. The unique nature of the abortion decision cuts both ways. The child may focus on
the fact that the decision cannot be postponed; the parent may focus on the fact that the decision
cannot be undone. That the consequences of the decision are grave and indelible would strike many
as more reason for parents to be involved. Regardless of one’s position on abortion, it is difficult not
to conclude that the Supreme Court’s abortion jurisprudence has changed the landscape of parent-
child relations. If minors can make a decision as profound as whether to terminate a pregnancy, why
should courts presume that parents possess what a child lacks in maturity, experience, and capacity
for judgment required for making life’s other difficult decisions?

In its position on the reproductive rights of minors, the Court is clearly attentive to the limits of
parental authority, but there is also at work a deeper concern about the personhood of the prospec-
tive mother. The abortion cases rest in part on the fundamental — moral fact that a person belongs
to himself and not to others nor to society as a whole. Of course, other — facts of human nature
work against atomistic theories of personhood and social relations, but surely Kenneth L. Karst is
correct enough when he asserts that — freedom of associational choice enhances the values of
intimate association to a degree that would not be attainable if choice were absent. As children
mature, they enter into a host of intimate associations, the value of which very much depends on
the child’s freedom of choice. We might even say that the child will have to choose whether or not
to identify with his or her parents and — to be committed to maintaining a caring intimacy with
them. But the decision to choose one’s parents, so to speak, is meaningful only if it is a free one,
only, that is, if the maturing child enjoys the freedom to choose not to make that association (or, at
least, not to make it an intimate one). As Karst writes, the full value of commitment can be meas-
ured — only when there is freedom to remain uncommitted .

. . . [C]oerced intimate associations are the most repugnant of all forms of compulsory associa-
tion. This is not just the case with intimate associations, however; it is (again, Karst) — equally
applicable to associations that are primarily ideological. It hardly needs to be added that coerced
religious association is repugnant in ways both intimate and ideological.

Frieda Yoder was fifteen years old when she testified that religious beliefs guided her decision to
discontinue school attendance. Lillian Gobitis was not yet a teenager when the court heard her

Fried, Correspondence, 6 PHIL. & PUB. AFF. 288–89 (1977).
130 Id. at 644.
131 Id. at 637–38.
132 Id. at 638; see also Alan B. Kalin, Comment, The Right of Ideological Nonassociation, 66 CALIF. L. REV. 767 (1978). And, we might add,
freedom of choice is equally applicable to associations that are primarily vocational. See Wisconsin v. Yoder, 406 U.S. 205, 239–40 (1972)
(White, J., concurring) — It is possible that most Amish children will wish to continue living the rural life of their parents, in which case
their training at home will adequately equip them for their future role. Others, however, may wish to become nuclear physicists, ballet
dancers, computer programmers, or historians, and for these occupations, formal training will be necessary. ); see also id. at 244–45
(Douglas, J., dissenting) — While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter
on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer.
objection to compulsory patriotic rituals. And Betty Simmons was only nine years old when she testified that street preaching was a religious duty. The courts should be no less reluctant to hear from children when they choose not to follow the religious preferences of their parents, when there are, as Justice Douglas put it, —potentially conflicting desires.

When parent and child agree, it will not always be easy to determine if the child is speaking freely. When parent and child disagree, it will not always be easy to determine whether the child is sufficiently mature to make decisions about religious identity. But these are matters with which courts are familiar enough. The reality is that children can be coerced by not being heard as surely as they can by being forced to utter what is not in their minds. If the child belongs to herself, she may not be made a means by which parents perpetuate their own moral mandates or preferences; she may not be held hostage to religious tradition. Before the full moral personhood of the child, the right to parent, even when joined to a claim of religious liberty, must give way.

William Galston, among others, describes parenting as a form of expressive liberty. By expressive liberty, he means —the absence of constraints imposed by some individuals or groups on oth-

136 id. (Douglas, J., dissenting) (—Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child’s rights to permit such an imposition without canvassing his views. ).
137 For instance: The slave-master may withhold education and the Bible; he may forbid religious instruction, and access to public worship. He may enforce upon the slave and his family a religious worship and a religious teaching which he disapproves. In all this, as completely as in secular matters, he is entirely subject to the will of the master, to whom he belongs. The claim of chattelhood extends to the soul as well as to the body, for the body cannot be otherwise held and controlled . . . . There is no other religious despotism on the face of the earth so absolute, so irresponsible, so soul-crushing as this.
WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS 235 (1853) (emphasis added). Compare the above regulation with, for example, Stephen L. Carter, Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later, 27 SETON HALL L. REV. 1194, 1200–05 (1997) (—A religion, then, is not a static thing, existing at a particular place and time. It is, or rather, it aspires to be at once elusive and evolutionary, existing in more than one time. A religion, in this view, is a story that a people (not a person) tells itself about its historical relationship to God. One reason our contemporary constitutional law tends to miss this point is that it tends to view religion as a matter of individual choice rather than as a community activity; but serious religions revolve around the group, not the individual . . . . A religion survives through tradition, and tradition is multigenerational. A religion that fails to extend itself over time is, in this vision, not a religion at all. It might be a set of moral beliefs or a collection of folk tales or a nifty theological idea or a list of interesting rules, but, if it does not exist in this timeless, evolutionary fashion, the one thing it is not is a religion. ); George W. Dent, Jr., Of God and Caesar: The Free Exercise Rights of Public School Students, 43 CASE W. RES. L. REV. 707, 738 (1993) (—The communitarian tradition is especially relevant to the religion clauses because the survival of religious communities is necessary to make the religious freedom of individuals ‘both possible and meaningful.’ The education of children is crucial to this survival. People are mortal, but humanity (we hope) is not. To survive, religious groups depend on raising their members’ children within the faith. Although government may not act affirmatively to preserve any particular religious group or religion generally, religious freedom permits, and to some extent requires, government to forbear from unnecessarily weakening religious communities. When public schools undermine a sect without a compelling need to do so, the state should offer reasonable accommodation to children of the sect. ).
138 GALSTON, supra note 69, at 101–02, 109 (—[T]he ability of parents to raise their children in a manner consistent with their deepest commitments is an essential element of expressive liberty. ); see also DAVID WILLIAM ARCHARD, CHILDREN, FAMILY AND THE STATE 96 (2003) (—Being a parent is extremely important to a person. Even if a child is not to be thought of as the property or even as an extension of the parent, the shared life of a parent and child involves an adult’s purposes and aims at the deepest level . . . . [P]arents have an interest in parenting—that is, in sharing a life with, and directing the development of, their child. It is not enough to discount the interests of a parent in a moral theory of parenthood. What must also merit full and proper consideration is the interest of someone in being a parent. ); Colin M. Macleod, Conceptions of Parental Autonomy, 25 POLITICS AND SOCIETY 117, 119 (1997) (—[T]hose who accept the responsibility of raising children frequently do so because the project of creating and raising a family is an important, indeed often fundamental, element of their own life plans. Viewed from this perspective, parents cannot be seen as mere guardians of their children’s interests. They are also people for whom creating a family is a project from which they may derive substantial value. They have an interest
Galston adds that — [n]ot all sets of practices will themselves rest on, or reflect a preference for, liberty as ordinarily understood . . . . Expressive liberty protects the ability of individuals and groups to live in ways that others would regard as unfree. For Galston, then, the expressive interests of parents — are not reducible to their fiduciary duty to promote their children’s interests. But does the expressive liberty of parents include the right to force children to live in unfree ways? Here, Galston agrees with Eamonn Callan’s critique of parenting that leads children to a life of ethical servility. — As a parent, Galston writes (quoting Callan), — I cannot rightly mold my child’s character in a way that effectively preempts serious thought at any future date about the alternatives to my judgment. The child, too, has an interest in expressive liberty, though a prospective one, — that parents cannot undermine.

No doubt, the expressive interests of parents can be pushed too far. The question is: How far is too far? No doubt, children, dependent as they are, rely on parental direction to establish a sense of self and place in the world. But a healthy respect for the proper boundaries of parental authority does not mean that children ought to be used as the vehicle of adult religious expression. We would all agree (wouldn’t we?) that the expressive interests of parents would not legitimate the ritual sacrifice of children. Galston appears to require parents to hurdle a much higher bar when in the family as a vehicle through which some of their own distinctive commitments and convictions can be realized and perpetuated.); Arneson & Shapiro, supra note 68, at 151 (— As the discharge of parental obligations allows wide scope for parental discretion, choosing and pursuing a child-rearing regimen is for many parents an important mode of self-expression and personal creativity.).

110 GALS TON, supra note 69, at 101.
111 Id. at 29.
112 Id. at 103; cf. CALLAN, supra note 90, at 144–45 (— We do not experience the rearing of a child merely as unilateral service on behalf of a separate human life; we experience it as the sharing of a life and a cardinal source of self-fulfillment. The child-centered strategy, when it purports to be the whole moral truth about parenthood, flies in the face of our ordinary understanding of what rearing a child signifies because it does not accommodate the task’s momentous expressive significance in parents’ lives. By the expressive significance of child-rearing I mean the way in which raising a child engages our deepest values and yearnings so that we are tempted to think of the child’s life as a virtual extension of our own . . . . No one would now deny that if a moral theory interprets the child’s role so as to make individual children no more than instruments of their parents’ good it would be open to damning moral objections. But parallel objections must be decisive against any theory that interprets the parent’s role in ways that make individual parents no more than instruments of their children’s good. (citations omitted)).

113 See WILLIAM GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 253 (1991) (objecting to conclusion that — the state must (or may) structure public education to foster skeptical reflection on ways of life inherited from parents or local communities ). But see Anne C. Dailey, Developing Citizens, 91 IOWA L. REV. 431, 484 (2006) (— A developmental approach [to caregiving] does rule out the possibility that a commitment to democratic citizenship is compatible with depriving children of the means by which to choose whether to accept or reject family beliefs or practices. The unexamined life—a life premised on faith rather than reason—is a perfectly acceptable choice for adult citizens, but foreclosing children from eventually making that choice for themselves is not compatible with democratic principles or the maintenance of a democratic constitutional polity. A developmental perspective sets some outer limits on the extent to which communities of faith may sustain themselves by depriving children of the opportunity for acquiring the skills of democratic citizenship. (footnote omitted)).

114 GALSTON, supra note 69, at 105 (quoting CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY152–54 (1997)).
115 Id.
116 Cf. Martha L. A. Fineman, Taking Children’s Rights Seriously, in CHILD, FAMILY, AND STATE 240 (Stephen Macedo & Iris Marion Young eds., 2003) (— The big question is not whether the state must recognize parents’ expressive interest in their children’s interest, but where we draw the line separating that expressive interest from the child’s interest in the diversity and independence-conferring potential of a secular and public education. ); Arneson & Shapiro, supra note 68, at 154 (stating that parents — cannot pretend to speak for the child while really regarding the child as an empty vessel for the parents’ own religious convictions ).

117 See GALSTON, supra note 69, at 102 (— No one would seriously argue that the expressive liberty of parents would legitimate the ritual
he proposes that —parents abuse their expressive liberty if . . . they deprive their children of the opportunity to exercise their own expressive liberty. But it turns out that the bar is not very high: Galston means that parents abuse their expressive liberty —if they turn their children into automatons. It would be abusive to seal off the outside world —so that children are not even aware of alternatives to the group’s way of life. Thus, for Galston, Yoder is a correct decision. It protects the expressive liberty of Amish parents without depriving Amish children of the opportunity to exercise their own expressive liberty. After all, he observes, —the Amish community is not a prison.

Of course, Galston knows that parents can undermine the expressive liberty of children without turning them into automatons. The narcissistic parent can create a regime of filial obedience so rigid that children cannot fairly consider the alternatives of which they are aware. Galston writes that —[t]he nonexercise of a justified claim becomes questionable only when the potential claimant is subject to intimidation or is deprived of the information and self-confidence required for independent judgment. But is not rejection by home and community always a form of intimidation? Is not schooling beyond the eighth grade a prerequisite for the information and self-confidence required for independent judgment? Galston notes that —[s]ubstantial numbers of Amish children decide to leave their religious community. But he fails to note that those who do decide to leave face the prospect of being shunned—that is, they exercise a justified claim of religious liberty (their free-standing exit right) only at the cost of forsaking the only life they know, at the cost of being abandoned by home and community. We ought to remind ourselves that the ritual sacrifice of children can take a variety of forms.

147 See id. at 105.
148 Id.
149 Id.
150 Id. at 106. But see Arneson & Shapiro, supra note 68, at 140–41 (—Although the Amish believe that the vow of baptism must be taken voluntarily by a mature person, they go to great lengths in designing their system of education and acculturation to ensure that Amish children will take the vow and join the church. ).
151 GALSTON, supra note 69, at 105.
152 Id. at 106. According to Donald Kraybill’s study of Amish culture, the Amish —retention rate is about eighty-six percent. See Donald B. Kraybill, Plotting Social Change Across Four Affiliations, in THE AMISH STRUGGLE WITH MODERNITY 73 (Donald B. Kraybill & Marc A Olshan eds., 1994); cf. Macleod, supra note 137, at 136 (—[A]lthough entrance into the Amish culture by an adolescent is officially a matter of voluntary choice, it is difficult to see such a choice as the expression of genuine autonomy. After all, the ordinary Amish adolescent can hardly be said to have an informed opinion about other possible life choices and for most of her life has, in effect, been subjected to the will of her parents and community. ). Oddly, Yoder was based on the premise that secondary schooling was not needed because the children were being prepared —for life in the separated agrarian community that is the keystone of the Amish faith. Wisconsin v. Yoder, 406 U.S. 205, 222 (1972).
V. EDUCATION FOR AN OPEN RELIGIOUS FUTURE

Few disputes generate the degree of heat or the depth of hostility that accompany religious controversy. When that controversy touches the lives of our children, it is often a struggle to find room for compromise; it takes nothing less than a leap of faith to see compromise as anything less than a violation of one’s conscience. The religious destiny of our children matters so deeply, so personally—it matters so much—that we fight with . . . well, with religious fervor. In our homes, schools, and communities, and, of course, in our courts, we fight to control our children’s religious upbringing as though we are (and many truly believe they are) fighting for the soul of the child. Sadly, if predictably, it is children who suffer the fallout of uncompromising religious conviction.

Children are poorly served by a legal regime that too readily In this regard, courts should look skeptically at any educational program, whether imposed by the parent or by the state, that restricts the spectrum of knowledge available to the child. To see that free choice is not strangled at its source, the state may not sponsor particular religious beliefs, but that is not enough; it must protect its children from being forced to adopt religious beliefs; and this obligation, as educational theorist Harry Brighouse has pointed out, —cuts against the differential regulation of public and private schools with respect to religious instruction. The state must protect all its children, not just those in the public school system.

It is the state’s duty to ensure that all schools, public and private, inculcate habits of critical reasoning and reflection, a way of thinking that implies a tolerance of and respect for other points of views. To pursue this goal, the state need not make public schooling compulsory. (Unless

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154 Harry Brighouse, School Vouchers, Separation of Church and State, and Personal Autonomy, in MORAL AND POLITICAL EDUCATION 247 (Stephen Macedo & Yael Tamir eds., 2002).

155 Pierce v. Soc’y of Sisters, 268 U.S. 510, 534 (1925); cf. Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 245–46 (1968) (—Since Pierce, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State’s interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. ); Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 18 (1947) (—This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. ).

156 See, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (—These fundamental values of habits and manners of civility essential to a democratic society must, of course, include tolerance of divergent political and religious views . . . . ); Ambach v. Norwick, 441 U.S. 68, 77 (1979) (—These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. ).

157 But see Fineman, supra note 144, at 241 (—Perhaps the most appropriate suggestion for our current educational dilemma is that public education should be mandatory and universal. ).
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Pierce is overruled, it could not.) But it must see that all children are provided an education that is, in the fullest sense, public—a schooling that gives children the tools they will need to think for themselves by making public, as it were, a common intellectual and cultural capital; a schooling that takes seriously the idea that both autonomy and tolerance require children to know other sources of meaning and value than those they bring from home. This effort may well divide child from parent. Indeed, we should be entirely forthright and unapologetic about this: The inculcation of such habits is more likely than not to divide child from parent, not because socialist educators want to—submerge our children, but because learning to think for oneself is what children do; it is one facet of the overall movement toward separation and individuation that is—growing up, perhaps the most natural and vital part of healthy maturation. Likewise, we should be entirely candid about the fact that the inculcation of such intellectual habits will be more compatible with the beliefs of some religious groups than others.

The state as educator, then, is no ideologically neutral actor. The philosophical foundations supporting a truly public education are the liberal biases of our nation’s intellectual forbearers, biases in favor of a non-authoritarian approach to truth, of free argument and debate—what Thomas Jefferson called truth’s—natural weapons—and of a healthy sense of human fallibility. Unless children are to live under—a perpetual childhood of prescription, they must be exposed to the dust and heat of the race—intellectually, morally, spiritually.

Whether one considers the formation of moral commitments a matter of choice or duty, of self-directedness or cultural embeddedness, the child must not be denied the type of education that will allow him, as an adult, to choose whether or not (and in what way, and to what degree) to honor those commitments. A public education is the engine by which children find a place (or places) on

159 Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (―In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.‖).

160 Cf. Stephen Macedo, The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality, 69 FORDHAM L. REV. 1573, 1593 (2001) (―The patterns of social life that support liberal democratic forms of civil flourishing embody definite rankings of competing human goods, which will be associated with some versions of religious truth and not others. In this sense, the project of promoting a healthy liberal democratic civil society is inevitably a deeply judgmental and non-neutral project.‖)

161 See, e.g., Stanley Ingber, Comment, Religious Children and the Inevitable Compulsion of Public Schools, 43 CASE W. RES. L. REV. 773, 778–79 (1993) (―A value-free curriculum is clearly impossible . . . . [S]chools simply cannot attain value-neutral or balanced education. With only limited resources and time, they cannot possibly provide curricula that encompass the world’s enormous mass of information and perspectives. Furthermore, subtle characteristics such as style and emphasis may undermine any substantive success in achieving balanced presentations. Even if these practical difficulties could be overcome, an insurmountable conceptual problem remains: Value neutrality itself has a value bias favoring the liberal philosophy embodied by the scientific method of inquiry. (footnote omitted)); cf. Arons & Lawrence III, supra note 29, at 309 (―Schooling is . . . a manipulator of consciousness, an inculcator of values in young minds.‖).

162 Jefferson, supra note 30, at xvi.

163 JOHN MILTON, AREOPAGITICA, in JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE 727–28 (Merritt Y. Hughes ed., 1957) (1644) (―For those actions which enter into a man, rather than issue out of him, and therefore defile not, God uses not to captivate under a perpetual childhood of prescription, but trusts him with the gift of reason to be his own chooser; there were but little work left for preaching, if law and compulsion should grow so fast upon those things which heretofore were governed only by exhortation . . . . I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race where that immortal garland is to be run for, not without dust and heat.‖)
— the great sphere that is their world and legacy. It is their means of escape from, or free commitment to, the social group in which they were born. It is their best guarantee of an open future.

In *Meyer* and *Pierce* the Court feared that the state as educator would — standardize its children. But children sent to religiously or ethnically homogeneous private schools, or those kept cloistered at home, might more easily suffer a similar fate. We are well cautioned by family law historian Barbara Bennett Woodhouse that — [s]tamped on the reverse side of the coinage of family privacy and parental rights are the child's voicelessness, objectification, and isolation from the community. The open world of public schooling should challenge the transmission of any closed set of values, whether those values belong to parent or state. If education is to foster, in Eamonn Callan's words, — [t]he cultivation of serious and independent ethical criticism, and the enlargement of the imagination that process entails, it must not only question parental authority but provide as well a brake on efforts at state indoctrination. Ideally, the state, like the ideal parent, would want to cultivate the child's capacity to make free choices. But, like real parents, the state can behave less than liberally toward its young people. The liberal state wants to pass on its traditions of freedom and equality, but the surest way not to do so would be to pass on those traditions as moral absolutes to be accepted uncritically. To guard against indoctrination at home or at school

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164 See BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 159 (1980) (— The entire educational system will, if you like, resemble a great sphere. Children land upon the sphere at different points, depending on their primary culture; the task is to help them explore the globe in a way that permits them to glimpse the deeper meanings of the life dramas passing on around them. At the end of the journey, however, the now mature citizen has every right to locate himself at the very point from which he began—just as he may also strike out to discover an unoccupied portion of the sphere. ).

165 *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (— The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. ). On the threat of state indoctrination in the public schools, see, for example, Dent, Jr., supra note 136, at 707; Strossen, supra note 72; Arons & Lawrence III, supra note 29; Robert D. Kamenshine, The First Amendment's Implied Political Establishment Clause, 67 CALIF. L. REV. 1104 (1979); Mark G. Yudof, When Governments Speak: Toward a Theory of Government Expression and the First Amendment, 57 TEX. L. REV. 863 (1979); Joel S. Moskowitz, The Making of the Moral Child: Legal Implications of Values Education, 6 PEPP. L. REV. 105 (1979); cf. JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 117–18 (Oxford Univ. Press 1991) (1859) (— A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power . . . whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation in proportion as it is efficient and successful, it establishes a despotism over the mind. ).

166 Barbara Bennett Woodhouse, Who Owns the Child?: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1001 (1992); cf. ACKERMAN, supra note 163, at 160 (criticizing educational proposals that would — [legitimize] a series of petty tyrannies in which like-minded parents club together to force-feed their children without restraint ).

167 Cf. Suzanna Sherry, Responsible Republicanism: Educating for Citizenship, 62 U. CHI. L. REV. 131, 188–89 (1995) (— [A] citizen needs to be able both to understand and internalize the norms of her society and to judge those norms against rational attack. A predisposition to adopt certain values, coupled with the knowledge and critical skills necessary for citizenship, is likely to yield slow but careful changes that jeopardize neither the stability of the polity nor the liberty of its citizens. ); Ingber, supra note 160, at 19 (— Society must indoctrinate children so they may be capable of autonomy. They must be socialized to the norms of society while remaining free to modify or even abandon those norms. ).

(or elsewhere, for that matter), the liberal state must provide a common education that prepares its children to make choices that are as free and independent as possible.

The state as educator does not replace the parent as educator. The parent remains a private source of intellectual and moral authority (as do a host of private players and entities). Indeed, against these private sources, —the state is normally at a disadvantage.\(^\text{170}\) Thus, even if the state were to mandate a common curriculum for all schools, public and private, the allocation of educational authority still would be shared by parent and state. Ira Lupu usefully approaches the issue of educational pluralism by thinking in terms of separated powers, comparing the division of power and influence over the educational liberty of children to the Constitution’s structural division of governmental power.\(^\text{171}\) This model of power separation, as Lupu writes, —reduces the risk of tyrannical treatment and domination of children by parents as well as the state.\(^\text{172}\)

But parentalism is not about educational power sharing. It is about control. Parentalists who paint the public education system as ideologically monolithic and propose greater educational choice rarely purport to be the guardians of the child’s educational options.\(^\text{173}\) What the parentalist seeks

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\(^\text{170}\) See Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 599 (1940) (—What the school authorities are really asserting is the right to awaken in the child’s mind considerations as to the significance of the flag contrary to those implanted by the parent. In such an attempt the state is normally at a disadvantage in competing with the parent’s authority, so long—and this is the vital aspect of religious toleration—as parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state’s educational system is seeking to promote. ); overruled by W. Va. State Bd. of Educ. v. Barnett, 319 U.S. 624 (1943); cf. GUTMANN, supra note 90, at 69 (—[P]arents command a domain other than schools in which they can—and should—seek to educate their children, to develop their moral character and teach them religious or secular standards and skills that they value . . . . The discretionary domain for education— particularly but not only for moral education—within the family has always been and must continue to be vast within a democratic society. And the existence of this domain of parental discretion provides a partial defense against those who claim that public schooling is a form of democratic tyranny over the mind. ).

\(^\text{171}\) See generally Lupu, supra note 74. See also Parker v. Hurley, 514 F.3d 87, 105–06 (1st Cir. 2008) (—[T]he mere fact that a child is exposed on occasion in public school to a concept offensive to a parent’s religious belief does not inhibit the parent from instructing the child differently. A parent whose child is exposed to sensitive topics or information [at school] remains free to discuss these matters and to place them in the family’s moral or religious context, or to supplement the information with more appropriate materials.); (quoting C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 185 (3d Cir. 2005)); GUTMANN, supra note 90, at 42 (—A democratic state of education recognizes that educational authority must be shared among parents, citizens, and professional educators even though such sharing does not guarantee that power will be wedded to knowledge, that parents can successfully pass their prejudices on to their children, or that education will be neutral among competing conceptions of the good life. ); Maxine Eichner, Who Should Control Children’s Education?: Parents, Children, and the State, 75 U. CIN. L. REV. 1339, 1340 (2007) (—[G]iven the legitimacy of claims by the community to have a say in how its future citizens should be educated; the equally legitimate claims of parents to have a say in how their own children should be educated; the need for children to develop the autonomy that liberalism demands; and the needs of the polity to ensure that children come to possess the civic virtues necessary to perpetuate a healthy liberal democracy, none of these interests should be allowed to dominate education in public schools. Instead, a vigorous liberal democracy must develop a framework for education that gives all of these interests some accommodation. ); cf. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004) (holding that a school requirement to recite Pledge of Allegiance does not impair parent’s right to instruct his daughter in his religious views).

\(^\text{172}\) Lupu, supra note 74, at 189–90 (—We have learned as a people to be distrustful of despotic power. The federal Constitution, and all of our state constitutions as well, proceed from the premise that dividing governmental power over adults will help safeguard their liberty. Not surprisingly, we have developed analogous mechanisms to protect the liberty of children. The division of power and influence over them among parents, school employees, and others in the community reduces the risk of tyrannical treatment and domination of children. ).

\(^\text{173}\) On the public school as educational monolith, see Strossen, supra note 72, at 370 (—An additional characteristic of the typical public school, which further enhances the importance of protecting students’ freedom of belief, is its relatively authoritarian, hierarchical, and disciplined structure. This structure limits the students’ opportunity to express or hear viewpoints at variance with those expressed by school officials. In tandem with the compulsory education requirement and the students’ relative impressionability, the school’s structure makes students especially vulnerable to the influence of teachers and other school authorities, who wield significant power over them. ); Arons & Lawrence III, supra note 29, at 317 (comparing public school to other —total institutions ); cf. Yudof, supra note 164, at 902 (describing school as a —semitotal institution).
to protect is the parent’s choice—to reject schooling that promotes values contrary to their own.\textsuperscript{174} We can be certain that some parents will choose educational options precisely because they want monopolistic control over the ideas to which their children have access. For some religious parents, no compromise is possible with the public school curriculum; no state regulation is acceptable;\textsuperscript{175} and the only educational option is the ideological and social segregation of private schooling.\textsuperscript{176}

\textsuperscript{174} Gilles, supra note 81, at 938. This reality can be masked by referring to parental choice as—family choice. See also, e.g., Arons & Lawrence III, supra note 25, at 325 (―The government allows families to inculcate their own values by choosing private school.‖).

\textsuperscript{175} See, e.g., New Life Baptist Church Acad. v. Town of East Longmeadow, 666 F. Supp. 293, 297 (D. Mass. 1987) (—Plaintiffs believe that parents are required by their religion to educate their children to share their faith. They also believe that they are obligated by God to provide as an indispensable ministry of their church a school which teaches their religious beliefs. For plaintiffs, the secular and religious aspects of education are inseparable. Thus, in its educational ministry, New Life teaches all subjects from a biblical and Christian view of the world. Plaintiffs believe they are forbidden to send their children to schools, such as public schools, which they believe teach doctrines contrary to the Holy Scriptures. ).

\textsuperscript{176} See MEIRA LEVINSON, THE DEMANDS OF LIBERAL EDUCATION 58 (1999) (arguing that—it is difficult for children to achieve autonomy solely within the bounds of their families and home communities—or even within the bounds of schools whose norms are constituted by those held by the child’s home community ); cf. Rob Reich, Testing the Boundaries of Parental Authority over Education, in MORAL AND POLITICAL EDUCATION 299 (Stephen Macedo & Yael Tamir eds., 2002) (―I submit that even in a minimal construal of autonomy, it must be the function of the school setting to expose children to and engage children with values and beliefs other than those of their parents. The premise is that minimal autonomy requires that there are ways of life other than those of their parents. The aim is to expose children to other varied activities of a modern school. In shaping the students’ experience to achieve educational goals, teachers by necessity serve as role models for the other varied activities of a modern school. In shaping the students’ experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students . . . . Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities. This influence is crucial to the continued good health of a democracy.‖). Before the boom of the modern home-schooling movement, social segregation was a concern that courts took seriously, routinely upholding state educational regimes that did not permit home instruction. See, e.g., State v. Edgington, 663 P.2d 374, 378 (N.M. Ct. App. 1983) (—By bringing children into contact with some person, other than those in the excluded group, those children are exposed to at least one other set of attitudes, values, morals, lifestyles and intellectual abilities. ); State v. Riddle, 285 S.E. 2d 359, 366 (W. Va. 1981). The defendants in Riddle were —Biblical Christians— who, according to the court, —were determined to have their children totally indoctrinated and educated in their religious beliefs, with no smattering of heresy. Riddle, 285 S.E.2d at 361. The parents —never requested the county superintendent of schools to approve their home as a place for instruction, as required by law. Id. at 363. With less than abundant generosity of spirit, the court thought it was—inconceivable that in the twentieth century the free exercise clause of the first amendment implies that children can lawfully be sequestered on a rural homestead during all of their formative years to be released upon the world only after their opportunities to acquire basic skills have been foreclosed and their capacity to cope with modern society has been so undermined as to prohibit useful, happy or productive lives. Id. at 366; cf. State v. Hoyt, 146 A. 170, 170–71 (N.H. 1929) (—Education in public schools is considered by many to furnish desirable and even essential training for citizenship, apart from that gained by the study of books. The association with those of all classes of society, at an early age and upon a common level, is not unreasonably urged as a preparation for discharging the duties of a citizen. ); Knox v. O’Brien, 72 A.2d 389, 392 (Cape May County Ct. 1950) (—Cloister and shelter have its place, but not in the every day give and take of life . . . . The entire lack of free association with other children being denied to [the O’Brien chil-
Even proponents of public school choice may show little interest in schooling that is ideologically pluralistic. The charter school movement may hold the promise of a common education without the curricular rigidity of a common schooling,¹⁷⁷ and more attention should be paid to the role that charter schools, including religious charter schools, might play in a public school system,¹⁷⁸ but charter schools ought to be more than a state-supported means of forming an ideologically bounded community —within which like-minded parents and teachers can reside.¹⁷⁹ (And, it goes without saying, students who will be expected to be equally like-minded.) One advocate of educational choice observes approvingly that a charter school would provide parents —with the opportunity to create a free public school that, while it does not teach their religious beliefs, also does not teach lessons that they find religiously objectionable.¹⁸⁰ Indeed, it has been argued that —if students are financially empowered to choose among a variety of secular and religious schools, the compulsion to protect their individual consciences from the moral or religious content embodied in the curriculum or environment at any particular school dissipates significantly.¹⁸¹ Of course, it hardly needs to be pointed out that children do not make these choices. If parental choice can mean that the compulsion to protect a child’s conscience dissipates, then the safest place for a child’s conscience is the traditional public school.

In the broadest sense, an education that is ideologically or socially reclusive robs children of community. It keeps from them a common intellectual and cultural capital. Even the children of a separatist religious community are members of many other communities: political, historical, philosophical, artistic. They belong to a past as well as a present; they live, geographically and otherwise, in multiple jurisdictions. A liberal education takes heed of this. It respects the rootedness of chil-

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¹⁷⁸ A common state-mandated curriculum could ensure that all charter schools, including religious ones, do not become segregated educational enclaves. Charter schools that satisfy common curricular requirements would be able to add focused educational offerings compatible with religious values and culture. (In addition, they would be able to make reasonable accommodations logistically impossible for the public schools.) Additions to a common curriculum are consistent with the core principle of Meyer v. Pierce that a parent has a right, —after he has complied with all proper requirements by the state as to education, to give his child such further education in proper subjects as he desires and can afford. Meyer v. State, 187 N.W. 100, 104 (Neb. 1922) (Letton, J., dissenting); cf. Berea College v. Kentucky, 211 U.S. 45, 67 (1908) (Harlan, J., dissenting) —(The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its use may not be forbidden or interfered with by Government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. ). While state support of pervasively sectarian schools would violate the Establishment Clause, many church-affiliated charter schools could embrace a common state- mandated curriculum and a diverse student/faculty body without considering their normative religious mission in danger of being undermined. On religious charter schools, see, for example, Preston Green III, Charter Schools and Religious Institutions: A Match Made in Heaven?, 158 WESTLAW EDUC. L. REP. 1 (2001); Benjamin Siracusa Hilton, Note, Is There a Place for Religious Charter Schools?, 118 YALE L.J. 554 (2008).

¹⁷⁹ Bruce Fuller, The Public Square, Big or Small?: Charters Schools in Political Context, in INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION 14 (Bruce Fuller ed., 2000).


dren’s lives, teaching children from the inside, in what Warren Nord has nicely called —the communities of memory which tentatively define them. A liberal education is inherently conservative, reinforcing cultural continuity. In this sense, a liberal education is inherently liberating, freeing children from cultural discontinuity. A liberal education also respects the self-directedness of children’s lives, teaching children from the outside, from a stance (again, Nord) of —critical distance on the particularities of their respective inheritances.

These are not incompatible lessons. We reinforce tradition as we come to understand it and even as we come to reinterpret it.

Children who are cut off from an understanding of—or, at least, an introduction to—foreign ideas and values, cultures and traditions, suffer more than an intellectual loss. Understanding what is —other is an exercise of heart and soul as well as mind; in Eamonn Callan’s phrase, it requires —the enlargement of the imagination, the experience —of entering imaginatively into ways of life that are strange, even repugnant, and some developed ability to respond to them with interpretive charity.

This is why, according to Nord, a liberal education must nurture —passions and imagination as well as thinking, why it must nurture the faculties that allow children to get inside alternative ways of life and —to feel the[ir] intellectual and emotional power. This human and humane sympathy is not an elective subject, an option to be selected after the child has learned basic reasoning skills. As both Nord and Callan (and others) remind us, developing the faculties that allow for sympathetic engagement with —otherness is a process at the core of teaching children to understand themselves.

[I]t is only when we can feel the intellectual and emotional power of alternative cultures and traditions that we are justified in rejecting them. If they remain lifeless and uninviting this is most likely because we do not understand them, because we have not gotten inside them so that we can feel their power as their adherents do. Only if we can do this are we in a position to make judgments, to conclude, however tentatively, that some ways of thinking and living are better or worse than others.

182 WARREN NORD, RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA 202–03 (1995) (—Liberal education has both a conservative and a liberating task: it should provide students a ballast of historical identities and values at the same time that it gives them an understanding of alternatives and provides critical distance on the particularities of their respective inheritances . . . . The essential tension of a liberal education, properly understood, lies in its commitment to initiating students into the communities of memory which tentatively define them, and, at the same time, nurturing critical reflection by initiating them into an ongoing conversation that enables them to understand and appreciate alternative ways of living and thinking. ).

183 Id. at 202.

184 CALLAN, supra note 90, at 5.

185 Id. at 133.

186 NORD, supra note 181, at 202.

187 Id. at 201.

188 Id.
Who Owns the Soul of the Child?: An Essay on Religious Parenting Rights and the Enfranchisement of the Child

Kept out of a conversation to which their birthright entitles them to join, cloistered children are cut off from themselves, bereft of self-consciousness and awareness of cultural place, and denied the moral freedom to stand or fall. Only through wide and fair exposure to moral and intellectual difference can children — surpass the threshold of ethical servility.\footnote{Reich, supra note 175, at 293. For a multiculturalist defense of exposure to otherness, see WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 82–83 (1995); JOSEPH RAZ, THE MORALITY OF FREEDOM 204 (1986); CHARLES TAYLOR, 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 204–05 (1985).}

The Supreme Court has identified autonomy and tolerance as the fundamental values indispensable — in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests . . . .\footnote{Ambach v. Norwick, 441 U.S. 68, 76 (1979).} The prerequisite for both autonomy and tolerance is exposure. To think for themselves, children must know how others think; to take their place as members of a liberal democracy, they must learn to make room for the places that other members will take. Our constitutional freedoms are predicated on the republican distrust of authoritarian ideologies and a profound skepticism toward final and complete truths.\footnote{Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).} The Supreme Court has said, a bit hyperbolically perhaps, that — [t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.\footnote{See Barnette, supra note 29 and accompanying text.} Constitutionally speaking, we are all students and teachers.

Liberal pluralists concede that some religious groups will create lives that run far counter to cultural norms, separate lives where they can educate their children without exposing them to and engaging them with diverse values and beliefs. For Galston, a liberal society can and should make room for religious separatism: — Autonomy is one possible mode of existence in liberal societies—one among many others; its practice must be respected and safeguarded; but the devotees of autonomy must recognize the need for respectful coexistence with individuals and groups that do not give autonomy pride of place.\footnote{GALSTON, supra note 69, at 24. See also generally MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).} Even a proponent of autonomy-facilitation like Harry Brighouse agrees that civic stability does not require everyone to lead autonomous lives, as long as enough people do so — to yield a threshold level of stability.\footnote{Brighouse, supra note 154, at 269; cf. WALZER, supra note 192, at 219 (1983) (stating that there is no need for a — frontal assault on private schools as long as the chief effect is — to provide ideological diversity on the margins of a predominately public system ).} But one need not quarrel with the virtue of peaceful coexistence to ask about the fate of children whose families and communities do not give autonomy pride of place. While democracy may survive if it maintains a threshold level of stability, this is no reason to assign some children to a life without free choice.\footnote{Cf. ARCHARD, supra note 137, at 75–76 (— A pluralistic culture is important not for its own sake but because it is the natural outcome of the exercise of autonomous life-choices and, at the same time, the invaluable, indeed indispensable, background against which autonomy is exercised. This point is significant for it means that children must still be reared to be autonomous. If all that mattered was pluralism as such it would suffice that families produced heteronomous adults with very different outlooks on life. What the argument from pluralism shows, however, is that families are to be valued for producing diverse, but also autonomous, adults. ).}
Yet if the classroom really is, as the Supreme Court has said, —peculiarly the marketplace of ideas,196 the voices of religious children must be allowed to be heard, too. The school classroom, at every level, should be a forum where students are exposed to a variety of viewpoints, secular and religious. The idea that students benefit from exposure to opposing viewpoints only makes sense if that benefit flows in all directions. To that end, the study of religion should be a regular part of a common curriculum. The state has a compelling interest in teaching children the —fundamental values of habits and manners of civility essential to a democratic society,197 but if children are to learn a civility that is more than mere manners, then the state must let them speak for themselves (whether they speak the language of reason or faith) and for their community and culture (whether that background is informed by religious or secular values). The voices of religious children must be allowed to be heard—for the educational benefit of the entire class. The classroom that welcomes appropriate religious expression may also be a less threatening place for some religious parents.198

Many religious parents are concerned, and rightly so, that school officials sponsor particular religious or political beliefs— not deliberately, perhaps, but by a failure to see their own beliefs as partial viewpoints. Certainly, the principle of exposure can be manipulated for use as a political instrument, a latter-day version of the child-saving strategies of the nineteenth century.199

But exposure, if it is genuinely implemented, operates on more intellectually generous principles. First, if autonomy is to be taken seriously, then liberals as well as conservatives, the secular-minded as well as the faithful, must be willing to look critically at their own values and beliefs. The voices of all children need to be heard, with fairness and respect. Compulsory education requirements presuppose —sympathetic and critical engagement with beliefs and ways of life at odds with the culture of the family or religious or ethnic group into which the child is born[;]200 they entail the effort to foster respect for difference and a willingness to entertain, if only for the sake of argument, ideas that go against the familial grain. Second, exposure is not a ready means to discount the history and culture that children bring with them to school. Respect for difference does not presuppose the child's rejection of his primary culture. Just the opposite should be the case: The classroom should be a place where the child's primary commitments can be strengthened; it should be a place where children can go to be understood as well as to understand others.201 What compulsory education

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196 Keyishian, 385 U.S. at 603 (internal quotation marks omitted).
198 See, e.g., Gutmann, supra note 90, at 122–23 (stating that refusal to permit exemptions from some required practices will drive parents away from public schools); Stephen Macedo, Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?, 105 ETHICS 468, 488 (1995) (observing that school officials may have prudential reasons to accommodate religious parents in order to keep their children in public schools).
201 Cf., e.g., Steven C. Rockefeller, Comment, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 97–98 (Amy Gutmann ed., 1994) (―[A]ny liberal democratic politics committed to the ideals of freedom and equality cannot escape the demand that it create inclusive and sustaining social environments that respect all peoples in their cultural diversity, giving them a feeling of belonging to the larger community.‖).
requirements seek to ensure is that, at a minimum, the child learns that there are important choices to be made, and that no source of authority—parent or teacher—has the right to deny someone the opportunity to make choices that are genuinely free.

VI. CONCLUSION: THE LIMITS OF RELIGIOUS ADVOCACY WHEN SUSAN MURPHY WAS THIRTEEN YEARS OLD, SHE BEGAN TO

explore the beliefs of the Hare Krishna religion.\textsuperscript{202} She was taught, among other things, that women are inferior to men, that the female form is the form of evil, that women should always consult a man before making any type of decision, and that a woman should take her husband as her spiritual authority.\textsuperscript{203}

Upon leaving the church, Susan sued the church, alleging that church teachings had caused her emotional distress.\textsuperscript{204} Expert psychiatric testimony supported Susan’s claim, and she received a jury award of $210,000.\textsuperscript{205}

On appeal, the Massachusetts State Supreme Court vacated the emotional distress judgment.\textsuperscript{206} Concluding that tort liability amounted to punishment for religious heterodoxy, the court barred what it considered to be a constitutionally impermissible evaluation of the church’s religious beliefs: —The essence of what occurred in the trial is that the plaintiffs were allowed to suggest to the jury extensively that exposure to the defendant’s religious beliefs was sufficient to cause tortious emotional damage . . . .\textsuperscript{207}

No defendant, the court maintained, should be forced to prove —that the substance of its religious beliefs is worthy of respect.\textsuperscript{208}

For the \textit{Murphy} court, the key question was whether Susan’s testimony related to conduct or belief. The court rejected her argument that religious teaching is activity, not belief: —Inherent in the claim that exposure to [defendant’s] religious beliefs causes tortious emotional damage is the notion that the disputed beliefs are fundamentally flawed . . . .\textsuperscript{209} The court suggested that Susan’s

\begin{footnotesize}
\textsuperscript{203} Id. at 344.
\textsuperscript{204} Id. at 346.
\textsuperscript{205} Id. at 342.
\textsuperscript{206} Id. at 347.
\textsuperscript{207} Id. at 348.
\textsuperscript{208} Id. at 348.
\textsuperscript{209} Id. at 347.
\end{footnotesize}
age—may lessen the degree of constitutional protection which [the church] has against a claim of an intentional tort based on religiously motivated activity. But it would not be enough. According to the court, the nature of Susan's case would—embroil[] the court in an assessment of the propriety of those beliefs regardless of the age of the plaintiffs.

Essentially, the court would not conduct a heresy trial.

In fact, whether the church's religious beliefs were—fundamentally flawed was really irrelevant. The right legal question was not whether the female form is truly evil (as the church taught), but whether Susan Murphy could show that the church's teachings, regardless of their truth or falsity, had caused her tortious injury. To borrow from the law of evidence, the court did not need to decide the truth of the matter asserted. In the adjudication of such cases, courts can, and must, restrict their inquiries to objective measures of emotional and psychological harm to children.

Adults consent to religious association, but the religious identity of children is determined without their consent or understanding. They are made members of religious groups by birthright, or ceremonies of induction and initiation, or other rules of religious affiliation. Not possessing the full capacity for individual choice, children are by their very nature captive to the will of others.

210 Id. at 349.
211 Id.
212 See FED. R. EVID. 801(c).
213 Cf. Kendall v. Kendall, 687 N.E.2d 1228, 1236 (Mass. 1997) (finding that a restriction on the father's right to share religious belief with his children—does not foster excessive government entanglement because the focus of any judicial inquiry will center on the emotional or physical harm to the children rather than the merit worthiness of the parties' respective religious teachings).
214 By freely choosing to unite themselves with the spiritually like-minded, adults submit to be governed by the rules of religious membership. But religious authority may not be imposed on those unwilling to subject themselves to it. See, e.g., Guinn v. Church of, 775 P.2d 766, 781 (Okla. 1989) ("[T]he First Amendment will not shield a church from civil liability for imposing its will, as manifested through a disciplinary scheme, upon an individual who has not consented to undergo ecclesiastical discipline."). Thus, once a member withdraws consent, see, for example, id., or where a religious entity has used coercive techniques to undermine a member's capacity to consent, the constitutional shield that safeguards religious freedom against tort liability is appropriately broken, see, for example, Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 762 P.2d 46, 56–63 (Cal. 1988) (reversing summary judgment for church on emotional distress claim where atmosphere of coercive persuasion rendered plaintiffs incapable of deciding not to join church); Wollersheim v. Church of Scientology of Cal., 66 Cal. Rptr. 2d, 1, 7–19 (Cal. Ct. App. 1989) (affirming emotional distress judgment for plaintiff where church conducted religious practices in coercive environment); cf., e.g., Guinn, 775 P.2d at 776 ("No real freedom to choose religion would exist in this land if under the shield of the First Amendment religious institutions could impose their will on the unwilling and claim immunity from secular judicature for their tortious acts.").
215 See, e.g., Belotti v. Baird, 443 U.S. 622, 635 (1979) ("Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability . . . .")

Where a listening audience is effectively captive to the will of the speaker,—government regulation of [protected] expression may co-exist with and even implement First Amendment guarantees. Id. On the captive audience doctrine, see Hill v. Colorado, 530 U.S. 703, 716–18 (2000) (upholding statute that prohibited speakers from approaching unwilling listeners outside health care facilities); Madson v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994) (targeted picketing of a hospital or clinic threatens psychological well-being of the patient held—captive by medical circumstance); Frisby v. Schultz, 487 U.S. 474, 484 (1988) (residential privacy protects the—unwilling listener from unwanted and intrusive speech); Carey v. Brown, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting) (describing the psychological tensions and pressures that result from targeted residential picketing); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (—Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. (citing Rowan v. U.S. Post Office Dep't, 397 U.S. 728 (1970))); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209–10 (1975) (noting that restrictions on speech are warranted when the degree of captivity—makes it impractical for the unwilling viewer or auditor to avoid exposure); Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (noting that riders on city transit system are captive audience); Rowan, 397 U.S. at 738 (—We
This vulnerability drives the concern that public schoolchildren are easy targets for state indoctrination.\textsuperscript{217}

But children are no less captive to private educators—indeed, where cut off from ideas and values contrary to those of the home, they are likely to be more so; and religious mentorship carries with it a form of authority from which children may find it especially difficult to escape.

When courts consider the tort liability of religious mentors, they commonly ask two questions: (1) whether liability would infringe upon belief as opposed to conduct, and (2) whether the conduct was secular or, if the conduct is deemed religious, whether it is a central part of the religious teachings of the defendant (and, thus, prohibition would be a substantial burden on religious freedom).\textsuperscript{218}

But both questions rest on dubious grounds.

The line between belief and conduct is not as bright as we might think.\textsuperscript{219} Laura Schubert discovered how quickly bright lines can lead to confusion when she sued the Pleasant Glade Assembly of

\textit{Who Owns the Soul of the Child?: An Essay on Religious Parenting Rights and the Enfranchisement of the Child}
God.\textsuperscript{220} In \textit{Pleasant Glade Assembly of God v. Schubert}, Schubert brought a tort claim based on the emotional injuries she suffered when church members, against Laura’s objections, sought to cast demons out of her.\textsuperscript{221} Laura was physically restrained as part of a —laying on of hands— and subsequently she commenced a tort action for assault, battery, and false imprisonment.\textsuperscript{222} The Supreme Court of Texas concluded that the adjudication of such claims —would necessarily require an inquiry into the truth or falsity of religious beliefs.\textsuperscript{223}

In the court’s judgment, —the act of „laying hands’ [was] infused in Pleasant Glade’s religious belief system.\textsuperscript{224} The court ignored the irony that this judgment was itself a determination about doctrinal matters. Dissenting from the majority opinion, Chief Justice Jefferson was on more solid ground when he observed that —[i]n reaching the conclusion that the act of „laying hands’ is infused in Pleasant Glade’s religious belief system, the Court engages in the unconstitutional conduct it purports to avoid: deciding issues of religious doctrine.\textsuperscript{225}

When courts assess what is a substantial burden on religion, they do so despite the Supreme Court’s admonition that it is not the business of the courts to determine what beliefs or practices are central to a religious tradition.\textsuperscript{226} But what if litigation itself is a substantial burden? In Schubert’s case, the church did not seek protection from Laura’s secular claims of false imprisonment and assault. To these claims, the church stated, its religious belief and practices were —actually irrelevant.\textsuperscript{227} In its words:

Plaintiff, Laura Schubert, a teenager, does bring a \textit{secular complaint} against the church and its pastors. It begins when, according to her own pleading, she —collapsed while standing at the altar of the church during a church service. She alleges she was physically grasped, taken and held on the floor of the Church against her will. \textit{This was allegedly done as part of an “exorcism” in an alleged attempt to exorcise a demon from her. However, this religious context is actually irrelevant.} Since Laura Schubert alleges she was held on the floor against her will, she brings claims for assault, battery, and false imprisonment. \textit{This is a “bodily injury” claim} . . . \textit{Relators, the church and the pastors, concede that this is a “secular controversy” and

\textsuperscript{220} 264 S.W.3d 1, 5 (Tex. 2008).
\textsuperscript{221} \textit{Schubert}, 264 S.W.3d at 5 (Tex. 2008).
\textsuperscript{222} Id.
\textsuperscript{223} Id. at 9 (quoting Tilton v. Marshall, 9025 S.W.2d 672, 682 (Tex. 1996)); see also Paul v. Watchtower Bible & Tract Soc’y of N.Y., 819 F.2d 875, 883 (9th Cir. 1987) (—Intangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practices—or against its members. ).
\textsuperscript{224} \textit{Schubert}, 264 S.W.3d at 11.
\textsuperscript{225} Id. at 18 n.7 (Jefferson, C.J., dissenting (citation omitted)).
\textsuperscript{226} See EMP’T Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990) (—Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. ); Hernandez v. Comm’r, 490 U.S. 680, 699 (1989) (—It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith . . . . ); see also Smith, 494 U.S. at 887 (—Judging the centrality of different religious practices is akin to the unacceptable “business of evaluating the relative merits of differing religious claims.” (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1983) (Stevens, J., concurring))).
\textsuperscript{227} \textit{Schubert}, 264 S.W. 3d at 7.
does not come within the protection of the First Amendment. That is, no church or pastor can use the First Amendment as an excuse to cause bodily injury to any person . . .

If this were the sum total of this dispute, Relators [i.e., the church defendants] would not be here before this Court . . . No religious beliefs would be implicated. The First Amendment and the free exercise of religion would simply not be an issue. Therefore, Relators do not request that this Court issue mandamus to stop litigation of this "secular controversy forbv bodily injury."

Nonetheless, the court held that the church was constitutionally protected —against claims of intangible harm derived from its religious practice of "laying hands." The Schubert court decided that a restriction on the "laying hands practice would be a substantial burden. Even if the tort claim could be decided without regard to religion, the adjudication of the claim—that is to say, the mere fact that the church was subject to tort liability—would have an unconstitutional "chilling effect' by compelling the church to abandon core principles of its religious beliefs.

Though Yoder's harm standard fails to offer children the full measure of protection they need, it does set an outer limit to the right of religious indoctrination. Where indoctrination —impairs a child’s emotional development or sense of self-worth, the state should protect the child by allowing religious mentors to be subject to tort liability. This protection need not come at the cost of constitutional privilege for religious entities. Tort liability is not premised on the judgment that a religious belief is somehow —fundamentally flawed or not worthy of constitutional protection. To the contrary, whether religious advocacy was meant to and did inflict severe emotional distress is a question that can be adjudicated by the neutral and generally applicable principles of tort law.

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228 Id.
229 Id. at 8.
230 Id. at 11.
231 Id. at 10.
233 See supra note 213 and accompanying text.
234 See Smith, 494 U.S. at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law prescribes (or prescribes) conduct that his religion prescribes (or proscribes)." (quoting Lee, 455 U.S. at 263 n.3 (1982) (Stevens, J., concurring in the judgment))); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) ("Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded."); Jones v. Wolf, 443 U.S. 595, 602 (1979) ("[W]e think the 'neutral principles of law' approach is consistent with the foregoing constitutional principles."); see also, e.g., Smith v. O'Connell, 986 F. Supp. 73, 80 (D.R.I. 1997) (finding that "there is no question that the principles of tort law, at issue, are both neutral and generally applicable"); Doe v. Hartz, 970 F. Supp. 1375, 1431–32 (N.D. Iowa 1997) (holding that the First Amendment does not bar tort claim against church defendants because claim can be assessed applying neutral principles of law); Isely v. Capuchin Province, 880 F. Supp. 1138, 1151 (E.D. Mich. 1995) (finding no constitutional bar to adjudication of tort claim because — 'neutral' principles of law can be applied without determining underlying questions of church law and policies (citing Serbian E. Orthodox Diocese v. Milivojevich, 426
It is a powerful and appreciable privilege to control the spiritual consciousness of another. And it is not immune from abuse. Children need to be protected from religious indoctrination that is psychologically injurious, but, more broadly speaking, they need to be safeguarded from mentorship that denies them the ability to make independent choices about religious matters. Religious mentorship should make, so to speak, no permanent marks on the child; in other words, it must not foreclose the child’s prospective religious freedom. To direct, rather than to control, the religious destiny of the child: This is the great and challenging task, the heart (and soul) of the religious mentor’s fiduciary responsibilities.

With all its attendant joys, parenting is a somber task for it entails, in a profound and poignant way, the loss of the child. It is the parent who enables the child to make free and independent choices, thus preparing the child to leave behind home and family, thus encouraging (or at least allowing) the child to form his or her own image rather than merely to conform to some parental likeness. If we could, we might shield our children from the responsibilities and sufferings that accompany choice. If we could, we might shield ourselves from the pain that accompanies the child’s individuation and eventual separation from our hands. The law presumes that parents act in the best interests of their children, but, as every parent knows, it is often more difficult for parents to

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235 Cf. Macleod, supra note 137, at 130 (—A refined liberal conception [of parental authority] does impose constraints on the strategies that parents may legitimately employ to transmit the good to children . . . . The general idea is that parents should be permitted to advance a distinctive conception of the good for their children. However, parents must not seek to exempt the ends they wish their children to adopt from rational scrutiny. Nor may parents undertake to foreclose the possibility of deliberation about such matters by tightly insulating children from exposure and access to the social conditions of deliberation. )

236 The Supreme Court has defined the due process right to parent as — the interest of parents in the care, custody, and control of their children. Troxel v. Granville, 530 U.S. 57, 65 (2000). On the phrase — care, custody, and control, see Leezaert v. Harrington, 332 F.3d 134, 142 n.3 (2d Cir. 2003): The Troxel Court appears to be the first to use the phrase — care, custody, and control, rather than the very similar — care, custody, and management, Stanley v. Illinois, 405 U.S. 645, 651 (1972), in the context of a parent’s right concerning his or her children. Prior to Troxel, the phrase was typically used with respect to physical property, for example, in criminal statutes, see, e.g., Fischer v. United States, 529 U.S. 667, 675 (2000) (quoting 18 U.S.C. § 666 which prohibits theft or bribery concerning programs receiving federal funds), and in the context of insurance policies, see, e.g., First Investors Corp. v. Liberty Mut. Ins. Co., 152 F.3d 162, 167 n.6 (2d Cir. 1998) (quoting a portion of an insurance policy which read, — The loss, depreciation in value, or damage to any real or personal property, including, but not limited to, money, securities, negotiable instruments or contracts representing money, held by or in the care, custody or control of the insured. ).

After Troxel, federal courts of appeals have begun to employ the phrase to refer to parental rights. See, e.g., Batten v. Gomez, 324 F.3d 288, 295 (4th Cir. 2003) (seizure of child violated mother’s due process interest — in the companionship, care, custody, and control of her child ); Hatch v. Dept for Children, Youth and Their Families, 274 F.3d 12, 20 (1st Cir. 2001) (—The interest of parents in the care, custody, and control of their children is among the most venerable of the liberty interests embedded in the Constitution. ) (citing Troxel, 530 U.S. at 65); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 288 (5th Cir. 2001) (—One of the fundamental liberty interests recognized by the Court is the interest of parents in the care, custody, and control of their children.”) (quoting Troxel, 530 U.S. at 65–66).
separate themselves from their children, to let go of them, than it is for children to follow the natural path to adulthood.

Most of us do manage to let go. We see every day that our children are on a path that leads to separation and individuation. We encourage that growth, validating the child’s steps (literal and metaphorical) toward independence. But we should not presume that all parents do so. Deeply dependent on the child, desperately wanting the child to mirror, and thus affirm parental interests and emotions, the narcissistic parent uses any number of emotional tools—often disguised to parent and child alike as acts of love—to frustrate the child’s assertions of selfhood.

Among other students of parenting pathologies, the psychoanalyst Alice Miller has described how the narcissistic parent, ridden with a profound lack of security, disrupts the process by which children become morally, intellectually, and spiritually autonomous. In fact, the narcissistic parent turns this developmental process on its head:

- Healthy parenting serves the needs of the child. One of the most important needs of the child is for mirroring (or echoing). By being a mirror of the child’s emotions and interests, the parent reflects the child’s evolving self-image. The act of mirroring enables the child to gain the trust and confidence that is a prerequisite to both individuation and intimacy. In the natural course of events, children separate themselves from their parents. In the natural course of events, children form new relationships outside the family sphere of interest.

- The narcissistic parent reverses this process. Narcissistic parents use the child as a mirror of their own interests and emotions. The adult creates the child in his or her own image. The problem of individuation does not belong to the child: The problem is that it is difficult for parents to separate themselves from their children.

- Emotional or psychological misconduct occurs when the love of the parent is made conditional on the child’s mirroring of the adult image. The issue is obedience in the broadest sense. It is not just a matter of following the rules, though that is important. It is more a matter of being like the adult, of thinking and acting like the adult. It is a matter of accepting the adult’s set of interests and perspectives. It is even a matter of liking and loving the adult.

- The child has no choice but to accept the images of approval and disapproval it receives from the parent, and to embrace these images as an ego ideal. Conforming to an image needed

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237 On parental narcissism, see generally ALICE MILLER, THOU SHALT NOT BE AWARE: SOCIETY’S BETRAYAL OF THE CHILD (1998); LEONARD SHENGOLD, SOUL MURDER: THE EFFECTS OF CHILDHOOD ABUSE AND DEPRIVATION (1989); R.D. LAING, THE DIVIDED SELF: AN EXISTENTIAL STUDY IN SANITY AND MADNESS (Penguin Books 1965) (1959); cf. Ira C. Lupu, The Separation of Powers and the Protection of Children, 61 U. CHI. L. REV. 1317, 1326 (1994) (―Self-love may be an unusually corrupting force when it comes into play in a parent-child relationship. When a politician or corporate official advances the interests of himself, his class, or his cronies, one would expect that he would at least be aware of the tension between his own interests and those of the commonwealth; cognitive dissonance has its limits. In the parent-child relationship, however, the capacity for self-deception may be at its maximum. Because the parent is socially and psychologically reinforced to view her relationship with the child as one of affectionate personal attachment, the parent may be unusually blind to the possibility that self-love is distorting her judgment. Moreover, one can much more easily justify domination of children, who obviously need some degree of care and guidance, than one can justify comparable (mis)treatment of adults. ).
and desired by the parent, the child represses its own need and desires. The child represses its own will. The price of not doing so is shame and humiliation (the child is willful, the child is bad). The child must accept that the adult is not at fault. If my parent withdraws love from me, I must be bad. The ideal image of the parent must be preserved.

• But the price of repression is that the child must come to see its own needs and desires as bad. The obedient child is thus trapped in a double-bind of self-abnegation.

This type of parental rule takes a terrible emotional toll on the child. The child comes to see its own needs and desires as unworthy and, accordingly, represses its evolving capacity for thinking and feeling independently. To be fully loved, the child has no choice but to conform to, to be obedient to, the parental image. And when parental authoritarianism has the sanction of religious authority, its emotional toll is compounded, its emotional effects more entrapping. It is one thing to disobey and displease a parent, another to disobey and displease God. When God himself demands the child’s self-sacrifice, the child is bound to suffer sorely for simple acts of self-assertion.

If the state as educator demanded submission to its ideological authority, we would consider that gross misconduct. 238

But we do not define the same requirement as injurious when required by religious mentors. Quite the opposite: We applaud the obedient child—the child who, like Betty Simmons, embraces filial devotion, unaware of its costs.

And because we do not define the child’s self-sacrifice as injury, we do not see it.

238 Cf. Arons & Lawrence III, supra note 29, at 312 (—If the government were to regulate the development of ideas and opinions through, for example, a single television monopoly or through religious rituals for children, freedom of expression would become a meaningless right.)
§ 1. INTRODUCTION

The advent of proportionality in constitutional adjudication is one of the most significant developments in contemporary law. Proportionality has become the “universal criterion of constitutionality.” Its spread around the world has led scholars to describe it as the “most successful legal transplant of the twentieth century.” However, this success remains confounding. Proportionality’s empowerment of judges seems to bring it into tension with ideals of democratic rule. Furthermore, the protection this method affords to constitutional rights is not automatic, but conditional upon contextual assessment by courts that rights are sufficiently strong to override conflicting public or private interests. In the proportionality machinery, rights become mere considerations in the process of judicial reasoning – which is, admittedly, “not much.”

1 Associate Professor, Boston College Law School. This paper was presented at the Conference “Constitutionalism in a New Key: Cosmopolitan, Pluralist and Reason-Oriented”, organized by the Social Science Research Center and Humboldt University (Berlin, January 2011). Earlier drafts were also presented at the NYU Colloquium on Global and Comparative Public Law and at workshops at Princeton University, Harvard Law School, George Washington Law School as well as a conference at the Australian National University. I thank Stephen Gardbaum, Jamal Green, Mattias Kumm, Michel Rosenfeld, Frank Michelman, Fred Schauer and Kim Lane Scheppele for comments on earlier drafts or discussions on this topic. The usual disclaimer applies.


4 Mattias Kumm, Id. at 582. (“Having a right does not confer much on the rights holder: that is to say, the fact that he or she has a prima facie right does not imply a position that entitles him/her to prevail over countervailing considerations of policy.”).
Nevertheless, ours is the “era of proportionality.” From countries in Eastern Europe to South Africa and from Canada to Brazil to Europe’s supranational courts, judges have adopted proportionality as their method of choice in constitutional cases and beyond. This global spread of proportionality has been extensively documented. From its origins in nineteenth century Prussian administrative law and transition to the constitutional domain after World War II, at first in Germany and gradually far beyond, this method has colonized the imagination of constitutional jurists around the world. With the exception of American law, the centrality of proportionality in constitutional adjudication has made this method “a foundational element of global constitutionalism.”

However, the explanation of proportionality’s success remains elusive. The range of available accounts spans the entire spectrum from cold realism to an idealism of sorts. From a realist perspective, judges favor proportionality because it hides the exercise of judicial discretion more credibly or effectively than alternative methods, such as categorical reasoning or balancing. By giving a formal structure to the weighing of conflicting interests, proportionality offers the illusion that values can be aligned along one scale despite their incommensurability. However, such accounts leave much unanswered. Tracing the success of proportionality solely to this cover-up function is a jurisprudential shortcut to a likely dead-end. The painstaking process of proportionality-structured judicial reasoning cannot be a priori dismissed as merely a sham. By contrast, idealist accounts zero in on that reasoning process and emphasize its inherent rationality.

As we will see, these accounts of proportionality tend to overlook significant shortcomings in its judicial technique. But even if they did not, many idealist accounts only justify the advent of proportionality, without explaining its appeal. Quite apart from a healthy dose of skepticism about the promise of pure (legal) reason in the aftermath of the mass murders and catastrophes of the twentieth century, rationality alone cannot fully reveal this method’s appeal to complex institutional actors such as courts.

My aim in this paper is to provide an additional perspective on the rise of proportionality as a constitutional method. I argue that, more than alternative methods, proportionality helps judges mitigate what Robert Cover called the “inherent difficulty presented by the violence of the state’s law acting upon the free interpretative process.”

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8 Id. (Alec Stone Sweet and Jud Mathews, Proportionality Balancing and Global Constitutionalism), at 160. The authors base this conclusion on the observation that “(b) the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of proportionality analysis.” (id., at 74).
10 Robert Cover, Nomos and Narrative, 97 Harvard Law Review 4, 48 (1983). Since the state is often involved as a party in constitutional
In addition to routine deployment of its force-dispensing machinery, forcing citizens “to be free”\textsuperscript{11}, the institutions of the constitutional democratic state must also justify the direction of that deployment. Law’s violence is thus twofold. One coercive dimension takes the form of the actions or inactions that the state imposes on its subjects. But a second, and related, dimension of violence stems from the process of justifying those coercive effects. As we will see, that justification represents the state’s rejection of the outcome of the losing party’s jurisgenerative interpretative processes. I suggest that proportionality appeals to judges because of their need for adequate methods to mitigate the violence that their justification of state coercion inflicts on private (non-official\textsuperscript{12}) jurisgenerative interpretative processes in constitutional cases.\textsuperscript{13}

Left unmitigated, this second dimension of law’s violence can undermine the duty of responsiveness that courts owe to litigants qua citizens. In contrast to totalitarian regimes, whose institutions do not react to – or, even worse, retaliate against – the demands of their subjects, the public institutions of a constitutional democracy have a duty to respond to the claims of the citizenry in ways that recognize and reinforce the social standing of each citizen claimant as free and equal.\textsuperscript{14} In the case of legal disputes, responsiveness cannot always require the substantive satisfaction of all the claimants. But it does require that the process of justifying outcomes meet certain conditions. For instance, it requires that the justification treat with respect and dignity all the claimants, including those whose claims are inevitably unsuccessful.\textsuperscript{15} Proportionality, I submit, answers these demands better than alternative methods.

At first glance it might seem counterintuitive that judicial responsiveness should depend on how successfully courts mitigate the violence they inflict on the parties’ jurisgenerative processes. For one, litigants routinely set themselves up for disappointment by exaggerating the strength of their claims. One’s distorted view of the strength of his or her claim heightens the perception of violence inflicted by a court’s failure to endorse it, with the result of placing an unreasonably high bar for judicial responsiveness. Moreover, even when the expectations are not overblown, the mere imperative of not leaving cases undecided opens a wide gap between the perceptions of the parties – whether private individuals or the state\textsuperscript{16} – \textit{ex ante} and \textit{ex post} the judicial decision. At least in

\textsuperscript{11} The formulation is Rousseau’s. See Jean Jacques Rousseau, The Social Contract, Book I, § 7 (1726).

\textsuperscript{12} “Private” should not be interpreted as “individual” but as “non-official.” It includes the government’s constitutional interpretation seeking protection of its state interests.

\textsuperscript{13} I should note that Cover’s own substantive views about the possibility of justification is far more skeptical than the position presented in this article. For more on this difference, see below at note 17.

\textsuperscript{14} See, for example, Thomas Pogge, Politics as Usual 200 (Polity, 2010) (“defining feature of democracy “the moral imperative that political institutions should maximize and equalize citizens’ ability to shape the social context in which they live.”).

\textsuperscript{15} I discuss the duty of responsiveness in Vlad Perju, Cosmopolitanism and Constitutional Self-Government, International Journal of Constitutional Law I-CON, vol. 8(3): 236 (2010). For now I should only mention that I don’t understand “responsiveness” as a purely procedural value. For such an approach, see the analysis in Frank Michelman, Must Constitutional Democracy be ‘Responsive’?, 107 Ethics 706 (1997) (reviewing and analyzing the procedural conception of democratic responsiveness in Robert Post’s Constitutional Domains).

\textsuperscript{16} For an argument about how constitutional rights become interests by entering the decisional calculus, see Richard Fallon, Individual
hard cases, claims of ostensibly comparable strength are presented as the outcomes of the parties’ jurisgenerative interpretative processes that aspire to official endorsement by courts as the institutions mandated to settle disputes over constitutional meaning. Yet there is a striking discontinuity between the perceived strength of the parties’ claims, understood as their reasonable constitutional interpretations and assessed ex ante the judicial decision, and the effects on the parties of binary statements of constitutional validity, as experienced by them ex post the decision. Binary statements of legal validity (valid/invalid, legal/illegal) erase all traces of the chance for success that the losing claim had before the judicial decision was delivered. The binary effects of statements of validity heighten the violence on the parties’ free interpretative processes by which legal controversies come to an end. As a constitutive feature of a constitutional system, it seems that perceived judicial unresponsiveness cannot be a source of law’s violence.

Or can it? It helps to recall that violence is a matter of degree. While some level of violence in law seems unavoidable, judicial methodology structures the process of justification and thus calibrates the degree of violence. The two sources of law’s violence - outcome and justification of outcome - are related. As Charles Tilly concluded in his sociological study of reason-giving, “whatever else happens in the giving of reasons, givers and receivers are negotiating definitions of their equality or inequality.”

Proportionality stands out by how it positions judges vis-à-vis the parties and the parties in relation to one another. This is the proper context for understanding the common defense of proportionality as a method that “shows equal respect and concern for everyone concerned.” Proportionality mitigates the gap between the positions of the parties ex ante and ex post the judicial decision, because it treats with due consideration and respect the public interest pursued by the state as well as the individual interests of the right-holder.

My explanation of the success of proportionality is functional, not causal. The worldwide spread of proportionality is a complex phenomenon whose causes span from the historical to the sociological. By contrast, my account makes no claim about how proportionality comes into existence,

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17 As Habermas put it, “norms of action appear with a binary validity claim and are either valid or invalid; we can respond to normative sentences, as we can to assertoric sentences, only by taking a yes or no position or by withholding judgment”, Habermas, Between Facts and Norms 255 (1996). See also Ronald Dworkin, A Matter of Principle 119-120 (1985) (discussing the bivalence thesis that applies to law, as to all dispositive concepts.)

18 There are limits inherent in the process of justification. Robert Cover refers to them as tragic limits in the common meaning that can be achieved in justifying the social organization of legal violence. See Robert Cover, Violence and the Word, 95 Yale Law Journal 1601, 1628-1629 (1986).

19 Charles Tilly, Why?, at 24-25 (footnotes omitted).

20 David Beatty, Ultimate Rule of Law, at 169. Kumm argues that proportionality marks the shift from interpretation to justification: “the proportionality test merely provides a structure for the demonstrable justification of an act in terms of reasons that are appropriate in a liberal democracy. Or to put it another way: it provides a structure for the justification of an act in terms of public reason”, in Mattias Kumm, The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review, Law and Ethics of Human Rights vol. 4(2): 141-157 (2010), at 150. However, it is important to incorporate in a theory of proportionality the perspective of the right-holder himself. From that perspective, proportionality remains a method of interpretation. As I argue in Sections Three and Four, a virtue of proportionality is that it can integrate both perspectives.

21 For a discussion of available explanations, see Moshe Cohen-Eliya and Iddo Porat, supra note 8 (Proportionality and the Culture of
but it does aim to explain its staying power and success.\textsuperscript{22} I identify a function that proportionality plays in contemporary constitutional law and practice - namely, helping judges mitigate the violent effect of their decisions on the claimants’ jurisgenerative processes –, together with an account of what in contemporary law might explain why such a function is perceived as necessary (the fact of social pluralism, judges’ angst over law’s under-determined nature, the complexity of the relations between state and individual). This argument supplements, without replacing historical, sociological or other compatible normative explanations.

This broad approach to proportionality teaches as much about contemporary constitutional thought as it does about the method itself. Rather than analyzing this method as a stand-alone legal tool, I take a broader view, one that integrates proportionality within a larger configuration of patterns of constitutional doctrine and discourse. I refer to such configurations as “constitutional styles.” A style encapsulates in its methodology a comprehensive approach to constitutional rights, the role of courts and their duties of responsiveness, and generally to the substance of law’s shaping impact on the “culture of liberty”\textsuperscript{23} in a constitutional democracy. Different styles are often intertwined in practice, but my description here treats them as ideal-types. Proportionality epitomizes a particular style. Since each style can be differentiated by its peculiar approach to the positioning of different constitutional actors – that is, to the construction of constitutional space – I use an architectural metaphor to label it the Corinthian style.\textsuperscript{24}

This constitutional style, like the Greek architectural order itself, has an integrative aim that combines elements of two other constitutional styles. The first is the Doric constitutional style, which is characterized by a top-down form of legal reasoning and a categorical method of constitutional interpretation of deontological rights. The second is the Ionic constitutional style that relies on a contextualized bottom-up form of reasoning and a balancing judicial methodology.

The first two sections describe the Doric and Ionic styles, respectively. A description is necessary because the Corinthian style, to which I turn in Section Three, integrates their respective approaches through the proportionality method. Proportionality places a non-deontological conception of rights within a categorical structure of formal analysis. It represents a synthesis of Doric fidelity to form and institutional structure(thesis) with Ionic “fact-sensitivity”\textsuperscript{25} to contexts in which specific controversies arise (antithesis) that gives the perception of enhanced judicial responsiveness. However, one should not conflate the issue of perception and that of substantive worth. I argue in this section that while proportionality is comparatively more responsive than alternative methods, its judicial technique has not entirely lived up to its integrative aims. Proportionality succumbs to pressures from the centrifugal forces of universalism and particularism that it seeks to integrate. These

\textsuperscript{22} On functional explanations, see G.A. Cohen, Karl Marx’s Theory of History, 249-277 (1978).
\textsuperscript{23} I borrow this phrase from Ronald Dworkin, A Bill of Rights for Britain (1990).
\textsuperscript{24} For a discussion of the different orders of Greek and Roman architecture, see Fil Hearn, Ideas that Shape Buildings 97-133 (MIT Press, 2003).
\textsuperscript{25} Philip Sales and Ben Hooper, Proportionality and the Form of Law, 119 Law Quarterly Review vol. 119 (2003), at 428.
pressures give rise to a paradox in that the back-loading of proportionality analysis (the fact that, in practice, most governmental measures survive the first stages of the analysis), is both its flaw and the source of its appeal. It is its flaw because such back-loading raises the stakes at the later (balancing) stages of proportionality analysis by increasing the need for principled decision-making techniques. Such formalizing techniques are no more available here than they are under the Ionic style. But the escalating stakes are also a source of proportionality’s appeal because they have the effect of validating both competing interests. As far as the state interest is concerned, the more stages of proportionality analysis the challenged regulation survives, the stronger the recognition of the underlying public interest becomes. On the right-holder’s side, the demanding scrutiny of the state interest seeking to override the right reinforces the weight that the constitution places on the interest protected by the right. However counterintuitively, the judicial vindication of the strength of both conflicting interests narrows the ex ante/ex post gap to a considerable extent, thus enhancing the perception of judicial responsiveness.

In Section Four I take up the objection that judicial violence on private jurisgenerative interpretative processes is jurisprudentially irrelevant. The discussion progresses from constitutional methodology to the broader impact of the fact of social pluralism on constitutional adjudication in late modern democracies. Pluralism opens “abysses of remoteness”26, as Hannah Arendt calls them, that challenge the fundamentals of the interaction between citizens and their institutions. Pluralism widens the pool of perspectives on social and political life from which claims are drawn while, at the same time, deepening the need for justification of specific institutional responses in ways acceptable to a pluralist citizenry. I argue that the fact of pluralism, together with the critique of legal determinacy and the changing role of the state, lengthens the distance between claimants, widens the ex ante/ex post gap, and heightens the need for mechanisms of institutional responsiveness to mitigate the violence that the law of the state inflicts on private jurisgenerative interpretative processes.

Michael Walzer described the challenge of judging not as “that of detachment, but of ambiguous connection.”27 The last section analyzes the role of the imagination in how modern law constructs the ambiguous connection between judges and their audiences. Using the works of Kant and Arendt, I analyze the role imagination plays in how different constitutional styles construct the positional objectivity of decision-makers. Proportionality synthesizes the forces of universalism and particularism and relies on the role of imagination in ways that other constitutional styles have traditionally sought to avoid. In conclusion, I will argue that the relation between proportionality and freedom is complex, and identify some dangers and opportunities in the age of proportionality.

§2. THE DORIC CONSTITUTIONAL STYLE

Reasoning categorically on down from text or high principle, at the “emancipatory core” of the Doric style is the idea that constitutional – like all subspecies of legal – judgment should resist “subsumption under particularistic causes.” Such causes erode the virtues of generality, universalism, and legal form. In this view, succumbing to particularistic causes corrupts the commitment to the rule of law and undermines the responsiveness of the constitutional system to the demands of litigants qua citizens. Since constitutional judges decide cases “by virtue of their authority, and not because they are any more likely to be right than other people,” judicial power is usurped whenever judges are perceived to deliver all-things-considered decisions.

The Doric style builds walls – the “sworn enemy of caprice, ... the palladium of liberty” – to fragment the constitutional space into separate spheres of authority and discredit “Olympian” standpoints. Constitutional rights are walls that carve out absolute spaces of decision-making authority. The corresponding method of interpretation is categorical analysis. A claim that a right has been violated requires an “assessment of the state’s justifications for action in light of the principles that defined the legitimate basis for state action in the particular sphere in question.” That assessment is jurisdictional, so to speak, rather than substantive. For instance, burning a flag or criticizing the government’s energy policy are actions which the constitutional right to free speech shields from governmental intrusion, no matter how strong or even cogent the government’s reasons for interference might be. Rights are grounds for dismissing as irrelevant – not as weak or otherwise defective – claims to the satisfaction of collective goals that conflict with the right-holder’s interests.

According to the Doric style, responsiveness is owed to the allocational scheme and, through it, to the right-holder. This form of system-centered responsiveness is best understood through an institutional lens. The preservation of social order under conditions of pluralism requires constant reinforcement of the equal status of claimants and the stabilization of their expectations. Since rights protect the actions of right-holders within pre-designated spheres of authority, their judicial enforcement is not tantamount to endorsing the wisdom of their holders’ substantive choices.

30 “Form is the sworn enemy of caprice, the twin sister of liberty... Fixed forms are the school of discipline and order, and thereby of liberty itself. They are the bulwark against external attacks, since they will only break, not bend, and where a people has truly understood the service of freedom, it has also instinctively discovered the value of form and has felt intuitively that in its forms it did not possess and hold to something purely external, but to the palladium of its liberty.” (Rudolf von Jhering, quoted in Roscoe Pound, The End of Law as Developed in Legal Rules and Doctrines, 27 Harvard Law Review 195, 208-209 (1913).
31 Charles Fried, supra note 28 (Two Concepts of Interests), id.
32 There are a number of ways in which the constitutional spaces are carved out, and here I focus on just one approach. See Stephen Gardbaum, A Democratic Defense of Constitutional Balancing, 4 Law & Ethics of Human Rights 78 (2010).
34 This is the idea of exclusionary reasons. See Joseph Raz, Practical Reason and Norms 35-49 (1975). See also Jeremy Waldron, Pildes on Dworkin’s Theory of Rights, Journal of Legal Studies, 2000, vol. 29 (1): 301, 301 (“Rights are limits on the kinds of reasons that the state can appropriately invoke in order to justify its actions”). See also Pildes, supra note 32 (Avoiding Balancing), at 712.
Rather, in enforcing individual rights, courts (re)enforce an institutional scheme that allocates to the right-holder the authority to act and decide as he thinks best.\(^{35}\) Does the constitution place the authority to decide whether to terminate an unwanted pregnancy with the woman and her doctor or with the state?\(^{36}\) Does it leave it to the right-holder or to the state to decide if loaded handguns can be kept at home in urban areas with high crime rates?\(^{37}\) As a further example, consider whether terminally ill patients have a constitutinal right to experimental drugs.\(^{38}\) That question is not about the wisdom of the choice to take such a risk (i.e., whether or not it is wise or reasonable to put oneself at a heightened risk from insufficiently tested and thus potentially unsafe drugs). Rather, the question is to whom (the patient, the doctor, the state, etc.) does the constitution allocate the authority to make the decision that the risk is or is not worth taking.

Of course, this approach allows for great variety of approaches - historical, moral etc. - in answering such allocational questions. Moreover, that scheme itself may reflect substantive judgments.\(^{39}\) But stipulating as rights the outcomes of those substantive judgments marks an epistemological break: a particular liberty interest is protected not because it is important, but rather because the constitution says so. As one scholar put it, “a litigant’s reference to freedom of speech or conscience is not simply a claim for immediate satisfaction, but is the assertion of an interest which can be understood only as a reference to systemic ways of doing things, to roles, institutions and practices.”\(^{40}\)

In this world, each wall “creates a new liberty.”\(^{41}\) The advantage of this framing of constitutional questions is not that disagreement will fade away – it won’t – but rather that such framing allows for a better grasp of what the disagreement is about.

The Doric conception of rights has a deontological character that basic goods lack.\(^{42}\) Rights are not like iPads or designer clothes or any other consumer good we might wish to own but have no special entitlement to demand. Rather, as Ronald Dworkin put it, “if someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so.”\(^{43}\) Rights have a strong anti-utilitarian animus.\(^{44}\) Jeremy Waldron captures this well:

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\(^{35}\) Howe, Foreword: Political Theory and the Nature of Liberty, 67 Harv. L. Rev. 91,91 (1953) (“Government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign immunity.”)

\(^{36}\) For this interpretation of the early abortion cases, see Laurence Tribe, Structural Due Process, 10 HARV. C.R.-C.L. L. REV. 269 (1975).


\(^{39}\) The scheme can be “the very product of [substantive] interest-balancing.” 128 S. Ct. 2783 at 2821 (Scalia, J.)

\(^{40}\) Charles Fried, supra note 28 (Two Concepts of Interests), at 769. The right to free speech is a second-order reason about how the constitution allocates decision-making power within the spheres of authority that it carves out.

\(^{41}\) Michael Walzer, Liberalism and the Art of Separation, Political Theory vol. 12 (3): 315-330 (1984), at 315. Walzer continues: “The art of separation is not an illusory or fantastic enterprise; it is a morally and politically necessary adaptation to the complexities of modern life. Liberal theory reflects and reinforces a long-term process of social differentiation.”

\(^{42}\) Jürgen Habermas, Between Facts and Norms, at 257.

\(^{43}\) Ronald Dworkin, Taking Rights Seriously, at 269.

\(^{44}\) Id. (Ronald Dworkin, Taking Rights Seriously), at 277.
“the resolution of any conflict with considerations of utility is obvious: rights are to prevail over utility precisely because the whole point of setting them up is to correct for the defects in the utilitarian arguments which are likely to oppose them. We do not stare at the utility calculus and then stare at the rights, and discover that the second is sufficiently important to ‘trump’ the importance of the first. Instead, our sense of the internal connection between the two established the order of priorities.”\(^\text{45}\)

From this perspective, cracking the deontological shell that encases the constitutional rights, for instance by open balancing, compromises the structure of constitutional liberty. Such a procedure reopens the constitutional space to the kind of substantive negotiation that rights are supposed authoritatively to bring to an end. The stakes of revisiting the allocation of decision-making authority between actors of asymmetrical power – the state and the individual – are so high that the constitutional space should not be malleable: constitutional experimentation of this type is discouraged. The Doric space is simply not open to contestation in that way.

It is, however, open to contestation in other ways. Understanding rights as structural devices for the fragmentation of political authority should not obscure that the Doric culture of liberty is nevertheless a culture of argument.\(^\text{46}\) For one, rights themselves are not absolute. They can be overridden, presumably so long as limitations remain exceptional.\(^\text{47}\) The Doric style uses a twofold strategy to mitigate the impact of rights limitations. First, it requires a narrow definition of rights. This is unsurprising: defining broadly rights that are understood deontologically will increase exponentially the number of instances when government policies violate constitutional rights. Such an approach would expand the constitutional domain and make courts the sole negotiators of state’s role in society. The second strategy of the Doric style is to structure the typical constitutional conflict as between individuals and the state. In situations when constitutional norms do not apply horizontally, conflicts of individual rights that could challenge the deontological conception will be infrequent. Assessing the success of this double strategy depends largely on how one defines success. If one takes a participant’s perspective, the mere possibility that rights can be limited, however exceptionally, is sufficient to enable the interested party – typically the state – to argue that the case at hand warrants precisely such an exception.\(^\text{48}\)

As should be apparent by now, the Doric style denies the constitutional relevance of the \textit{ex ante}/\textit{ex post} gap. In this view, there is only one legal standpoint and that is the standpoint of the con-


\(^{46}\) Martti Koskenniemi, The Gentle Civilizer of Nations, supra note 27, at 502 (“To put it simply and, I fear, through a banality it may not deserve, the message is that there must be limits to the exercise of power, that those who are in positions of strength must be accountable and that those who are weak must be heard and protected, and that when professional men and women engage in an argument about what is lawful and what is not, they are engaged in a politics that imagines the possibility of a community overriding particular alliances and preferences and allowing a meaningful distinction between lawful constraint and the application of naked power.”)


\(^{48}\) At the same time, as the example of the American constitutional culture shows, the constant reaffirmation through public discourse of the deontological conception of rights in a Doric culture of liberty can be a successful self-fulfilling prophecy. For a critical discussion of the broader cultural implications of this deontological approach to rights in the US context, see Mary-Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991).
stutional allocation of decision-making authority. Judges are the guardians of that scheme. Constitutional responsiveness means respect for the allocational scheme and the underlying values or principles. Doric responsiveness requires that the judicial mind never becomes unmoored, for fear that, if set sail, it might drift away from the perspective of the allocation of decision-making power and toward the forbidden space of “particularistic causes.”

§3. THE IONIC CONSTITUTIONAL STYLE

The Ionic style develops as an alternative to the detached immutability of the judicial standpoint in the Doric approach. Specifically, it is an alternative to the “impartial reason [that] aims to adopt a point of view outside concrete situations of action, a transcendental ‘view from nowhere’ that carries the perspective, attitudes, character, and interests of no particular subject or set of subjects.” In this view, the attempt to move beyond “current human choices” breeds estrangement and alienation. The cold aloofness of Doric judicial reason can ignore context only by detaching from social life itself. From this perspective, the quest to resist the pressures of particularistic causes misunderstands the challenge of modern law. That challenge is not how to artificially detach constitutional reason from an unruly social life. Rather, it is how to face that complexity full-on and overcome, though law, “the frictions of distance” that separate us.

The Ionic alternative to detachment is situatedness. Situated decision-making rejects “the notion that there is a universal, rational foundation for legal judgment. Judges do not ... inhabit a lofty perspective that yields an objective vision of the case and its correct disposition.” Situatedness does not require that the judge be situated somewhere, anywhere — that would be trite — but rather that he be situated in the (particularist) context of the case. As Judith Resnik put it in her study of feminist adjudication, “adjudication is one instance of government deployment of power that has the potential for genuine contextualism, for taking seriously the needs of the individuals affected by decisions and shaping decisions accordingly. Precisely because adjudication is socially embedded, it can be fluid and responsive.” Responsiveness here is conceptualized as respect for the rich and

49 Koskeniemmi, The Gentle Civilizer of Nations, supra note 27, at 501 (“formalism seeks to persuade the protagonists (lawyers, decision-makers) to take a momentary distance from their preferences and to enter a terrain where these preferences should be justified, instead of taken for granted, by reference to standards that are independent from their particular positions or interests.”).
50 Iris Marion Young, Justice and the Politics of Difference 100 (1990).
52 David Harvey, Cosmopolitanism and the Geographies of Freedom 140 (2009).
multilayered social meanings of the participants in the constitutional process. A contextual, pragmatic, bottom-up approach leads constitutional analysis to reflect on the richness of the life that law aims to regulate. If the Doric divides social space into absolute spheres of authority, the Ionic constitutional space is relative; the landscape changes with the perspective of each stakeholder.55

Under this view, rights are not spaces of exclusion; fellow citizens and the state are not presumed to be intruders. Dieter Grimm made the point that “the function of the constitutional guarantees of rights is not to make limitations as difficult as possible but to require special justifications for limitations that make them compatible with the general principles of individual autonomy and dignity.”56 By contrast to the deontological approach to rights, the Ionic style routinely authorizes judges to break the shell encasing the right in order to access the background interests. Rights are understood as claims to institutional protection for select substantive needs, and not as ambits delimiting spheres of sovereignty. For instance, speech and privacy are super-valued interests that the pouvoir constituant selects and for whose protection and/or realization the state summons its coercive force.57

By contrast to the Doric style, which focuses on the delimitation of the sphere of constitutional authority and interprets rights narrowly, the Ionic approach interprets rights broadly and then channels the superior quantum of the judge’s interpretative energy to the question of whether their override is justified. For instance, when asked to decide whether there is a constitutional right to physician-assisted suicide, a judge first recognizes the privacy interest in these situations and then proceeds to consider whether the government has sufficiently good reasons to limit its exercise. The broad interpretation of rights has a cumulative effect on the legal system. Because public policies will more often interfere with broadly defined rights, the frequency with which public interest overrides individual rights will correspondingly increase, lest the government should be brought to a halt. This structure of the constitutional doctrines accordingly shapes the Ionic culture of liberty. In this culture, rights are not separating walls of a deontological cast.

So, what exactly are rights? Can they be more than “just rhetorical flourish?”58 Since breaking the deontological shell turns rights-claims into substantive reasons for demanding a particular institutional response, it seems that “having a right does not confer much on the rights holder.”59

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55 Catharine Wells, supra note 52 (Situated Decision-making), at 1734 (“Understanding a controversy … requires that it be experienced from several different perspectives as a developing drama that moves towards its own unique resolution.”).


57 The legal recognition of interests is of course not unidirectional. Some interests do not preexist legal norms; they are, rather, a consequence of their creation. The expectation that a benefit-granting statutory scheme will not be discontinued absent change in circumstances may give rise to interests that cannot logically precede the adoption of that scheme. See Goldberg v. Kelly, 397 U.S. 254 (1970).

58 David Beatty, supra note 1 (Ultimate Rule of Law), at 171 (“When rights are factored into an analysis organized around the principle of proportionality, they have no special force as trumps. They are just rhetorical flourish.”).

59 Mattias Kumm, supra note 2 (Constitutional Rights as Principles), at 582. (“Having a right does not confer much on the rights holder: that is to say, the fact that he or she has a prima facie right does not imply a position that entitles him/her to prevail over countervailing considerations of policy.”).
The existence of a privacy interest protected by a right does not *eo ipso* entitle the right holder to rely on the state’s protection of his privacy interests. If that protection is granted, it will be as the outcome of a balancing process wherein judges deem that privacy interest comparatively stronger than conflicting interests.\(^{60}\)

And so begins, in the view of its critics, the out-of-control process of judicial empowerment. After surveying more than three decades of German constitutional jurisprudence, David Currie concluded that “[a] balancing test is no more protective of liberty than the judges who administer it.”\(^{61}\) However strong, rights as substantive reasons are mere “reasons that can be displaced by other reasons.”\(^{62}\) Critics have dismissed the law-ness of this approach: “A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”\(^{63}\)

The critics get one point but miss another. Yes, this style empowers courts to override rights in specific contexts. But judges do so in a culture of argument that requires them to justify their decisions. While it may be disquieting to realize that the satisfaction of rights-protected interests depends on further judicial recognition, the fact is that no constitutional style – the Doric style included – can get around this problem, if a problem it is, once it is acknowledged that either public or private interests may override constitutional rights. To paraphrase a classic, the contemporary jurist who feels uneasy about leaving law to the “mercy” of argument was born in the wrong century. In our late modern age, the terms of collective self-government are the object of argument and debate.\(^{64}\)

Rather than mourn the lost age of certainties, we would be better served to study just how different styles construe constitutional inquiry. This is where Ionic balancing comes up short because it fails to adequately structure the process of weighing conflicting interests. The lack of formal structure is meant to facilitate the judge’s immersion into the particular contexts of the parties.\(^{65}\) Con-

\(^{60}\) The outcome of balancing can be stated in the form of a legal rule. See Robert Alexy, *Theory of Constitutional Rights* 56 (2002) (“the result of every correct balancing of constitutional rights can be formulated in terms of a derivative constitutional rights norm in the form of a rule under which the case can be subsumed.”).


\(^{62}\) Robert Alexy, supra note 59 (*Theory of Constitutional Rights*), at 57. It is of course possible to devise categorical protections within the model of rights as substantive reasons. As Kumm reminds us, certain types of reasons – say, religious reasons for introducing prayer in public schools – are categorically excluded from the comparative weighting of interests in proportionality analysis. See Mattias Kumm, supra note 2 (*Constitutional Rights as Principles*), at 591.

\(^{63}\) Scalia, J., in *Heller* 128 S. Ct. at 2821.

\(^{64}\) Rights can also alter the time-horizon in which that process unfolds. For instance, rights can be part of the *ongoing* interaction between the right-holder and social institutions over time. Martha Minow writes: “A claimant asserts a right and thereby secures the attention of the community through the procedures the community has designated for hearing such claims. The legal authority responds, and though this response is temporary and of limited scope, it provides the occasion for the next claim. Legal rights, then, should be understood as the language of a continuing process rather than the fixed rules. Rights discourse reaches temporary resting points from which new claims can be made. Rights, in this sense, are not “trumps” but the language we use to try to persuade others to let us win this round”. See Martha Minow, supra note 50 (*Interpreting Rights*), at 1875-1876 (footnotes omitted).

\(^{65}\) Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. Cal. L. Rev. 1877, 1935 (1988) (“Rather than bemoan...a switch in roles, feminism teaches us to celebrate such rearrangements, to require judges to let others judge them. Such moments might better enable judges to be empathetic, to adopt the perspective of the other, to enter into the experience of the courtroom unprotected by their special status. Judge as witness can thus be understood as a profound challenge to a stable hierarchy, as a subversive act to be applauded.”).
text-based analysis requires flexibility, which means there can be “no purely logical or conceptual answer” to the question of how to prioritize conflicting interests. At one level, the constant resurfacing of background interests in the balancing analysis is a welcome reminder of what makes them worth protecting as rights. However, leaving the judicial weighing of conflicting interests completely unscripted undermines the methodic dimension of balancing. Because there is no method to follow, parties can expect from judges only the outcome of the process – and that outcome is bound to be unpredictable. Balancing opens up the constitutional space and then simply leaves it open. But a constitutional method must do more. It must be administrable in a way that makes it responsive to the requirements of the institutional structure and the legitimate expectations of future claimants. Further, it must operationalize, again in an administrable fashion, the weight and pedigree of the right-holder’s interests that enter the balancing analysis. Granted, those interests do not automatically trump state interests. But then again, nothing happens “automatically” in a culture of argument.

Somewhere along the way the Ionic insight about the importance of context becomes a trap. The point of rights was the transcend context, yet it turns out that rights depend on context. That is the insight. But the demise of the deontological conception of rights also erodes the protected space that rights were supposed to create, whose enforcement depends in part on the interpreters’ awareness of the role of rights in the general constitutional scheme. It is a mistake to downplay that effect. The Ionic correction of Doric detachment from context and reliance on legal form swings too far in the opposite direction. The challenge becomes not how to chose between these two styles, but rather how to synthesize them.

§4. THE CORINTHIAN CONSTITUTIONAL STYLE

Like the Corinthian architectural order itself, which combines Doric and Ionic elements, this constitutional style integrates fidelity to legal form and institutional structure with versatile “factsensitivity” to the contexts in which controversies arise. This style aims to adjust the Ionic correction of the Doric style just enough to enhance judicial responsiveness to actual context and fulfill the demand of systemic predictability and administrability that are associated with the rule of law in complex democracies. The proportionality method epitomizes this integrative ethos. The method frames a non-deontological conception of rights within a categorical structure of formal analysis.

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66 128 S. Ct. at 2850 (Breyer, J., dissenting)
67 Contrasting balancing to rule-based categorical reasoning, Kathleen Sullivan has defended balancing on precisely this ground: “rules lose vitality unless their reason for existing is reiterated”, in Kathleen Sullivan, Post-Liberal Judging: The Roles of Categorization and Balancing, 63 University of Colorado Law Review 293, 309 (1992) (footnotes omitted).
68 Philip Sales and Ben Hooper, Proportionality and the Form of Law, 119 Law Quarterly Review vol. 119 (2003), at 428
Proportionality analysis consists of one preliminary step, where courts ask about the purpose of challenged regulation, followed by three “proper” steps: suitability, necessity, and (Ionic-type) balancing where courts weigh the gain from satisfaction of the goal against the loss that results from the intrusion on the constitutional right. Limitations on rights that fail any one of these steps are invalidated as violations of constitutional rights. Measures that survive the proportionality test are allowed to override constitutional rights.

The previous sections have identified two approaches to the *ex ante/ex post* gap. I have argued that the Doric style does not perceive the gap as a problem; the Ionic approach does perceive it as such but lacks the resources to address it. The Corinthian constitutional style seeks a more satisfactory approach. The key is its integration within the judicial standpoint itself of what Hannah Arendt called, in the context of judgment in general, the “plurality of diverging public standpoints.” Rather than assign judges to an immutable standpoint “above the melee” or immerse them into the standpoint of each participant, the Corinthian style gives them a method – the proportionality method – to transcend by integrating the perspectives of the parties. The plurality of those perspectives, and its relevance for constitutional judgment, is neither denied, as in the Doric style, nor extolled, as in the Ionic, but simply acknowledged as a fact of social life. Proportionality guides the judge to move back and forth between his position and that of the claimants, thus enlarging the judicial standpoint by integrating different perspectives. This constitutional space is neither absolute nor relative, but relational.

The next sections reconstruct the “positional objectivity” of the judicial standpoint in proportionality analysis. For now I am interested in the details of this method’s structure and application. I have thus far provided an account of this method’s aims, in their best light. However, attention to detail reveals a disconnect between its integrative aims and judicial technique. Proportionality aims to integrate universalism and particularism. In that task it ultimately fails because it succumbs to the centrifugal pressures exerted by these two poles. Put differently, the success of proportionality can be traced to the perception of enhanced judicial responsiveness, yet, as will see below, that perception itself is not fully supported by constitutional practice. Precisely because of this disconnect between reality and perception, a phenomenological approach to proportionality can be illuminating. For instance, only an inquiry into that perception itself can help to understand the distinction between proportionality and balancing. A purely analytical or conceptual different would fail to

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69 I use here Alexy’s standard “balancing” formula: “[t]he greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other.” In Robert Alexy, supra note 59 (Theory of Constitutional Rights), at 102.


71 Hannah Arendt, Lectures on Kant’s Political Philosophy 42 (1989).

72 I borrow this classification (absolute, relative, relational spaces) from David Harvey, Cosmopolitanism and the Geographies of Freedom (2009), although I should point out that my use does not completely track Harvey’s. For more on relational space, see Lefebvre, The Production of Space (1992).

73 This phrase is Amartya Sen’s. Sen argues for conception of objectivity that is positional-dependent and person-independent. Observations and beliefs are objective if any subject could reproduce them when placed in a position similar to that of the initial observer. The challenge then becomes how to define the position-dependent. See Amartya Sen, Positional Objectivity, Philosophy and Public Affairs, Vol. 22 (2) 126-145 (1993).
identify differences, as they both rely on a similar approach to rights. Nevertheless, judges who apply the proportionality method adamantly deny that balancing and proportionality are two names for the same method. The perception that proportionality is a method apart needs to be studied in both its doctrinal and theoretical roots. We begin with doctrine.

Consider the tensions deriving from the formalization of the different steps of proportionality analysis. The distinctiveness of these steps aims to enhance the administrability and legal certainty of the proportionality method in contrast to the more ill-structured balancing process. Concerned with applications of proportionality that blur the line between the “necessity” and the balancing stages of the test, Dieter Grimm has warned that “a confusion of the steps creates the danger that elements enter the operation in an uncontrolled manner and render the result more arbitrary and less predictable.” Arbitrary and unpredictable is how critics describe balancing. The formalization of the different steps is supposed to placate these worries.

But formalization replicates the tensions between the Doric and the Ionic styles. Consider, for instance, the analysis of legislative purposes at the preliminary stage. Judges’ demand that legislators present the legislative purpose is an significant challenge to the legislative prerogative. It signifies that the pedigree of a statute enacted by the people’s elected representatives is insufficient ground for upholding its validity; further justification is necessary. This demand introduces a Doric element into the Corinthian style: the idea that rights protect a space which the government may not enter when pursuing impermissible goals. In theory, the purpose analysis can be quite demanding since courts can impose requirements about the level of specificity at which the purpose must be formulated, as well require evidence that the stated purpose of legislation is the actual purpose, rather than an ex post facto rationalization.

In the practice of proportionality, however, legislation is virtually never invalidated at this early stage. It turns out, unsurprisingly, that it is always possible to come up with some permissible goal for the challenged statute. Courts can strike down legislation at this stage only by pushing back, and that has not been a strategy of choice for courts applying proportionality analysis. Judges have preferred to defer to the legislature on separation of powers grounds: the democratically elected branch has the right to set its policy agenda. To be sure, structural deferral does not make the preliminary stage meaningless. Even without close judicial scrutiny of legislative goals, the stated goals will shape the lines of argument available at later stages. However, asking for legislative reasons

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74 See Stephen Gardbaum, supra note 46 (Limiting Rights).
75 Dieter Grimm, Supra note 55 (Proportionality in Germany and Canada), at 397.
76 The idea is also to avoid the twin risk of what the South African Constitutional Court called the “mechanical adherence to a sequential check-list;” S. Manamela, 2000 (3) SA 1 (CC), at 20 (cited in Stephen Gardbaum, supra note 46 (Limiting Rights), at 841.
77 For an example of such analysis in American constitutional law, see United States v. Virginia, 518 U.S. 515 (1996).
78 See Dieter Grimm, supra note 55 (Proportionality), at 388. Canadian courts initially tried to impose a higher threshold on the government by asking that the governmental objective be “pressing and substantial” (Aharon Barak, Proportional Effect: The Israeli Experience, 57 U. Toronto L.J. 369, 371 (2007) concern or “sufficiently important to justify overriding a Charter [constitutionally protected] right” See Barak, Proportional Effect, at 371 (quoting PETER HOGG, CONSTITUTIONAL LAW OF CANADA, student ed. (2005) at 823. Over time however, as the other steps in the analysis have become more substantial, even Canadian courts have begun to defer more and more to the legislature. See generally Sujit Choudhry, So What Is the Real Legacy of Oakes?, (2006) 34 Sup.Ct.L. Rev. (2d) 501.
but failing to question their soundness is no doubt an odd combination. It is a combination that veils the unease of courts keen to be perceived as actors responsive to the overall constitutional structure.

Structural deference at the preliminary step sets in motion a sliding scale toward the later stages of analysis which threatens to collapse proportionality into unstructured balancing. The backloading of proportionality analysis inevitably puts heightened pressure on the balancing stage. The greater the deference of courts at the first stages of proportionality analysis, the more the substance of their review is pushed back to the latter stage. Paradoxically, herein lies both proportionality’s great flaw and the source of its irresistible appeal. On the one hand, the escalating stakes require a judicial technique for principled balancing. As we will see, it is questionable if such a technique is available. On the other hand, the ever-greater stakes legitimize the strengths of the competing interests. As far as the state interest is concerned, the more stages of proportionality analysis the challenged regulation survives, the stronger becomes the recognition of the underlying public interest becomes. On the right-holder’s side, this analytical structure ensures that demanding scrutiny awaits any attempts to override the individual interest, given its importance under the overall constitutional scheme. However counter-intuitively, this judicial vindication is the source of responsiveness, understood as due consideration, that bridges the ex ante/ex post gap and mitigates the violent dimension of judicial decision.

At the balancing stage of proportionality analysis, judges break the institutional shell that encases the right and engage in a comparative Ionic-like weighing of the seriousness of the infringement of the right against the degree of satisfaction to the interests protected by the challenged statute. Formalizing techniques are necessary in order to show that judicial analysis at this stage is not “free-style” moving in and out of form. I discuss below the formalizing technique of distinguishing between the core and periphery of rights and find it unconvincing. I conclude that the appeal of proportionality should be sought elsewhere.

The distinction between the core and the periphery of rights is a widely used formalizing technique. Its aim is to confine tradeoffs in the balancing process to the periphery of rights. As former President of the Israeli Supreme Court Aharon Barak put it, judges “must aim to preserve the ‘core’ of each … libert[y] so that any damage will only affect the shell.” Once an interest has been identified at the core of a right — for instance, the interest in self-defense at the core of the Second Amendment right to bear arms or the interest in political speech within the broader freedom of expression — that interest must not be balanced away.

Some advocates of proportionality — including judges writing extra-judicially — have argued for a more incisive judicial involvement at this stage. President Barak has expressed doubts about the wisdom of deferring to the legislator. See Aharon Barak, supra note 77 (Proportional Effect), at 371 (“Despite the centrality of the object component, no statute in Israel has been annulled merely because of the lack of a proper object [or purpose]. A similar approach exists in German constitutional law … This is regrettable. The object component should be given an independent and central role in examining constitutionality, without linking it solely with the means for realizing it. Indeed, not every object is proper from the constitutional perspective. This is not the expression of a lack of confidence in the legislature; rather it is the expression of the status of human rights.”) (footnotes omitted).

The centrifugal jurisprudential forces that structure proportionality analysis are apparent. By contrast to the deontological conception of rights, this conception authorizes judicial access to the underlying interests. The assumption is that a state measure – or conflicting individual right, as the case may be – affects only some interests protected by the right. However, those interests are prioritized. The corresponding gradation of degrees of difficulty matching the hierarchy of protected interests reflects the centrality of legal form. Assuming a vertical constitutional conflict, the state will find it more difficult, perhaps almost impossible, to justify overriding the core of a constitutional right. The more onerous the justification becomes on that scale of difficulty, the closer to categorical the protection that the core of the right receives. This is how the Corinthian style integrates a Doric dimension within a non-deontological, Ionic conception of rights.

There are, however, difficulties. Not all rights have clear cores. For instance, disability rights, which in many jurisdictions have constitutional stature, are said not to have cores. The delimitation of cores is also a matter of dispute, as the interpretation of freedom of religion shows. Critics have pointed out that it is often impossible to identify the core of a right without reference to competing public interests. The delineation will depend upon which methodology the interpreter uses, and how the methodology is used in the given case. For instance, in the U.S. Supreme Court debate in *District of Columbia v. Heller* showed, the distance between the majority’s originalist analysis and the dissenters’ proportionality method was much shorter than either side acknowledged. In that case, the dissenting justices used historical analysis to distinguish core and periphery (or central and ancillary purposes) of the Second Amendment right to bear arms and found the challenged regulation constitutional because it affected only the ancillary interest in individual self-defense, rather than the interest in partaking in a militia that was at the core of the constitutionally-protected right. The central disagreement between the majority and the dissent was about the correct historical interpretation. These difficulties have led some courts, such as the South African Constitutional Court, to stop relying on this technique at the balancing stage of proportionality analysis.

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81 The assumption, as Dieter Grimm put it, is that: “It is rarely the case that a legal measure affects a fundamental right altogether. Usually, only a certain aspect of a right is affected...The same is true for the good in whose interest the right is restricted. Rarely is one measure apt to give full protection to a certain good.” Dieter Grimm, supra note 55 (Proportionality), at 396.


83 In the context of freedom of religion, if judges may break the institutional shell of a right, then they may look for the “core” of the free exercise right in the beating heart of the belief and practice of a religious experience, but this is a notoriously sticky enterprise. “It is no more appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest’ test in the free exercise field, than it would be for them to determine the ‘importance’ of ideas before applying the ‘compelling interest’ test in the free speech field.” Employment Division, Dep’t of Human Resources v. Smith, 485 U.S. 660 (1988). See also Shavit v. The Chevra Kadisha of Rishon Le Zion, C.A. 6024/97 (1999) (Supreme Court of Israel) (Judge Englard) (deciding whether Jewish burial societies, which customarily administered cemeteries throughout the country, had the right to prevent family members from inscribing on the deceased’s tombstone her birth and death dates according to the standard Gregorian calendar (as well as the Hebrew calendar).

84 For these reasons, the distinction between core and periphery raises more questions than it answers. See also, Julian Rivers, Proportionality and Variable Intensity of Review, Cambridge Law Journal vol. 65 (1): 174-207 (“The problem with the ‘very essence’ of a right is that it is almost impossible to define it usefully without reference to competing public interests.”), at 187.


86 To be specific, the constitutional provision in the South African Interim Constitution followed the essentialist paradigm of the German
A more comprehensive study would be required to present the definitive case that judicial technique does not live up to proportionality’s integrative aims. But even a partial account should suffice to establish that technique alone cannot adequately explain the success of proportionality. The next section looks at that success in a broader jurisprudential perspective.

§5. CONSTITUTIONAL METHOD IN 3-D

Constitutional conflict is not only a conflict of interpretation, though this is the best normative reconstruction of the form that conflict takes before courts. Each party brings a claim as to why, in its interpretation, the constitution extends its protection in the given context to a specific interest. The role of courts is thus to create law as much as it is to suppress it. After mentioning the “inherent difficulty presented by the violence of the state’s law acting upon the free interpretative process,” Cover continues: “It is remarkable that in myth and history the origin of and the justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy. It is the multiplicity of laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution.”

According to the liberal sensibility, a solution is needed for fear that, when left untamed, the fecundity of the jurisgenerative process can endanger the social order.

While not all jurisgenerative processes are interpretative in nature, specific concerns about interpretation processes go as far back as Hobbes. As he argued, if individuals are left to their own lights to interpret the demands of the law – be that the law of nature or, by modern analogy, any form of higher law such as a written constitution – they will come up, for a variety of reasons not all of which include self-interest, with diverging interpretations. Those interpretations make coordination impossible, which in turn spells disaster. To enable coordination, individuals can be said to entrust to the state and its institutions the final authority to interpret the law. Judicial interpretation therefore supersedes private interpretation – that is, interpretation anchored in the citizens’ legal style. The Court’s discussion of its shortcomings can be found in S. v. Makwanyane, (1995) (3) SALR 391 (CC), para. 132 (The difficulty of interpretation arises from the uncertainty as to what the ‘essential content’ of a right is, and how it is to be determined. Should this be determined subjectively from the point of view of the individual affected by the invasion of the right, or objectively, from the point of view of the nature of the right and its place in the constitutional order, or possibly in some other way?”).

89 The Supreme Court delivers final statements of legal validity. The common reference is to Justice Jackson’s statement: “We are not final because we are infallible, but we are infallible only because we are final”, Brown v. Allen 344 US 443, 540 (1953) (Jackson J., concurring). See Larry Alexander and Frederick Schauer, On Extrajudicial Constitutional Interpretation,110 Harv. L. Rev. 1359 (1997).
imaginaries\textsuperscript{\textsuperscript{90}}—as, just as the law of the state trumps private law-making more generally. State law by necessity crushes private jurisgenerative processes and that inevitably disappoints the hopes that the future losing party had \textit{ex ante} the judicial outcome. Why, then, is the violence that courts inflict on the private laws or legal interpretation a problem?

To see why, let us first note that an account of the nature of political authority explains precisely that— the nature of political authority. Yet not all the questions about power and public life concern the nature of political authority. As Bernard Williams pointed out, there are questions about politics that are not first-order questions about its foundations.\textsuperscript{91} This simple point is relevant to our purposes. The issue of the nature of judicial authority is conceptually distinct from that of the effects of judicial decisions, which itself is distinct from how adjudicators reach those decisions. An account of the foundations of political or constitutional authority is not, without (much) more, also an account of constitutional methodology. While it is true that a theory of the foundations offers a lens for assessing methodological approaches, even that perspective is just one among many.

An alternative is the perspective from reality. The starting point here is not the foundation of political authority but a fact of social life or legal practice, such as the rise of proportionality as method of constitutional analysis around the world. This success can be understood as one indication that courts perceive as insufficient—or, as I have suggested, insufficiently responsive—to justify violence by reference solely to the need for an allocational constitutional scheme that gives judges the final word over what the law is. The reasons why invoking the allocational scheme is insufficient have as much to do with the perception of that violence as with the allocational scheme itself. The invocation of the allocational scheme is seldom appropriately “thin”, in other words, it is often difficult to resist the attraction of using the existence of the allocational scheme to support conclusions in specific cases without the need to further defend one’s interpretative choices. A combination of factors explains why such conclusions are unsupported. Consider first the fact of social pluralism. Pluralism makes it significantly more difficult to justify exercises of political power that coerce subjects into compliance with norms which they, as individuals holding diverging life plans, can—and often do—reasonably challenge on substantive grounds of fairness as they understand it. The fact of pluralism puts particular pressure on judicial responsiveness. It widens the pool of perspectives on social and political life from which claims are drawn while at the same time deepening the need for justification of specific institutional responses in ways acceptable to a pluralist citizenry. How can the free institutions of a constitutional democracy retain an appropriately high degree of responsiveness to the claims of a citizenry that holds deep, reasonable, yet incompatible comprehensive doctrines of the good?

Add to this the critique of legal determinacy in modern jurisprudence. Drawing inspiration from the mid-twentieth century philosophy of language, jurists have identified open-texture as a phe-

\textsuperscript{90} I use the idea of “legal imaginary” by analogy with Charles Taylor’s conception of the social imaginary, in Charles Taylor, Modern Social Imaginaries (2007). Taylor defined the social imaginary as “a largely unstructured and inarticulate understanding of our whole situation... (,) an implicit map of the social space.” (at 25)

\textsuperscript{91} Bernard Williams, In the Beginning Was the Deed (2005).
omenon central to law’s medium, language. This is especially relevant in the case of open-ended constitutional provisions where it is assumed that there will be a multiplicity of interpretative options, some rooted in conflicting, and sometimes irreconcilable, political and ideological visions of society. This critique of determinacy has heightened the perception of fallibility of legal justification and has recast the rights discourse in a different light. Recent calls for transparency and candor must be understood in this context, as attempts to compensate the inescapable need for legal interpretation through the virtues of the process of interpretation or the ethics of the legal interpreters.

Another reason why reference to the constitutional scheme is insufficient has to do with the complexity of the relations between individuals and the modern state. The role and functions of the modern state have expanded in the course of the twentieth century and the dynamic of the relationship between its institutions and citizens has become accordingly complex. As far as the law’s task is concerned, this complexity can cut both ways. Law’s role can be to counterbalance that complexity and preserving the polyphonic simplicity of the Doric style: constitutional rights are insuperable side- constraints on the satisfaction of state interests. Or, conversely, the state’s functions might require its law to reflect the intricate dynamic of the relations between the state and its citizens. This approach, encapsulated by the Corinthian style, sees law as lacking real ground on which to pretend that conflicts between the state (that is, us) and the individual right-holders are any less complex than we know them to be. While much can be said for both approaches, the spread of proportionality shows that constitutional practice has taken the latter route.

The question remains why proportionality has been perceived as more attuned to the need to justify interpretative violence and judicial coercion. I have already suggested that part of the answer has to do with respect. In hard cases, where the indeterminacy of the interpretative choice makes it both harder and more urgent to mitigate the *ex ante/ex post* gap, proportionality enhances judicial responsiveness by enabling judges to show “equal concern and respect for everyone involved.” As Alec Stone Sweet and Jed Mathews note, this method makes clear that “a priori, the court holds each of the (parties’) interests in equally high esteem... [and] provides ample occasion for the court to express its respect, even reverence, for the relative positions of each of the parties,” enabling the court to “credibly claim that it shares some of the loser’s distress in the outcome.”

The attention it gives to the claims before it, its substantive engagement and the respect with which it treats them – all of these validate the claims and make proportionality a respectful and thus responsive method. Proportionality aims to place the impartiality of the judicial standpoint without denying the objectivity – tantamount in this context to the strength – of the claimant’s positions. As

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96 David Beatty, supra note 1 (Ultimate Rule of Law), at 169.
David Beatty put it, “Because it is able to evaluate the intensity of people’s subjective preferences objectively, [proportionality] can guarantee more freedom and equality than any rival theory has been able to provide.” As we have seen, the back-loading of proportionality analysis escalates the stakes by heightening the need for a method that will allow judges to measure and ultimately decide which of the conflicting interests will be allowed to prevail. As far as the state interest is concerned, proportionality treats legislation with all the deference possible in a system of assertive judicial review. Judges do not reject out of hand the public interest as understood by the people’s elected representatives. Rather, they put it through a series of steps and are deferential to it up to and including the point when a decision needs to be made. The more stages of the analysis a claim survives, the more its legitimacy is confirmed and the stronger it becomes. By the same token, this method reaffirms the importance of the right-holder’s interest by ensuring that only important public interests will override the very high level of legal protection given to the individual’s rights. Of course, deciding remains inescapable. It would be unreasonable for the members of pluralist societies to imagine they can go through life without having to compromise with the other free and equal members of their communities. As Arendt put it, we share the world with men, not man. But against the horizon of that necessary act of coercion, proportionality does more than alternative methods to make judges treat the parties with respect.

We can now place the three constitutional styles along a spectrum. The Doric style reserves the stamp of objectivity for a judicial standpoint that transcends the “subjective” perspectives of the participants. The Ionic denies the possibility of objectivity altogether, which it understands as requiring “an authoritative basis or foundation beyond current human choices.” By contrast, the Corinthian style constructs the judicial standpoint to incorporate a plurality of perspectives of claimants and acknowledges the objectivity of their claims leading up to and including the moment of decision. The last section takes a closer look at how different constitutional methods articulate the positional objectivity of the judge.

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98 See David Beatty, supra note 1 (The Ultimate Rule of Law), at 172.
99 See supra note.
100 See Martha Minow, supra note 50 (Interpreting Rights), at 1877 (italics added)
101 As Hannah Arendt wrote referring to judgment in general, “impartiality is obtained by taking the standpoints of others into account: impartiality is not the result of some higher standpoint that would then settle the dispute by being above the melee.” Hannah Arendt, supra note 70 (Lectures on Kant’s Political Philosophy), at 42.
§6. FREEDOM AND IMAGINATION: THE CRITIQUE OF (CONSTITUTIONAL)
JUDGMENT

“Being seen and being heard by others derive their significance from the fact that everybody
sees and hears from a different position. This is the meaning of public life... The end of the common
world has come when it is seen only under one aspect and is permitted to present itself in only one
perspective.”

Hannah Arendt, The Human Condition

Public life requires citizens to bridge the abysses that separate them and experience the world
from the perspectives of others. Because we cannot visit other people’s standpoints in reality, we
must do it in thought. Imagination plays a crucial role. When one “tries to imagine what it would be
like to be somewhere else in thought,” one becomes “liberated from one’s own private interests”
and “one’s judgment is no longer subjective.” The power of imagination thus becomes the pre-
condition of our enlightenment. Imagining the world from other people’s perspectives – that is,
imagining the people we have not become – unveils dimensions of one’s own identity that routine
and thoughtlessness would otherwise have continued to conceal. Only the person that has trained
his imagination “to go visiting” and discover the vastness of social space can be trusted to be free.

Yet, imagining other people is difficult. We can hardly imagine what it is like to be the people we
know and love, much less a stranger, a political opponent or an adversary in the courtroom. Reli-
ance on imagination as a guarantor of political generosity is a dangerous gambit. Why then would
such reliance in the context of constitutional methodology be any different?

I will not answer here the question why. My aim is solely to study the forms that reliance might
take. To this end, I look at the role that imagination plays in each constitutional style and discuss
what value, if any, the focus on imagination adds to understanding constitutional methodology.
Since constitutional judgment is a subspecies of judgment in general, I use the works of Kant and
Arendt as helpful guides.

Like Kant’s transcendent idealism, the Doric style enlarges the judicial perspective by detaching
the judge from contingent particulars – including his own – to a universal position from which inde-
pendent judgment is possible. Kant wrote: “However small the range and degree to which a man’s
natural endowments extend, it still indicates a man of enlarged mind: if he detaches himself from
the subjective personal conditions of his judgment, which cramp the minds of so many others, and

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103 Arendt, Lectures on Kant, 105-106.
105 Arendt, Lectures on Kant, at 43.
reflects upon his own judgment from a universal standpoint (which can be done by shifting (one’s) ground to the standpoint of others).” 107 The objectivity and impartiality of the Doric judicial standpoint are functions of the judge’s capacity to transcend the perspectives of the claimants. But before transcending, the judge must imagine the position of the claimants – he must represent them. Representation is an essential faculty of constitutional judgment: the judge bridges “the abysses of remoteness that separate him from the parties by representing them.”108

The process of representation-imagination is scripted. The script – namely, judicial method – has the role of filtering out elements of the context whose relevance law does not recognize. And Doric law does not recognize most elements of context. Legal form de-robes people of their contingencies; as Elaine Scarry’s nicely put it, “constitutional strategies rely on a strategy of imagined weightlessness, since they define rights and powers that are independent of any person’s personal features.”109

Access to the universal standpoint requires detachment from the particulars of context and thinking in the place of “any other man.”110 Presumably, this task is not peculiar to judges only. Since representation is not a one-way street, the parties too must imagine themselves in the standpoint of their judges.111 They must make the effort to see whether the judgment by which they are required to abide is the same as the judgment they would have reached if they themselves had been in the position of the decision-maker. The burden of representing the standpoint of judges is significant. It requires parties to bracket away the need to satisfy the interests that brought them to court in the first place. That position places the claimants behind a veil of ignorance where awareness of their positions and the certainty of their own rightness no longer shape their perspective.112 This cognitive ability to grasp the mutability of social roles by learning how to detach oneself from the contingencies of one’s own social position is a defining characteristic of a Doric constitutional culture. There are far-reaching consequences for a political culture when citizens come to understand their social roles as being the result of fortune as much as of virtue or vice. It is a failure only of imagination, and not of possibility, if one cannot conceive of one’s life taking a different turn in “the yellow wood.”113

Critics of the Doric approach have questioned that style’s imperative of detachment. In this view, the impossibility of transcending all formative contexts that shape one’s perception of the world is only compounded by a mindset of striving towards the universal standpoint. That mindset breeds

107 Kant, The Critique of Judgment, at 153
108 Emphasis on representation of others in judicial reasoning, in the best understanding of the Doric or any of the other styles, is not meant to replace or supplement political representation. The disreputable history of such an approach is told in Martti Koskenniemi, Legal Cosmopolitanism: Tom Franck’s Messianic World, 35 New York University Journal of International Law and Politics 471 (2003).
109 Elaine Scarry, supra note 105 (The Difficulty of Imagining Other People), at 106 (my italics).
110 Id.
111 They must do so as part of their duties of citizenship. For the idea of citizens as office-holders, see Rawls, Political Liberalism, at .
112 See Koskeniemmi, The Gentle Civilizer of Nations, at 501 (“formalism seeks to persuade the protagonists (lawyers, decisionmakers) to take a momentary distance from their preferences and to enter a terrain where these preferences should be justified, instead of taken for granted, by reference to standards that are independent from their particular positions or interests.”)
estrangement and alienation from the political and social world. As we saw in the previous section, the Ionic style offers situatedness as an alternative to detachment. Judges immerse themselves in the positions of the parties and experience the controversy in its fullness from their perspective. This constitutional space is hyper-relativized: from each standpoint the landscape looks different. The Ionic style conceptualizes responsiveness not as transcendence of particulars but as empathy with the particulars. The other is represented empathetically, and empathy is the process by which the decision-maker immerses himself into the standpoint of the parties.

One critique of empathy targets its inherent instability. When conducted properly, empathy runs the risk of blurring the lines between oneself and others. The discovery of humanity in others ultimately threatens to transgress the boundaries of our inherent separations. For this reason empathy can be considered “assimilationist.” Its object assimilates it. The one who loses himself in another cannot be said to remain situated anywhere: he is always at the mercy of his object of attention. If the Doric approach positions judges in ways that are too aloof and distant, the Ionic correction errs in the opposite direction: the judicial standpoint melts under the heat of empathy. This is no doubt a rather drastic approach to the mutability of institutional roles.

This critique is only partly sound. The risk that the empathetic self can become entirely assimilated to its object is exaggerated. For the same reason why Doric transcendence cannot shake off its formative contexts before setting out to judge, so here the immersion into another person’s perspective does not wipe out all previous traces of one’s own personality. But it is true that the Ionic style lacks a synthesis formula, so to speak, to show how the judicial standpoint grows and expands as its object of empathy keeps shifting from one object to the next. Without such a formula, the judge runs the very real risk of becoming assimilated – or “locked,” as Kant put it – into other people’s prejudices and biases. Without critical distance and a method, an adjudicator might end up trading one set of prejudices for another.

But there is another and greater difficulty with Ionic empathy, and it has to do with the fact of pluralism. While this style embraces (indeed, extolls) pluralism, it also tends to miscalculate its depth. Its friendly attitude results from the questionable belief that distances between people are shorter than they appear. One can of course find evidence to the contrary, and the very line that

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114 For example, see Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges, 61 S. Cal. L. Rev. 1877, 1935 (1988) (“Rather than bemoan ... a switch in roles, feminism teaches us to celebrate such rearrangements, to require judges to let others judge them. Such moments might better enable judges to be empathetic, to adopt the perspective of the other, to enter into the experience of the courtroom unprotected by their special status. Judge as witness can thus be understood as a profound challenge to a stable hierarchy, as a subversive act to be applauded.”)

115 See supra note.


117 Kant, Critique of Judgment, at 160.

118 See Disch, 162 (discussing the risks of shifting “(others’) prejudices for the prejudices proper to (one’s) own station.”). It can be said, with respect to proportionality analysis, that the division into four distinct steps imposes a “mental double-check” aimed precisely at creating the distance necessary to identify and counter possible prejudice. For a discussion of mental double-checks and the psychology of judging, see Dan H. Kahn, David A. Hoffman & Donald Braman, Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. 837 (2009).
separates reasonable from unreasonable conceptions of the good is itself the object of (reasonable) dispute. But whatever the truth of the matter is, it might still be prudent to select a judicial method on the premise that the distance between the members of a political community is considerable. The need for a judicial mind that does not just travel but can also synthesize the resulting information is paramount to then applying constitutional law in a way that coordinates social interaction. Synthesis of that sort requires detachment to an impartial – that is, objective – judicial standpoint.

Like all legal judgments, constitutional judgment must be impartial. Impartiality reflects the decision makers’ distance from any claimants’ private interests: the judge should speak from the perspective of the citizenry and its laws. The Corinthian style seeks to construct an empathetic yet impartial judicial standpoint somewhere in the “middle ground between cognitive truth claims and mere subjective preferences.” We have already seen why and how it goes about doing it, and have reflected on its limited success.

Arendt’s work on the critique of judgment eloquently captures the task of the Corinthian style. Arendt famously framed this analysis as an explanation of Kant’s Lectures on Political Philosophy. Commentators have noted that there is more Arendt than Kant in those explanations. Yet, it is telling that Arendt herself did not see it that way. I believe the reason is that she saw her interpretation as solving the instability inherent in the concept of representation in the only way it can be solved, hence Kant’s only possible implied solution. The instability has to do with how much detachment judgment requires. As one commentator formulates the problem, “representation is principally oriented toward creating distance. It detaches me from the immediacy of the present where there is no space in which to stop and think. Representation is a limited withdrawal that makes the present less urgent and the familiar strange but stops sort of disengaging me to the point that I no longer care to wonder what a situation means.”

Now, the problem is the same we have encountered in the discussion between Doric universalism and Ionic particularism.

Arendt’s way out is to emphasize plurality as an alternative. She starts by rejecting approaches similar to what I labeled as the Doric approach: “[i]mpartiality is obtained by taking the standpoints of others into account: impartiality is not the result of some higher standpoint that would then settle the dispute by being above the melee.”

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121 Amy Salyzyn, The Role of Agency in Arendt’s Theory of Judgment: A Principled Approach to Diversity on the Bench, 3 J. L. & Equal. 165 (2004) --- at 169 (“while she seeks to appropriate many of the core concepts of Kant’s theory, she rejects his transcendental universalism and moves away from his formalism to situate judgments in real, particular communities.”)

122 Disch Hannah Arendt and the Limits of Philosophy, at 158

123 Arendt, Lectures on Kant, at 42.
By the same token, the process of representation “does not blindly adopt the actual views of those who stand somewhere else, and hence look upon the world from a different perspective: this is a question...of empathy.”\textsuperscript{124} As one of Arendt's commentators put it, empathy requires to “be or to feel like somebody else,’ while in representation – of the kind that Arendt has in mind – visiting is hypothetically to think and to feel as myself in a different position.”\textsuperscript{125} Rather, the standpoint gives the judge sufficient distance from a controversy to gain the perspective on which impartiality depends but not so much as to become disconnected and aloof.\textsuperscript{126}

The situated impartiality of the (Corinthian) judicial standpoint, as Arendt describes the standpoint of judgment generally, is the outcome of “a critical decision that is not justified with reference to an abstract standard of right but by visiting a plurality of diverging public standpoints.”\textsuperscript{127} In this relational constitutional space, moving back and forth enlarges the judicial standpoint by integrating different perspectives. And that integration of the different perspectives within the judicial standpoint – as constitutional interpretations whose objectivity is undisputed – enhances the perception of judicial responsiveness.

The presence of social pluralism in the form of a plurality of standpoints in constitutional methodology is a defining feature of proportionality. At one level, this development is unnerving. The purpose of law is to solve disagreement, not replicate it.\textsuperscript{128} However, the success of proportionality also shows that legal doctrine and method need not necessarily implode under the pressure of multiple standpoints. Exactly why not is a different matter that I cannot explore here. But pursuing this line of inquiry, that is, understanding how and why in some legal practices the judicial standpoint can incorporate multiple perspectives, might help explain why proportionality continues to be resisted in American constitutional law. That answer will probably include reference to the “integrity-anxiety” of the choice of the constitutional methodology that can help the legal system perform its socially stabilizing function under the constant pressures of political polarization.\textsuperscript{129}

\\textsuperscript{124} Arendt, Lectures on Kant, Interpretative essay, at 107. \\
\textsuperscript{125} Disch at 168 \\
\textsuperscript{126} Arendt, On the nature of totalitarianism: An Essay in Understanding (quoted in Lisa Disch, Hannah Arendt and the Limits of Philosophy, at 157) (“Only imagination is capable of what we know as “putting things in their proper distance” and which actually means that we should be strong enough to remove those which are too close until we can see and understand them without bias and prejudice, strong enough to bridge the abysses of remoteness until we can see and understand those that are too far away as though they were our own affairs. This removing some things and bridging the abysses to others is part of the interminable dialogue for whose purpose direct experience establishes too immediate and too close a contact and mere knowledge erects an artificial barrier.”) \\
\textsuperscript{127} Disch (162). Arendt goes on. As she describes it: “I form an opinion by considering a given issue from different viewpoints, by making present in my mind the standpoints of those who are absent: I represent them...The more people’s standpoints I have present in my mind while I am pondering a given issue, and the better I can imagine how I would feel and think if I were in their place, the stronger will be my capacity for representative thinking and valid my final conclusions, my opinions.” Arendt, Lectures on Kant, Interpretative essay, at 107. \\
\textsuperscript{128} Jeremy Waldron, Kant’s Legal Positivism, 1535 Harvard Law Review 1535, 1540 (1996) (“law must be such that its content and validity can be determined without reproducing the disagreements about rights and justice that it is law’s function to supersede.”) \\
\textsuperscript{129} This argument has been made in the related context of the American rejection of the use of foreign law in constitutional interpretation. See Frank Michelman, Integrity-Anxiety?, in Michael Ignatieff (ed.), American Exceptionalism and Human Rights (2005).
CONCLUSION

The relation between proportionality and freedom is complex. In this paper I have suggested that the main source of proportionality’ appeal is its promise of enhancing judicial responsiveness. I have also argued that proportionality does not entirely deliver on that promise since its judicial technique is not, at least in its current forms, able to synthesize properly the twin needs for the universality of form and the particularity of context. Nevertheless, a study of proportionality offers a glimpse at where constitutional practice and theory are today and where they might be headed in the future.

That future is fraught with dangers and opportunity. The need for internal stability and consistency can take proportionality in the direction of ever-greater reliance on expertise and an aseptic formalization of legal reasons. This development, whose signs are already present in contemporary constitutional practice, would turn the method into a powerful tool for the “administratization” of constitutional law, thus squaring the circle of its nineteenth century origins and the widespread colonization of the legal imagination two centuries later. It would take another paper to argue why such development ought to be resisted. For now, it suffices to say that, in my view, this development would impoverish constitutional discourse and leave contemporary constitutional democracies without an essential forum which, for all its flaws and insufficiencies, still enables citizens to reflect, albeit in a stylized form, on the terms of their collective self-government. Conversely, attention to proportionality understood as conceptualized in this paper can channel the considerable resources of constitutional thought in a more fruitful direction of synthesizing the universal and the particular, form and context - the deep forces that shape contemporary constitutional doctrine and theory. The stakes in that project are high, perhaps as high as the very fate of constitutional democracy in many parts of the world.

130 For such an argument, see Moshe Cohen-Eliya and Iddo Porat, supra note 8, at 487-490.

131 Reflecting on the public space of politics, Arendt wrote that “Whenever people come together, the world thrusts itself between them, and it is in this in-between space that all human affairs are conducted”, in Hannah Arendt, Introduction into Politics in The Promise of Politics 106 (Jerome Kohn ed., 2005).