RELIGIOUS ARGUMENTS AND THE UNITED STATES SUPREME COURT: A REVIEW OF *AMICUS CURIAE* BRIEFS FILED BY RELIGIOUS ORGANIZATIONS

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"The Court [has] a historic opportunity to offer constitutional guidance in an area of law and policy that has emerged as one of the most morally challenging in contemporary society. The choices before the Court are stark; the issues to be decided, profound; and the stakes, enormous."[1]

"[R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against."[2]

LAW AND RELIGION

Cases before the United States Supreme Court often concern profound religious questions about which religious organizations adopt positions based on religious convictions.[3] Analysis of the *amicus curiae* briefs filed with the Supreme Court by religious organizations provides

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1 Brief of Agudath Israel as Amicus Curiae Supporting Respondent at 2, Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261 (1990) (No. 88-1503), 1989 WL 1115264.

2 Walz v. Tax Commission, 397 U.S. 664, 694 (1970) (Harlan, J., concurring).

3 By using the term "religious organizations," I intend to designate any formally organized religious group, including what are typically referred to as Christian "denominations," Jewish groups, and representative groups of other religions active in the United States, if applicable (such as Buddhists and Muslims). Certain of the organizations included in this study are lobbying or umbrella organizations affiliated with or sponsored by religious groups. Rather than apply perhaps the best test for "religion" developed in the federal court system, found in *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981), this research accepts each group's self-identification as "religious."

at least three crucial insights. First, the legal arguments presented by religious organizations provide insight into how such organizations view the relationship between religion and the law. Religious organizations, for the most part, appear to believe that they should participate in the political process and that they should do so on overtly religious grounds. Second, the coalitions formed by various religious organizations give us perspective on the relationships between various United States denominations and religious groups. The coalitions of denominations and groups change based on the issues in a given case, with the Catholic Church often switching its alignment between liberal and conservative organizations. Finally, by reviewing the rulings of the Court in cases that were briefed by religious organizations, we can gain insight into the Court's understanding of whether, and of how, religious organizations should influence or affect legal decisions.

This paper analyzes forty-five *amicus curiae* briefs filed by religious organizations with the Supreme Court, from *Brown v. Board of Education,*[4] decided in 1954, through the decision in *Ayotte v. Planned Parenthood,*[5] rendered in 2006. The forty-five *amicus curiae* briefs were filed in nineteen cases and concern issues that are often identified as "religious." By the term "religious," I mean to indicate that the members of the religious organization typically have a belief that an issue at stake in the legal dispute is right or wrong and that the belief is related to religion, scripture, teachings, sentiments, doctrine, or philosophy. Religious issues, as most often understood by religious organizations, are guided or informed by spiritual principles, divine guidance, or natural law. As we will see from a review of the briefs, the issues most often argued by religious organizations between 1954 and 2006 concern racial segregation and racial justice, affirmative action, abortion, euthanasia, the imposition of the death penalty, homosexuality, the public role of religion, the treatment of illegal aliens, and pornography.

If the Supreme Court were to address religion's substantive role in our legal system, one would expect it to do so in the decisions concerning issues perceived as religious dilemmas worthy of being briefed by the nation's religious organizations. For the most part, this is not the case. Supreme Court justices, when writing opinions in these cases, tend to avoid any discussion of religion or spirituality. In the handful of cases that do address such issues directly, the Supreme Court has defined its

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[4] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

[5] Ayotte v. Planned Parenthood, 546 U.S. 320 (2006).

role as one of protecting only individual autonomy as a fundamental liberty interest.

The methodology for the collection of these *amicus curiae* briefs was to identify major Supreme Court decisions that concerned issues that might be classified as "religious" by religious organizations. This paper develops a list of such potential issues. Further, research was conducted within materials published or made available by various religious organizations to identify cases in which such groups filed *amicus curiae* briefs. The docket of each such identified Supreme Court case provided further information on those parties that filed *amicus curiae* briefs. Other religious organizations were identified through the dockets and further research was conducted into the other briefs filed by these newly identified religious organizations. Such briefs were collected from various public sources and from the websites of the religious organizations. The collection is meant to be representative, but is, naturally, not exhaustive. Several relevant *amicus* briefs could not be obtained.[6] In one case, two of five particular briefs in a case could not be obtained.[7] In addition, several decisions of the Supreme Court that were briefed by religious organizations were excluded because they concerned internal church matters, such as disputes about church hierarchy or church property.[8] Nevertheless, the forty-five briefs examined provide a robust overview of the participation of American religious organizations in Supreme Court decision-making.

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6 Brief of Christian Medical Association as Amicus Curiae Supporting Petitioner, Gonzalez v. Oregon, 546 U.S. 243 (2006) (No. 04-623), 2005 WL 1125937; Brief of Catholic Medical Association as Amicus Curiae Supporting Petitioner, Gonzalez v. Oregon, 546 U.S. 243 (2006) (No. 04-623), 2005 WL 1141253.

7 Brief of Catholic Council on Civil Liberties as Amicus Curiae Supporting Respondent, Griswold v. Connecticut, 381 U.S. 479 (1965); Brief of American Ethical Union as Amicus Curiae Supporting Respondent, Roe v. Wade, 410 U.S. 113 (1973); Brief of American Friends Service Committee as Amicus Curiae Supporting Respondent, Roe v. Wade, 410 U.S. 113 (1973); Brief of American Humanist Association as Amicus Curiae Supporting Respondent, Roe v. Wade, 410 U.S. 113 (1973); Brief for American Jewish Congress as Amicus Curiae Supporting Respondent, Roe v. Wade, 410 U.S. 113 (1973); Brief of American Baptist Churches as Amicus Curiae Supporting Respondent, Stanford v. Ky., 492 U.S. 361 (1989); Brief for West Virginia Council of Churches as Amicus Curiae Supporting Respondent, Stanford v. Ky., 492 U.S. 361 (1989).

8 Catholic Charities of Sacramento, Inc. v. Cal., 543 U.S. 816 (2004); Russian Orthodox Church Outside of Russia v. The Russian Orthodox Church of the Holy Resurrection, 513 U.S. 1121 (1995); City of Boerne v. Flores, 521 U.S. 507 (1997); Bronx Household of Faith v. Bd. of Educ., 524 U.S. 934 (1998); Bauchman v. West High School, 524 U.S. 953 (1998).

While the *briefs* demonstrate that religious organizations are participating in arguing issues before the Supreme Court, a reader of the Supreme Court *decisions* might have no idea such a debate is occurring. Little, if any, explicit mention is made of the concerns of *amici* or their participation in the process in the Supreme Court's decisions. The lack of explicit reference does not, of course, mean that the concerns or positions of these organizations are going unheeded or do not subtly influence the Court.[9]

The distribution of issues across cases and briefs analyzed in this paper is as follows:

Issue	Cases	Briefs
Segregation	1	2
Affirmative Action	1	2
Abortion	3	11
Euthanasia	3	10
Death Penalty	2	2
Homosexuality	4	12
Display of the Ten Commandments	2	2
Pledge of Allegiance	1	2
Indefinite Detention of Illegal Aliens	1	1
Pornography	1	1

Appendix A contains a table of all cases and briefs included in the database for this study. Appendix B contains a list of cases reviewed but ultimately excluded from the study. Appendix C contains a table of those *amici* that filed four or more briefs in the cases considered.

This paper is divided into four sections. First, I provide a short overview of the holdings in the cases considered in this research. Second, I briefly outline the nature of the *amicus curiae* procedure in the Supreme Court. Third, I provide an analysis of the briefs filed by the religious organizations, including descriptions of the various groups and an analysis of the types of arguments presented. Finally, in the last sec-

[9] In contrast, the structure of decisions, arguments for outcomes, and research are often used by the Supreme Court when such evidence is provided by the social scientific or neuroscientific community. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); Ind. v. Edwards, 128 S. Ct. 2379 (2008).

tion, I review Supreme Court decisions concerning the freedom of speech enjoyed by religious organizations and constitutional law concerning the expression of religious belief in government actions. It is the tension between these two positions—and the maintenance of both as fundamental values—that result in the odd situation of extensive participation by religious organizations in the *amicus curiae* process and the lack of discussion of those arguments by the Supreme Court.

I. DECISIONS BY THE SUPREME COURT IN CASES CONSIDERED

Considering the ethical breadth and importance of the issues presented to the Court since 1954, one may expect to find a developed discussion of the role of religion in influencing or shaping American law. One finds no such discussion. The majority of decisions are completely silent concerning this issue. In the handful of cases where the Court has addressed religion, it has either emphasized the separation of church and state and individual liberty or referenced a simplified form of a general "Judeo-Christian heritage."[10] While a reference to the Judeo-Christian heritage of the United States is, of course, religious, it does not typically track or follow the precise arguments, doctrines, or beliefs of any one particular religious group briefing a case. Before turning to the content of the briefs, let us first review the Supreme Court's discussion of religion in the decisions analyzed.

Brown v. Board of Education prohibits segregation in public schools.[11] The reasoning of the decision is not based on religious concerns or imperatives. Instead, the Court found that education is a crucial issue to society, democracy, and American culture.[12] Education is necessary for individual and collective success. The Court, in addressing the immense injustice of segregated schools, merely states, "such an opportunity [for education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[13]

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[10] This is not surprising given the mission of several religious organizations discussed in this article. *See, e.g.*, Family Research Council, Mission Statement, http://www.frc.org/mission-statement (last visited Nov. 30, 2008). This is manifest in briefs filed by such organizations. *See, e.g.*, Brief of Focus on the Family and Family Research Council as Amici Curiae Supporting Respondents at 24, Cruzan v. Dir., Mo. Dept. Health, 497 U.S. 261 (1990) (No. 88-1503) (citations omitted), 1989 WL 1128132; Brief of Focus on the Family and Family Research Council as Amici Curiae Supporting Respondent at 1, Van Orden v. Perry, 545 U.S. 677 (2005) (No. 03-1500), 2005 WL 263788.

[11] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

[12] *Id.*

[13] *Id.* at 493.

Grutter v. Bollinger, a much more recent case, holds that a public university could consider race as one factor among many factors in admitting students.[14] The case was decided on the grounds that the promotion of diversity enhances the educational experience of all students.[15] The enhancement of education was found to be a compelling state interest. The nature of affirmative action programs was not discussed; no mention was made of religious organizations or their views on the social justice implications of the controversy. Of note was the fact that Supreme Court did not address the effects of past discrimination on individuals or classes of individuals.

Cruzan v. Director, Missouri Dept. of Health received the most extensive briefing by religious organizations of all of those matters considered in this study.[16] In discussing euthanasia, Chief Justice Rehnquist noted that euthanasia was "a perplexing question with unusually strong moral and ethical overtones."[17] That sentence is the only reference in the decision to the ethical or religious dimensions of euthanasia. The majority of the decision concerns the standard of proof required in order to determine the expressed intentions of a now unconscious person concerning ongoing life-support measures.

The decision in *Gonzales v. Oregon* is similar.[18] Although the Court considered whether to allow Oregon doctors to actively participate in euthanasia, the Court observed, "[t]he dispute before us is in part a product of [a] political and moral debate, but its resolution requires an inquiry familiar to the courts: interpreting a federal statute to determine whether Executive action is authorized by, or otherwise consistent with, the enactment."[19] The decision was putatively based on statutory interpretation and administrative law. No further reference was made to the ethical or religious issues involving euthanasia.

In *Roper v. Simmons*, the Court found that the Eighth Amendment prohibits the execution of juveniles.[20] Again, there is no mention of religion in the decision. Instead, the Court mentioned its review of the practice of the states, psychological data, and international norms. It

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14 Grutter v. Bollinger, 539 U.S. 306 (2005).

15 *Id.*

16 Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261 (1990).

17 *Id.* at 277.

18 Gonzales v. Or., 546 U.S. 243 (2006).

19 *Id.* at 249.

20 Roper v. Simmons, 543 U.S. 551 (2005).

based its decision on social scientific data about the nature of juvenile cognition and the common practices of other jurisdictions.

In striking down Colorado's Amendment 2 (a law that prohibited the enactment of laws protecting homosexuals), the Court in *Romer v. Evans* based its decision solely on equal protection grounds. Constitutional law, not ethics, was the touchstone for the decision.[21] This case was heavily briefed by religious groups, but their arguments and positions are not discussed in the decision. The question of homosexuality itself is not addressed. Rather, the Court begins its analysis with the constitutional question of disparate treatment, protected classes and state interests.

The other decisions in the cases involved in this study avoid almost all discussion of religion. For example, in *Elk Grove Unified School District v. Newdow*, the plaintiff challenged the inclusion of the phrase "under God" in the pledge of allegiance.[22] Instead of discussing religion or reviewing First Amendment jurisprudence, the Court held that the plaintiff (the father of a minor child forced to recite the pledge) did not have standing to sue. Chief Justice Rehnquist challenged the Court on this avoidance. "The Court today[,]" he wrote, "erects a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim."[23] Likewise, in *Ashcroft v. ACLU*, the Court invalidated Congress' attempt to regulate the viewing of Internet pornography by minors on the ground that "less restrictive" means were available.[24] Despite the extensive briefing by religious organizations, no discussion of religion or ethics is found in the decision. In *Boy Scouts of America v. Dale*, the Court avoided discussion of religious and ethical issues related to discrimination against homosexuals.[25] Instead of addressing the rights of James Dale, a homosexual assistant Scoutmaster, the Court held that the forced inclusion of homosexuals in the Boy Scouts of America violated the organization's rights of free association.[26]

The most direct discussion of the role of religion in the law is contained, one may argue, in *Planned Parenthood v. Casey*.[27] In that decision, Justice O'Connor, writing for a group of justices, explained

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21 Romer v. Evans, 517 U.S. 620 (1996).

22 Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

23 *Id.* at 18 (Rehnquist, J., concurring).

24 Ashcroft v. ACLU, 542 U.S. 656, 660 (2004).

25 Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

26 *Id.* at 644.

27 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

that individuals have the right to develop their own explanations on fundamental metaphysical issues: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion from the State."[28] Justice O'Connor then sought to isolate the work of the Court in interpreting the Constitution from such concerns:

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.[29]

The Court also developed a broad description of a constitutional right to autonomy in overturning Texas' sodomy laws:[30]

> Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.[31]

The liberty interest in autonomy outweighs society's right to enforce even "profound and deep convictions accepted as ethical and moral principles . . . ."[32]

While some decisions emphasize the right of the individual to religious or metaphysical autonomy, other decisions demonstrate a tolerance for religious expression associated with the state. On issues such as the recitation of the pledge of allegiance in public schools and the public or governmental display of the Ten Commandments, the Court explic-

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28 *Id.* at 851.

29 *Id.* at 850-51.

30 Lawrence v. Tex., 539 U.S. 558 (2003).

31 *Id.* at 562.

32 *Id.* at 571.

itly considers the historical "Judeo-Christian heritage" of the United States.[33] The Court is much more likely to allow such state expressions of religious belief and to include discussion of the Judeo-Christian heritage of the nation, when the issues are ones where there is a broad consensus among many religious organizations. We shall see such an argument in *Van Orden v. Perry*,[34] for example, discussed among other such cases below.

II. *AMICUS CURIAE* PROCEDURE

Rule 37 of the Rules of the Supreme Court governs the filing of an *amicus curiae* brief.[35] The Rule provides, "[a]n *amicus curiae* brief that brings to the attention of the Court relevant matters not already brought to its attention by the parties may be of considerable help to the Court."[36] At the same time, the Rule warns, "[a]n *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored."[37] The Court does not request *amicus* briefs. Instead, under the American legal system, a party who wishes to participate in the legal argument brings itself to the attention of the parties or the Court. The filing of an *amicus* brief may be done with the written consent of all of the parties or by leave of the Court. The Court specifically discourages an interested party from seeking leave to file when one or more parties does not wish for it to participate.[38]

III. ANALYSIS OF THE *AMICUS CURIAE* BRIEFS

A. *The Parties*

From among the scores of religious organizations that file *amicus curiae* briefs, fourteen organizations submitted more than four briefs concerning the cases considered in this research.[39] A table setting forth

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33 *See, e.g.*, Brief of Focus on the Family and Family Research Council as Amici Curiae Supporting Respondents at 24, Cruzan v. Dir., Mo. Dept. Health, 497 U.S. 261 (1990) (No. 88-1503) (citations omitted), 1989 WL 1128132; Brief of Focus on the Family and Family Research Council as Amici Curiae Supporting Respondent at 1, Van Orden v. Perry, 545 U.S. 677 (2005) (No. 03-1500), 2005 WL 263788.

34 Van Orden v. Perry, 545 U.S. 677 (2005).

35 SUP. CT. R. 37.

36 *Id.*

37 *Id.*

38 *Id.* at (b)(2).

39 This list of "most active" participants, contained in Appendix C, does not, of course, exhaustively list all of those who have signed or submitted briefs. Many parties have submitted

the distribution of those briefs by organization and issue is contained in Appendix C. As we can see from the table, five religious organizations have been most active in filing briefs with the Supreme Court: (1) Family Research Council; (2) Focus on the Family; (3) the Unitarian Universalist Association; (4) the United States Conference of Catholic Bishops; and (5) the United Church of Christ. Other frequently participating groups include: (1) the Episcopal Church; (2) the American Jewish Committee; (3) Agudath Israel; (4) American Friends (Quakers); (5) Lutheran Church Missouri Synod; (6) the National Association of Evangelicals; (7) the Presbyterian Church (U.S.A.); (8) the United Methodist Church; and (9) the Evangelical Lutheran Church in America. Before examining the arguments presented by these groups in their *amicus curiae* briefs, let us explore the nature and history of the groups themselves.

1. Family Research Council

The Family Research Council describes itself as follows:

> The Family Research Council (FRC) champions marriage and family as the foundation of civilization, the seedbed of virtue, and the wellspring of society. FRC shapes public debate and formulates public policy that values human life and upholds the institutions of marriage and the family. Believing that God is the author of life, liberty, and the family, FRC promotes the Judeo-Christian worldview as the basis for a just, free, and stable society.[40]

The Family Research Council is associated with James Dobson and Focus on the Family, and was founded in 1983.[41] Gary Bauer served as President for a number of years.[42] Although initially founded as a Capitol Hill lobbying effort by Focus on the Family, the Family Research Council allegedly became a separate entity in 1992 due to IRS concerns.[43]

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one brief in one case. The substance of their arguments and participation is not discussed in this article.

40 Family Research Council, *supra* note 10.

41 Family Research Council, History/Mission, http://www.frc.org/historymission (last visited Nov. 30, 2008).

42 *Id.*

43 Media Transparency, Recipient Profile, Family Research Council, Inc., http://www.mediatransparency.org/recipientprofile.php?recipientID=109 (last visited Mar. 15, 2009).

2. Focus on the Family

Focus on the Family was founded by James Dobson in 1977.[44] Its mission is "[t]o cooperate with the Holy Spirit in sharing the Gospel of Jesus Christ with as many people as possible by nurturing and defending the God-ordained institution of the family and promoting biblical truths worldwide."[45] Focus on the Family describes one of its guiding beliefs as:

> We believe that God has ordained three basic institutions — the church, the family and the government — for the benefit of all humankind. The family exists to propagate the race and to provide a safe and secure haven in which to nurture, teach and love the younger generation. The church exists to minister to individuals and families by sharing the love of God and the message of repentance and salvation through the blood of Jesus Christ. The government exists to maintain cultural equilibrium and to provide a framework for social order.[46]

Focus on the Family is an evangelical Christian group.[47] The group advocates public prayer projects, such as the National Day of Prayer,[48] and supports corporal punishment.[49] It strongly opposes abortion, homosexuality, pornography and pre-marital sexual activity.[50]

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44 Focus on the Family, Historical Timeline, http://www2.focusonthefamily.com/aboutus/a000000993.cfm (last visited Nov. 30, 2008).

45 Focus on the Family, Our Mission, Vision and Guiding Principles, http://www2.focusonthefamily.com/aboutus/A000000408.cfm (last visited Nov. 30, 2008).

46 Focus on the Family Institute, Focus on the Family Institute Catalog 4 (Fall 2008, Spring 2009, Summer 2009), *available at* http://www.focusinstitute.org/Uploads/08-09%20Catalog.pdf (last visited Nov. 30, 2008) (the Focus on the Family Institute is the educational outreach arm of Focus on the Family).

47 *See generally* DAN GILGOFF, THE JESUS MACHINE: HOW JAMES DOBSON, FOCUS ON THE FAMILY, AND EVANGELICAL AMERICA ARE WINNING THE CULTURE WAR (2007).

48 Focus on the Family, FAQs, When is The 2009 National Day of Prayer?, http://family.custhelp.com/cgi-bin/family.cfg/php/enduser/std_adp.php?p_faqid=1358&p_created=1049753924&p_sid=u6TZignj&p_accessibility=0&p_lva=&p_sp=cF9zcmNoPSZwX3NvcnRfYnk9JnBfZ3JpZHNvcnQ9JnBfcm93X2NudD03NjImcF9wcm9kcz0mcF9jYXRzPSZwX3B2PSZwX2N2PSZwX3NlYXJjaF90eXBlPWFuc3dlcnMuc2VhcmNoX2NweCZwX3BhZ2U9MQ**&p_li=&p_topview=1 (last visited Jan. 6, 2009).

49 *See generally* Focus on the Family, FAQs, http://family.custhelp.com/cgi-bin/family.cfg/php/enduser/std_alp.php?p_sid=6n4Jcohi (last visited Mar. 16, 2009).

50 *Id.*

3. Unitarian Universalist Association

The Unitarian Universalist Association describes itself as,

> [a] liberal religion born of the Jewish and Christian traditions. We keep our minds open to the religious questions people have struggled with in all times and places.
>
> We believe that personal experience, conscience and reason should be the final authorities in religion. In the end religious authority lies not in a book, person, or institution, but in ourselves . . . .
>
> We do not ask anyone to subscribe to a creed. We say ours is a noncreedal religion.[51]

The Unitarian and Univeralist Churches merged in 1961. The Unitarian Church traces its roots back to the Congregational Puritan Churches in New England. There are approximately 629,000 members of the Unitarian Universalist Association in the United States.[52]

4. The United States Conference of Catholic Bishops (USCCB)

The Catholic Church is the largest denomination in the United States. It currently has approximately 69 million adherents.[53] The Conference of Catholic Bishops describes itself as follows:

> The . . . USCCB is an assembly of the [Catholic Church] hierarchy. . . . The bishops themselves constitute the membership of the Conference and are served by a staff of over 350 lay people, priests, [and] deacons . . . [who work together t]o unify, coordinate . . . promote and carry on Catholic activities in the United States; to organize and conduct religious, charitable and social welfare work at home and abroad; to aid in education; to care for immigrants . . . .[54]

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51 Unitarian Universalist Association, Pamphlets: We Are Unitarian Universalists, http://archive.uua.org/pamphlet/3081.html (last visited Dec. 6, 2008).

52 This number (and other information on denominational or membership size) is taken from the American Religious Identity Survey, http://www.gc.cuny.edu/faculty/research_briefs/aris.pdf (last visited Mar. 15, 2009).

53 United States Conference of Catholic Bishops, Church Facts, http://www.usccb.org/comm/cip.shtml (last visited Dec. 7, 2008).

54 United States Conference of Catholic Bishops, About Us, http://www.usccb.org/whoweare.shtml (last visited Nov. 28, 2008).

Cardinal Joseph Bernardin first developed the position called the "consistent ethic of life" in the 1980s by linking nuclear war and abortion.[55] This framework has since been expanded upon and adopted by the United States Bishops and links disparate issues by focusing on the basic value of human life.[56]

5. Mainstream Christian Denominations

Seven of the next ten religious organizations involved in routinely filing *amicus curiae* briefs are what may be described as mainstream Protestant Christian denominations. We need only briefly consider each denomination. The United Church of Christ is considered a denomination within the Reformed tradition. It formed in 1957 as the result of the merger of two denominations, the Evangelical and Reformed Church and the Congregational Christian Churches. It is a liberal Christian denomination with roughly 1.2 million adherents.[57]

The Evangelical Lutheran Church in America was formed as a mosaic of prior Lutheran churches.[58] It originated with the Norwegian Lutheran Church of America in 1917 (itself a merger of three European Lutheran Churches) and has since merged with two other Lutheran denominations.[59] In the United States, it has roughly five million members.[60] It is one of five largest denominations in the United States today.[61]

The Episcopal Church, USA, is one of thirty-eight autonomous churches worldwide that exist in the Anglican Union. With roughly 2.25 million members, it is the tenth largest denomination in the

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55 *See, e.g.*, Fr. Richard McBrien, *A Consistent Ethic of Life, 'Seamless garment' marks 25th anniversary*, NAT'L CATHOLIC REPORTER, Dec. 22, 2008, *available at* http://mirrorofjustice.blogs.com/mirrorofjustice/2008/12/a-consistent-ethic-of-life (last visited Mar. 15, 2009).

56 *Id.*

57 United Church of Christ, About Us, http://www.ucc.org/about-us/ (last visited Jan. 6, 2009).

58 Evangelical Lutheran Church of America, History of the ELCA, http://www.elca.org/Who-We-Are/History.aspx (last visited Jan. 6, 2009).

59 Evangelical Lutheran Church of America, Lutheran Roots in America, http://www.elca.org/Who%20We%20Are/History/Lutheran%20Roots%20in%20America.aspx (last visited Jan. 6, 2009).

60 *Id.*

61 PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY, RELIGIOUS COMPOSITION OF THE U.S., *available at* http://religions.pewforum.org/pdf/affiliations-all-traditions.pdf (last visited Jan. 6, 2009).

United States.[62] The American Friends Service Committee "carries out service, development, social justice, and peace programs throughout the world."[63] Its "work is based on the Quaker belief in the worth of every person and faith in the power of love to overcome violence and injustice."[64]

The Lutheran Church Missouri Synod is the second largest Lutheran denomination in the United States, with approximately 2.5 million believers.[65] The Presbyterian Church (U.S.A.) has 2.3 million believers[66] and ranks as the ninth largest religious organization in the United States.[67] It belongs to the Reformed family of Protestantism, originating with the branch of the Protestant Reformation begun by John Calvin.[68] It was established by the 1983 merger of the former Presbyterian Church in the United States, a southern branch of American Presbyterianism, and the United Presbyterian Church in the United States of America, a northern branch.[69] The United Methodist Church is the second largest Protestant denomination in the United States.[70] It has approximately 11.5 million adult members in this nation.[71]

6. Jewish Organizations

Two Jewish organizations of disparate political persuasion often participate in filing amicus briefs at the Supreme Court level. The American Jewish Committee describes its mission as safeguarding Jews, strengthening pluralism, and deepening ties between the American and Israeli Jews.[72] It claims 175,000 members.[73] Agudath Israel aims to

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62 *See id.*; *see also*, U.S. Census Bureau, Fact Sheet, http://factfinder.census.gov/servlet/ACSSAFFFacts?_submenuId=factsheet_1&_sse=on (last visited Jan. 6, 2009).

63 American Friends Service Committee, About AFSC, http://www.afsc.org/ht/d/sp/i/267/pid/267 (last visited Jan. 6, 2009).

64 *Id.*

65 The Lutheran Church Missouri Synod, About Us, http://www.lcms.org/pages/internal.asp?NavID=73 (last visited Jan. 6, 2009).

66 Presbyterian Church (U.S.A.), Who We Are, http://www.pcusa.org/navigation/whoweare.htm (last visited Jan. 6, 2009).

67 PEW FORUM, *supra* note 61.

68 Presbyterian Church (U.S.A.), Presbyterian Church History, http://www.pcusa.org/101/101-history.htm (last visited Jan. 6, 2009).

69 *Id.*

70 PEW FORUM, *supra* note 61.

71 *See id.*; *see also* U.S. Census Bureau Fact Sheet, *supra* note 62.

72 American Jewish Committee, Who We Are, http://www.ajc.org/site/c.ijITI2PHKoG/b.789093/k.124/Who_We_Are.htm (last visited Jan. 6, 2009).

"perpetuat[e] authentic Judaism."[74] This organization seeks "to establish the sovereignty of Torah in all problems facing the Jew[s] as individuals and as a nation."[75]

B. *Alliances*

An *amicus curiae* brief is often presented by multiple parties. There are three groupings of parties that often submit unified briefs or briefs that support and complement one another. The first such alliance is decidedly conservative in its political positions. The second is conservative on most issues but crosses "party lines" based on the consistent ethic of life. The third is markedly liberal in orientation.

The most conservative alliance consists of Focus on the Family, the Family Research Council, and the Lutheran Church Missouri Synod. These parties unite in opposition to abortion, gay rights or marriage, and euthanasia.[76] In addition, Focus on the Family and the Family Research Council are virtually alone in supporting governmental display of the Ten Commandments, defending the phrase "One Nation Under

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[73] AMERICAN JEWISH COMMITTEE, AJC BY THE NUMBERS 7 (2007), http://www.ajc.org/atf/cf/%7B42D75369-D582-4380-8395-D25925B85EAF%7D/ajcbythenumbers.PDF.

[74] Orthodox Union, Agudah – New York Metro Area – Mincha Directory, http://www.ou.org/news/article/agudah_mincha_directory/ (last visited Jan. 15, 2009).

[75] *Id.*

[76] *See* Brief for Focus on the Family et al. as Amici Curiae Supporting Respondents and Cross-Petitioners, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006412; Brief of the Family Research Council as Amicus Curiae Supporting Petitioners, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 34005434; Brief of National Right to Life Committee et al. as Amici Curiae Supporting Petitioners, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 228496; Brief of the United States Catholic Conference et al. as Amici Curiae Supporting Petitioners, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 223648; Brief of the Family Research Council, Inc. and Focus on the Family as Amici Curiae Supporting Petitioner, Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006) (No. 04-1144), 2005 WL 1902076; Brief of Christian Legal Society et al. as Amici Curiae Supporting Petitioners, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008428; Brief of the Family Research Council as Amicus Curiae Supporting Petitioners, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008422; Brief of Focus on the Family and Family Research Council as Amici Curiae Supporting Respondents at 24, Cruzan v. Dir., Mo. Dept. Health, 497 U.S. 261 (1990) (No. 88-1503), 1989 WL 1128132; Brief of United States Conference of Catholic Bishops et al. as Amici Curiae Supporting Petitioners, Gonzales v. Or., 546 U.S. 243 (2006) (No. 04-623), 2005 WL 1078945; Brief of Focus on the Family and the Family Research Council as Amici Curiae Supporting Petitioners, Gonzales v. Or., 546 U.S. 243 (2006) (No. 04-623), 2004 WL 2825877.

God" in the pledge of allegiance, defending the death penalty, and arguing for governmental regulation of Internet pornography.[77]

The second set of religious organizations, often supporting conservative positions, is led by the United States Conference of Catholic Bishops. The bishops have a long history of submitting *amicus* briefs on a wide variety of issues. In the cases considered for this study, the bishops opposed applying the death penalty to juveniles and to the mentally retarded, a position commonly described as "liberal."[78] On abortion, euthanasia, and homosexuality, however, the bishops are close in position to Focus on the Family. The other religious groups that often follow or join the United States Conference of Catholic Bishops include the Southern Baptist Convention, the National Association of Evangelicals, and the Alliance of Baptists.

Finally, the "liberal" coalition of religious organizations often follows the lead of the Unitarian Universalist Association. The United Church of Christ, the American Friends Service Committee, the Episcopal Church, USA, and the Presbyterian Church (U.S.A.) often work with or file jointly with the Unitarian Universalist Association.

Two other groupings of the religious organizations deserve special discussion. First, the two death penalty cases analyzed below (*Roper v. Simmons* and *McCarver v. North Carolina*) demonstrate an impressive unity among almost all of the religious organizations that are the subject of this research.[79] Notably, the only major religious groups that absent themselves from opposition to the death penalty are Focus on the Family, the Family Research Council, and the Lutheran Church Missouri Synod.[80] Second, a wide range of religious organizations recently have begun to use the Religious Coalition for Reproductive Choice to submit

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77 *See* Brief of the Family Research Council, Inc. and Focus on the Family as Amici Curiae Supporting Petitioners, McCreary v. ACLU of Ky., 545 U.S. 844 (2004) (No. 03-1693), 2004 WL 2851013; Brief of Focus on the Family et al. as Amici Curiae Supporting Petitioners, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (No. 02-1624), 2003 WL 23011474.

78 *See* Brief of the United States Conference of Catholic Bishops and Other Religious Organizations as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1617400.

79 Roper v. Simmons, 543 U.S. 551 (2005); McCarver v. N.C., 533 U.S. 975 (2001).

80 Of course, it is difficult to conclude definitively that these groups' failure to oppose the death penalty is religiously based. Given the breadth and frequency with which these avowedly religious organizations brief other issues, it appears reasonable to conclude that their position is religiously based.

amicus briefs in abortion-related cases (instead of filing separate briefs).[81] The Coalition submitted multi-party briefs in *Stenberg v. Carhart*[82] and *Ayotte v. Planned Parenthood*.[83]

IV. The Approaches and Arguments Concerning the Intersection of Law and Religion

Each of the briefs was analyzed based on the following criteria:

1. Did the brief make explicit reference to religion? A number of briefs submitted by religious parties do not make reference to religion but instead present secular or legal arguments. Other briefs are extremely direct in advocating on the basis of religion or theology.

2. Each brief was considered in light of the spectrum of positions that one may describe as running from absolutist to pluralistic.

3. Each brief was examined for any stated position by the filing organization on the proper relationship between church and state.

4. Each brief was classified as advocating either the inclusion of religion in law and public policy or as advocating limitations on the role of religion.

5. Another question considered was whether the brief indicated that the religious organization seeks a lenient or strict accommodation of religion within the state.

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[81] Members include Rabbinical Assembly, United Synagogue of Conservative Judaism, Women's League for Conservative Judaism, The Episcopal Church, American Ethical Union, National Service Conference of the American Ethical Union, Society for Humanistic Judaism, Presbyterian Church (U.S.A.), Presbyterians Affirming Reproductive Options (PARO), Women's Ministries, Jewish Reconstructionist Federation, Central Conference of American Rabbis, North American Federation of Temple Youth, Union for Reform Judaism, Women of Reform Judaism, The Federation of Temple Sisterhoods, Women's Rabbinic Network of Central Conference of American Rabbis, United Church of Christ Justice and Witness Ministries, United Methodist Church General Board of Church and Society, Unitarian Universalist Association, Unitarian Universalist Women's Federation, Young Religious Unitarian Universalists, American Humanist Association, American Jewish Committee, American Jewish Congress, Anti-Defamation League of B'Nai Brith, Catholics for a Free Choice, Church of the Brethren Women's Caucus, Disciples for Choice, Episcopal Urban Caucus, Episcopal Women's Caucus, Hadassah, WZOA, Jewish Women International, Lutheran Women's Caucus, Methodist Federation for Social Action, NA'AMAT USA, National Council of Jewish Women, Women's American ORT, YWCA of the USA.

[82] 530 U.S. 914 (2000).

[83] 546 U.S. 320 (2006).

6. Each brief was analyzed for the group's preferred balance between public or state supported religious expression and protection of religious minorities.

7. Each brief was reviewed to determine whether the religious organization supported reference to the nation's Judeo-Christian heritage, a modified form of Protestant Christianity, or a non-Christological theism.

8. Each brief was categorized as arguing that religion is either fundamentally "private" or that religious values should be discussed in the "public sphere."

9. Each brief was reviewed for what may be termed "sectarian communitarianism." By this phrase, I mean to indicate that the brief expressed a preference for group or community values over individual autonomy and that such a preference was based on religious beliefs.

A. *Explicit References to Religion*

Over three-quarters of the briefs examined directly referenced religion and based ethical and legal arguments on religious grounds. In counterpoint to this trend is the fact that the two most politically conservative religious organizations avoid almost all religious references. Focus on the Family and the Family Research Council present their arguments in almost entirely secular legal arguments.

Some groups have a long tradition of basing their arguments on religious principles and values. The American Jewish Congress, in arguing against segregation in *Brown v. Board of Education*, stated that "Jewish interests are inseparable from the interests of justice."[84] Further, "the special concern of the Jewish people in human rights derives from an immemorial tradition which proclaims the common origin and end of all mankind and affirms, under the highest sanction of faith and human aspirations, the common and inalienable rights of all men."[85] Likewise, in supporting the University of Michigan's admission policy in *Grutter v. Bollinger*, the American Jewish Committee wrote, "a long, dark history of injustice and prejudice has made African Americans, La-

[84] Brief for the American Jewish Congress as Amicus Curiae, Brown v. Bd. of Educ. of Topeka at 2, 347 U.S. 483 (1954) (No. 1), 1952 WL 47254.

[85] *Id.*

tinos, women and other groups strangers in society's mainstream."[86] Judaism, the brief claims, addresses this issue.[87] The Committee wrote that "[t]he Jewish tradition has always been sensitive to the plight of the stranger."[88]

Agudath Israel unabashedly advertises the religious basis of its ethical positions in the briefs it has filed.[89] In arguing against abortion in *Planned Parenthood v. Casey*, Agudath Israel states that it is "[i]nformed by classical Jewish tradition which teaches that all human life is sacred."[90] Agudath Israel provides some explanation beyond divine revelation by writing that "[l]aws which undermine the sanctity of human life send a message that is profoundly dangerous . . . ."[91]

Again, in its *amicus* brief in *Cruzan v. Director, Missouri Dep't of Health,* arguing against any right to refuse food and water, Agudath Israel addresses the religious basis of its argument and provides the reasons that others should be persuaded to adopt their position:[92]

> Agudath Israel of America's interest in this case is especially keen because it represents the first time the Court has had occasion to address some of the most fundamental questions concerning human life: its value to society, its intrinsic sanctity, its voluntary termination, its involuntary termination. It is a basic principle of Jewish law and ethics that "man does not possess absolute title to his life or body."[93]

Agudath Israel argued that allowing someone to commit suicide, for any reason, admits that some life is worth less than others.[94] As victims of the Holocaust, an event related to euthanasia programs, Jews are "sensitive to the legal assessment" that some life is inferior.[95]

The Evangelical Lutheran Church of America ("ELCA") based its arguments in *Cruzan* on its "theological understanding of life and

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86 Brief of the American Jewish Committee et al. as Amici Curiae Supporting Respondents at 5, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241 & 02-516), 2003 WL 536749.

87 *Id.*

88 *Id.*

89 Brief of Agudath Israel of America as Amicus Curiae Supporting Respondents and Cross-Petitioners at 2, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744 & 91-902), 1992 WL 12006427.

90 *Id.*

91 *Id.*

92 Brief of Agudath Israel of America, *supra* note 1.

93 *Id.* at 1 (citation omitted).

94 *Id.* at 3-4.

95 *Id.* at 3.

death, all of which is in God."[96] Supporting a limited right to refuse medical treatment, the ELCA states, "As life draws to an end, with no hope for health restoration, permitting death is often the most heroic, caring and charitable rendering of stewardship."[97]

Opposition to the death penalty unites numerous religious organizations. For example, opposition to the execution of juveniles brought together twenty-nine religious organizations on one brief.[98] These parties argued, "Morality and decency are subjects on which religious bodies legitimately can claim a particular experience and competence."[99]

In that brief, the Alliance of Baptists, in a separate section, stated that it was categorically opposed to the death penalty because "God's power to forgive is greater than humanity's power to do evil."[100] The Evangelical Lutheran Church of America opposed the death penalty because it sends a message of brutality and violence, stating that "we know the Church is called by God to be a creative critic of the social order, and to speak on behalf of justice, peace and order."[101] The United Church of Christ opposed the death penalty "as a contradiction of God's grace and sovereignty in human life . . . ."[102]

McCarver v. North Carolina concerned the execution of a mentally retarded man.[103] Twelve religious organizations united in filing a brief opposing capital punishment in such a case.[104] The United States Conference of Catholic Bishops and the Unitarian Universalist Association joined forces on this issue.[105] They wrote, "It would be unwise to dismiss as 'uncertain' or 'unobjective' the considered judgment of the Nation's churches, synagogues, mosques, and temples."[106] These groups

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96 Brief of the Evangelical Lutheran Church in America as Amicus Curiae Supporting Petitioners, Cruzan v. Dir., Mo. Dep't Health at 2, 497 U.S. 261 (1990) (No. 88-1503), 1989 WL 1115249.

97 *Id.* at 3.

98 Brief of the United States Conference of Catholic Bishops and Other Religious Organizations as Amici Curiae Supporting Respondent at app., Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1617400.

99 *Id.* at 4.

100 *Id.* at 7.

101 *Id.* at 12.

102 *Id.* at 25.

103 McCarver v. N.C., 533 U.S. 975 (2001).

104 Brief of the United States Catholic Conference and Other Religious Organizations as Amici Curiae Supporting Petitioner, McCarver v. N.C., 533 U.S. 975 (2001) (No. 00-8727), 2001 WL 648613.

105 *Id.* at app.

106 *Id.* at 12.

exist "for the very purpose of educating, uplifting, and inspiring our citizenry and, perhaps more than any other institutions, they shape the evolving standards of morality and decency to which the Eighth Amendment's requirements are inextricably tied."[107]

A number of religious groups filed *amicus* briefs in *Crawford v. Martinez*.[108] The United States asserted the right to indefinitely imprison illegal aliens who would not be accepted back into their country of origin.[109] The Presbyterian Church (U.S.A.), Episcopal Church, Evangelical Lutheran Church and others asserted that "on moral and ethical issues such as these, religious organizations are an important source to supplement the advice of legislatures, the parties, and non-religious organizations."[110] After asserting the dignity of each human person, *amici* also argued that "'strangers' such as Respondent not only should be accorded basic rights, but in fact should receive special care and consideration" under their various religious traditions.[111]

Concerning homosexuality, Agudath Israel exercises no restraint in its citation to the Jewish scriptures. Orthodox Jews, it wrote, consider homosexuality "an abomination (Leviticus 20:13)" and refuse to let homosexuals serve as role models for children.[112]

B. *Factionalism, Divisiveness, and Absolutism*

Certain religious arguments are prone to claims of absolute truth. Those who disagree are not considered honest opponents but are instead labeled as immoral actors. Almost all of the briefs analyzed in this study avoided appeals to divine revelation. Another form of argument that encourages factionalism and limits argument is the labeling of one's opposition as murderers or as actors outside the civil discourse.

One example of a brief that comes very close to making such an argument is that presented by the Family Research Council in *Stenberg v. Carhart*, concerning what opponents have termed "partial birth abor-

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107 *Id.*

108 Brief for Religious Organizations as Amici Curiae Supporting Respondent, Crawford v. Martinez, 540 U.S. 1217 (2004) (No. 03-878), 2004 WL 1776911, *aff'd sub nom.*, Clark v. Martinez, 543 U.S. 371 (2005).

109 Crawford v. Martinez, 540 U.S. 1217 (2004), *aff'd sub nom.*, Clark v. Martinez, 543 U.S. 371 (2005).

110 Brief of Religious Organizations as Amici Curiae Supporting Respondent, *supra* note 108, at 3-4.

111 *Id.* at 16.

112 Brief of Agudath Israel of America as Amicus Curiae Supporting Petitioners at 1-2, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699), 1999 WL 33611421.

tion."[113] The main argument in this brief is that all abortion methods are "gruesome and violent."[114] Partial birth abortion, according to the brief, is even more heinous.[115] They argued that "[t]he difference between partial birth abortion and conventional abortion techniques is the evident similarity between the partial birth abortion method and infanticide."[116] The Family Research Council goes on to state that allowing partial birth abortion invites and encourages actual infanticide.[117]

Also in *Stenberg v. Carhart*, the Conference of Catholic Bishops used charged language.[118] The Conference argued that "this procedure is more like infanticide than abortion."[119] One can sense the bishops' frustration in statements like this:

> The constitutional challenge to the Nebraska statute and similar legislation is a truly extraordinary chapter in American law. In cases such as this one, it is contended that the killing of partly-born children is not only a public *good* – a claim that would seem to turn any ordinary understanding of the common good on its head – but a constitutional *right* with which the state may not interfere.[120]

Another example of a divisive brief is one filed by Focus on the Family in support of Colorado's Proposition 2 (preventing laws outlawing discrimination against homosexuals).[121] In its brief in *Romer v. Evans*, Focus on the Family, joined by several other organizations, argued that "orthodox and traditional religions" stand in the way of "the social agenda of gays, lesbians, and bisexuals . . . ."[122] They also argued that homosexuals should be denied "moral legitimacy for their sexual practices."[123] Further, the *amici* argued affirmatively that religious groups should be able to discriminate against homosexuals and that such dis-

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113 Brief of Family Research Council as Amicus Curiae Supporting Petitioners, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 34005434.

114 *Id.* at 7.

115 *Id.* at 8-9.

116 *Id.* at 8.

117 *Id.* at 9-12.

118 Brief of The United States Catholic Conference et al. as Amici Curiae Supporting Petitioners, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 223648.

119 *Id.* at 5.

120 *Id.* at 7.

121 Brief of Christian Legal Society et al., *supra* note 76.

122 *Id.* at 37.

123 *Id.*

crimination serves religious purposes.[124] Those purposes include: (1) correction of the homosexual; (2) communication disapproving of homosexuality; and (3) protection of the traditional family.[125]

C. *Neutrality*

For the most part, the *amici* remained silent concerning the Establishment Clause and the Free Exercise Clause of the Constitution's First Amendment. There are, nevertheless, several examples of discussions concerning the appropriate type of "neutrality" towards religion that the government should display.

In its brief concerning the governmental display of the Ten Commandments in the case of *McCreary County v. ACLU of Kentucky*, the Family Research Council argued that the government need not remain strictly neutral.[126] *Amici* requested a ruling affirming that a government display of religion was acceptable so long as it was not made for the purpose of demonstrating the *truth* of a particular religion.[127]

In the similar case of *Van Orden v. Perry*, the Family Research Council and Focus on the Family advocated a new test of neutrality. The new test was named by these religious organizations as a "coercion" test.[128] This test would be used for those government actions that "coerce religious orthodoxy or financial support for religion by force of law or threat of penalty."[129] General support for religious organizations or public roles for such organizations would then be allowed.[130]

One example may be cited from these briefs to demonstrate the opposite extreme of the arguments concerning neutrality. In *Elk Grove Unified School District v. Newdow*, the Unitarian Universalist Association filed a brief opposing the pledge of allegiance in public school.[131] Urging strict neutrality, the *amici* write:

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124 *Id.* at 8.

125 *Id.* at 9.

126 Brief of Family Research Council and Focus on the Family, *supra* note 77.

127 *Id.* at 24.

128 Brief of Focus on the Family and the Family Research Council as Amici Curiae Supporting Respondent at 2, Van Orden v. Perry, 545 U.S. 677 (2005) (No. 03-1500), 2005 WL 263788.

129 *Id.* at 23.

130 *Id.*

131 Brief of the Unitarian Universalist Association et al. as Amici Curiae Supporting Respondent, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 961 (2004) (No. 02-1624).

> On religious matters, the government does not lead. The government has no legitimate role in shaping the religious opinions of the American people – not by coercion, and not by persuasion or endorsement either.[132]

D. *"Civic Virtue" or the Protection of Rights*

Each of the religious groups analyzed in this work may be categorized into one of two distinct approaches to the role of government and religion. The First Amendment has been interpreted as prohibiting the government from taking an active role in religion. This approach focuses on rights and sees law as a bulwark against religion. On the other side of the issue, religious organizations and people are seen as contributing to the creation of a common good. Religion plays a vital role in a fair debate about the common good and what values should underlay conceptions of the good. The two distinct approaches are: (1) the use of law to limit religion in government, and (2) advocacy for religion or religious organizations taking an active role in public life so as to strengthen and unify the United States through the definition of a common good.

The United States Conference of Catholic Bishops presents a well-developed and positive vision of civic virtue in its brief in *Planned Parenthood v. Casey*.[133] The Bishops write that we must seek the "proper balance of individual and societal interests — allowance for personal liberty within a framework that protects human life, respects family relationships, promotes the common good, and preserves our free society."[134] Although this concept also relates to a strong communitarian ethic in Catholic thought, it presents a vision of an ethical society. The Bishops continued, "Historically, it was always understood that liberty to engage in certain personal actions is not license."[135]

Other scattered references to creating and fostering civic piety exist. In their brief on the issue of indefinite detention of illegal aliens, the religious organizations signing that brief state, "*amici*'s collective views provide an important guide as to the moral and ethical principles to which a multitude of the nation's citizens — indeed, entire civilizations

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132 *Id.* at 16.

133 Brief of the United States Catholic Conference et al. as Amici Curiae Supporting Respondents and Cross-Petitioners, Planned Parenthood of Se. Pa. v. Casey, 510 U.S. 1309 (1992) (Nos. 91-744 & 91-902), 1992 U.S. S. Ct. Briefs LEXIS 311.

134 *Id.* at 8.

135 *Id.*

— aspire."[136] In arguing that pornography on the Internet is not protected speech under the First Amendment, Focus on the Family and the Family Research Council stated, "It is certainly clear that Congress, in working toward passage of COPA, believed in a right of our nation to maintain societal decency."[137] Further, Focus on the Family and the Family Research Council address the issue that most religious organizations sidestep, arguing that "the Constitution permits a state to regulate on the basis of morality."[138] Issuing a prophetic call, *amici* warned the Court to "expect the remnants of what is left of our national moral fabric to unravel" if Internet pornography was not more heavily regulated.[139]

Agudath Israel outlined a positive ethical position in *Vacco v. Quill*.[140] Acknowledging that other parties to the case will brief the Court on the law, Agudath Israel states, "The focus of our argument, therefore, will be not on why we think the decisions below are bad law, but why we think they are dangerous law."[141] Further, "Agudath Israel takes both moral and legal exception to the notion that a person enjoys unfettered personal autonomy to decide that his life is no longer worth living."[142] Referring to the Jewish experience in the Holocaust, this organization concludes, "There are particularly strong reasons to reject the view that the generally accepted doctrine of personal autonomy in medical decision making should allow patients to enlist their doctors' help in committing suicide."[143]

Many of the religious organizations typically affiliated with liberal positions openly argue against the state taking a moral position or defining a civic piety. The Religious Coalition for Reproductive Choice, in its brief in *Stenberg v. Carhart*, argued the following:

> Where religious people have such profound and sincere differences – even within denominations and faith groups – the right of privacy

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136 Brief of Religious Organizations as Amici Curiae Supporting Respondent at 4, Clark v. Martinez, 543 U.S. 371 (2005) (No. 03-878), 2004 WL 1776911.

137 Brief of Focus on the Family and the Family Research Council as Amici Curiae Supporting Petitioner at 8, Ashcroft v. ACLU, 542 U.S. 656 (2004) (No. 03-218), 2003 WL 22873088.

138 *Id.* at 10.

139 *Id.* at 28.

140 Brief of Agudath Israel of America as Amicus Curiae Supporting Petitioners, Vacco v. Quill, 521 U.S. 793 (1996) (Nos. 95-1858 & 96-110), 1996 WL 752720.

141 *Id.* at 7.

142 *Id.* at 8.

143 *Id.* at 9.

> prevents government from enacting restrictive abortion legislation that interferes with the exercise of personal and religious conscience.[144]

In another widely signed brief (this one signed by fifty-two religious organizations and individuals, including the Unitarian Universalist Association), *amici* argue the following:

> Some faiths, religious organizations, and religious leaders steadfastly oppose physician-assisted dying, but that is by no means the universal view. Numerous faiths, religious organizations, and religious leaders strongly support physician-assisted dying as an entirely legitimate and moral choice by which the terminally ill can hasten their impending death with dignity and integrity.[145]

When faced with such disparate religious views, *amici* argue the government should not legislate. "At its core, this case is about social policy, religious freedom, and preserving the right to pursue one's individual beliefs about human dignity, personal autonomy and spirituality."[146]

In its brief in *Bowers v. Hardwick* concerning homosexuality, the American Jewish Congress stated, "At a minimum, heightened judicial scrutiny means that Georgia cannot justify this regulation simply by asserting that certain kinds of consensual adult sexual practices are so clearly and self-evidently evil that no further justification is required."[147] In briefing that same case, the Presbyterian Church (U.S.A.) demanded that the state explain the reasons that it views homosexual conduct as immoral. The Presbyterian Church (U.S.A.) concluded, "Because we do not understand the [f]ull mystery of human sexuality, and because we are unwilling to condemn that which we do not understand, we believe as a matter of ethics that characterizing consensual sodomy as immoral is unwise."[148]

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144 Brief of Religious Coalition for Reproductive Choice et al. as Amici Curiae Supporting Respondent at 3, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 340115.

145 Brief of 52 Religious Freedom Organizations and Leaders as Amici Curiae in Support of Respondents at 5, Gonzalez v. Or., 546 U.S. 243 (2006) (No. 04-623), 2005 WL 1687166.

146 *Id.* at 6.

147 Brief of the American Jewish Congress as Amicus Curiae Supporting Respondents at 13, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667945.

148 Brief of the Presbyterian Church (U.S.A.) et al. as Amici Curiae for Respondent at 4, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140), 1986 WL 720447.

E. *Accomodationism*

The degree to which society must "accommodate" religion is directly related to one's position on the type of neutrality that the government must exhibit towards religion. Generally, those who advocate less neutrality are willing to "accommodate" a wide spectrum of practices and beliefs both in civil society and the government itself.

As already discussed, Focus on the Family and the Christian Legal Society argued vociferously for Colorado's anti-homosexual rights law. One reason given was that "religious pursuits must remain free of governmental interference."[149] These organizations worried that the government would order them to hire homosexuals or allow homosexuals as members.[150] In *amici*'s brief on *Romer v. Evans*, they argued the following:

> Without Amendment 2 in place, it is not farfetched to anticipate in the near future a court holding gay-equality a compelling interest overriding religious liberty. Already one lower federal court has held that a church-affiliated university must comply with a municipal gay-rights law.[151]

Likewise, Agudath Israel feared government interference in religious schools and expressed such a belief in its brief on *Boy Scouts of America v. Dale*:

> Stated simply, the dangers of disallowing private entities like Boy Scouts of America from embracing their own notions of moral propriety and role model fitness could have ramifications, especially in this era of limited free exercise protection, that threaten the religious independence of countless programs and institutions across the country.[152]

F. *Tension Between Religion's Essential Role in Freedom and Religion as a Danger to Freedom*

James Madison saw individual religious freedom as the essential liberty.[153] He also worried that the religion of the majority, in its corpo-

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149 Brief of Christian Legal Society et al., *supra* note 76, at 9.

150 *Id.* at 32.

151 *Id.*

152 Brief of Agudath Israel of America, *supra* note 112, at 5-6.

153 *See generally* Donald Drakeman, *Religion and the Republic: James Madison and the First Amendment*, 25 J. CHURCH & STATE 427 (1983).

rate form, might be a force for oppression.[154] The text of the First Amendment, which he influenced, seeks to balance these two concepts.[155] Madison sought a separation of church and state but not a radical separation of religious *belief* from political life.[156] No brief directly addresses this Madisonian tension. Little or no discussion occurred in any of examined amicus curiae briefs about the right to dissent from majority religious positions.

G. *American Civil Piety as Protestant Christianity or non-Christological Theism*

In many ways, our times are marked by nostalgia for a more ethically certain past (real or imagined). Soon after the American Revolution, a civil piety arose. It was composed, for the most part, of generalized Protestant Christianity, references to our Judeo-Christian heritage, and even non-Christological theism and concepts of Providence. References to such a general Judeo-Christian tradition are few in the briefs here studied. Those references that do appear are included only by the most conservative religious groups.

Focus on the Family appeals to this tradition in its argument in *Cruzan v. Director, Missouri Dept. of Health*:

> The Anglo-American prohibition of euthanasia has "ancient roots." "Jewish, Christian, and Islamic teachings alike have always maintained that deliberate killing in case of abnormality or incurable illness is wrong." The sanctity of human life, as protected by the common law, holds that human dignity is intrinsic. It does not depend on the person's race, sex, intelligence, or physical or mental condition. Nor does it depend on the person's ability to communicate or, if ill, his prognosis for recovery.[157]

A similar reference is made in the Family Research Council's brief in *Van Orden v. Perry*:

> Efforts by some to remove the Ten Commandments from public buildings, textbooks, and other facilities frequented by the public both

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154 *Id.*

155 *Id.*

156 *Id.*

157 Brief of Focus on the Family and Family Research Council as Amici Curiae Supporting Respondents at 24, Cruzan v. Dir., Mo. Dep't Health, 497 U.S. 261 (1990) (No. 88-1503), 1989 WL 1128132.

> deny the cultural and historical heritage of this country, and actively demean the religious beliefs of a substantial portion of the population . . . .
>
> Amici believe that the government may lawfully acknowledge the major role religious principles have served in forming our legal system and liberties.[158]

The strongest reference to the nation's Judeo-Christian heritage was made by the Family Research Council in their brief supporting the display of the Ten Commandments in the courtroom:

> The God spoken of by the Kentucky documents is transcendent and intelligent, a greater-than-human source of meaning and value. The documents as a whole show that their human authors considered themselves dependent upon this God's continuing care. This care for humans according to a divine plan is most often called Providence, and the documents reflect heartfelt recognition of it.[159]

The Kentucky display presents the concept of

> objective moral law as the effect or deliverance of God — ethical monotheism. . . . The reasonable observer concludes that the documents' unifying theme is that Biblical ethical monotheism has shaped our basic law and our political tradition . . . .
>
> It is important to consider, too, that to leave the biblical ethical monotheism out of any attempt to convey the foundations of our Republic would be false.[160]

As mentioned above, The Family Research Council has sought to change the type of neutrality required of the government by the First Amendment. It would only seek to prohibit coercion concerning orthodoxy or practice. It did not feel that the display of the Ten Commandments would qualify as coercive under this test.

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158 Brief of Focus on the Family and Family Research Council as Amici Curiae Supporting Respondent at 1, Van Orden v. Perry, 545 U.S. 677 (2005) (No. 03-1500), 2005 WL 263788.

159 Brief of Family Research Council, *supra* note 77, at 5.

160 *Id.* at 5-6.

H. *Private or Public Religion*

In both briefs filed by the Religious Coalition for Reproductive Freedom (*Stenberg* and *Ayotte*), the Coalition argued that decisions concerning the family are religious and therefore private.[161] In *Romer v. Evans*, the Presbyterian Church (U.S.A.) declared that homosexuality is a "sin," but one that must be dealt with privately.[162] An alliance of liberal churches (including the Unitarian Universalist Association, the American Friends Service Committee, the Brethren/Mennonite Council for Lesbian, Gay, Bisexual and Transgender Interests, the United Methodist Church, the United Church of Christ and even the Episcopal Church) pushed this argument to an extreme in their collective brief in *Lawrence v. the State of Texas*.[163] In arguing against sodomy laws that target homosexuals, *amici* state the following:

> Governments are responsible for protecting and promoting the public good, and therefore the criminal law properly reaches all acts that involve rape, coercion, corruption of minors, or public indecency, whether engaged in by people of the same or different sexes. Beyond these legitimate concerns, however, governments should not attempt to legislate codes of private morality. Instead, private morality is a matter for individuals, families, and faith communities.[164]

I. *Communitarianism*

Many of the briefs contain scathing attacks on individualism, autonomy, and "license." Certain religious organizations make clear that the balance between the autonomy of the individual and the rights of society must be reevaluated. While no brief states that the relevant religious organization will withdraw from society, the attacks on individualism and autonomy contain the seeds of what may be described as a communitarian ethic.

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161 Brief of the Religious Coalition for Reproductive Choice et al., *supra* note 145; Brief of the Religious Coalition for Reproductive Choice et al. as Amici Curiae Supporting Respondents, Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006) (No. 04-1144), 2005 WL 2646474.

162 Brief of James E. Andrews as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) as Amicus Curiae Supporting Respondents at 4-5, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008443.

163 Brief of the Alliance of Baptists et al. as Amici Curiae Supporting Petitioners, Lawrence v. Tex., 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152331.

164 *Id.* at 3.

The United States Catholic Conference repeatedly attacks what it perceives as an overemphasis on autonomy in the American legal system. In its brief in *Planned Parenthood v. Casey*,[165] for example, the Bishops' *amicus* noted that autonomy, first mentioned in passing by Justice Douglas, has come to dominate legal debate.[166] "By so doing, the Court truly caused the pregnant woman to be 'isolated in her privacy' from all other legitimate interest of society, of her community, of her family, of her unborn child – an outcome that Roe v. Wade originally disavowed."[167] In its brief in *Cruzan*, the Catholic Conference wrote, "The very right proposed as a mater of personal autonomy – unlimited, exclusive self-determination – has never been a part of the foundation of our democratic system."[168]

Agudath Israel also seeks to limit the jurisprudence of autonomy. In its brief in *Cruzan*, Agudath Israel argued that the dignity of human life trumps personal autonomy.[169] "It is this general principle —that rights of personal autonomy must ordinarily yield to countervailing compelling interests in human life—that provides the legal and moral foundation for society's negative view of suicide and euthanasia."[170] In its brief in *Vacco v. Quill*,[171] Agudath Israel also disputed autonomy's preeminence. "Agudath Israel takes both moral and legal exception to the notion that a person enjoys unfettered personal autonomy to decide that his life is no longer worth living."[172]

J. *Summary of Amici Positions*

The review of the *amicus* briefs in this study suggests at least three trends. In the introduction I noted that the legal arguments presented by religious organizations provide insight into how such organizations view the relationship between religion and the law. A wide variety of religious organizations believe that they should influence and inform the legal system. Religious groups are actively "lobbying" the Supreme

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165 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

166 Brief of the United States Catholic Conference et al., *supra* note 76, at 9.

167 *Id.*

168 Brief of the United States Catholic Conference as Amicus Curiae Supporting Respondents at 7, Cruzan v. Dir., Mo. Dep't Health, 497 U.S. 261 (1990) (No. 88-1503), 1989 WL 1128124.

169 Brief of Agudath Israel of America, *supra* note 1, at 9, 17-18.

170 *Id.* at 17-18.

171 Vacco v. Quill, 521 U.S. 793 (1997).

172 Brief of Agudath Israel of America as Amicus Curiae Supporting Petition at 8, Vacco v. Quill, 521 U.S. 793 (1997) (No. 95-1858), 1996 WL 33414054.

Court through the filing of numerous *amicus curiae* briefs on a range of issues. Second, I noted that the coalitions formed by various religious organizations give us perspective on the relationships between various United States denominations and religious groups. These interesting coalitions could bear further study as they often involve "strange bedfellows." Finally, I noted that by reviewing the rulings of the Court in cases that were briefed by religious organizations, we can gain insight into the Court's understanding of whether and how religious organizations should influence or affect legal decisions. This study indicates that the Court does not, at least explicitly, adopt or discuss the arguments presented by such religious organizations. Another interesting result of the study is the split between "liberal" and "conservative" religious groups in the role of religion in public life. The liberal religious organizations repeatedly attempt to define religion as private, outside the public sphere, and therefore the imposition of religious views in the public sphere interferes with individual autonomy. The most conservative religious groups avoid, for the most part, open discussion of religion in their briefs, although they clearly support public expressions of faith in the Judeo-Christian tradition. Such groups appear to understand the tension between religious expression of belief and the operation of the Supreme Court, with its inclusion of only secular arguments (or perhaps veiled references to religion). By framing their arguments in legal and secular terms, they may have a higher probability of influencing the outcome, even if such positions are based on religious belief.

Several religious organizations openly advocate a positive vision of civil society and yet stress respect for minority religious rights. This balance between the open participation of religious organizations in legal debates and respect for other religions is perhaps the most compatible with American First Amendment jurisprudence. For example, in its brief concerning *Planned Parenthood v. Casey*, Agudath Israel forcefully argued against abortion based on the sanctity of all human life.[173] Later in the brief, Agudath Israel acknowledges that it is "a representative of a religious minority community whose constituents rely heavily on the religious freedoms guaranteed under the First Amendment."[174] The United Methodist Church also exhibits both resolve and respect for other religions. In its brief in *Cruzan*, the Church states that,

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173 Brief of Agudath Israel of America, *supra* note 81, at 93.

174 *Id.*

> [*a*]*micus* does not urge that the views set forth herein should be adopted because they are Christian views and for that reason represent a correct constitutional resolution of the present issue. To the contrary, *amicus* is firmly committed to the constitutional principle that all religions are entitled to equal respect and equal opportunity to flourish. *Amicus* does urge that this Court's assessment of whether the right at stake here is 'deeply rooted in the traditions and conscience of our people' should be informed by our culture's traditional moral understandings, the development of which has been shaped by the religious and ethical principles of *amicus* and other religious organizations. And while *amicus* does not purport to speak for the entire judeo-christian [sic] community, the position it espouses with respect to the issue of a person's right to decline life-prolonging treatment is representative of a broad and deeply held traditional moral consensus.[175]

Review of the forty-five *amicus curiae* briefs and the decisions by the Supreme Court in those matters confirms: (1) the Supreme Court mostly avoids discussing religion or spirituality when determining matters of direct and significant ethical importance; yet, (2) the religious organizations *are* providing significant religious advice to the Court through *amicus curiae* briefs. The Supreme Court's lack of discussion on religion and morality is not, therefore, the result of a failure by religious organizations to encourage the Court to more directly address the religious and ethical basis for its decisions. It appears instead that the Justices of the Court subscribe to the belief that "the introduction of religious principles into policy discussions violates the rules of public discourse in a pluralistic democracy."[176] This leads to the question of whether the Court could or should openly include discussion and consideration of the views of religious organizations in its decisions. We must further investigate whether the religious organizations simply hope to persuade the justices "behind the scenes" without need for explicit mention in the decisions of the Court. Finally, this preliminary analysis of *amicus curiae* briefs also raises the issue of whether a justice who receives a brief from representatives of the religion with which he or she affiliates may be perceived as biased. One might argue that the lack of discussion of the viewpoints of the religious organizations in the deci-

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175 Brief of the General Board of Church and Society of the United Methodist Church as Amicus Curiae Supporting Petitioners at 5, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990) (No. 88-1503), 1989 WL 1128112.

176 RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY 11 (Georgetown University Press 1996).

sions of the Court is meant to avoid such questions. A review of the constitutional law doctrines associated with the protection of speech for religious organizations and the non-endorsement of religious views by government will further explain this odd combination of extensive briefing of issues by religious organizations coupled with silence by the Supreme Court on those arguments.

K. *Legal Analysis*

Citizens of the United States remain conflicted about the role of religion in public political life. In 2007, a poll by the Gallup Organization suggested that only 45% of the population would vote for an atheist for President.[177] In contrast, 49% of respondents in a Pew Forum poll indicated that conservative Christians had gone "too far" in trying to impose religious values on the country.[178] American public opinion is divided on the proper role of religion in the public sphere.

The legal doctrines governing the role of religious organizations in political and legal decision-making are anchored by the First Amendment to the United States Constitution. The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[179] The First Amendment contains two separate prohibitions relating to religion (that may need to be read together to be properly interpreted): (1) the Establishment Clause; and, (2) the Free Exercise Clause (collectively, "the Religion Clauses"). These clauses speak to the issues analyzed in this article, namely the right of religious organizations to lobby the United States Supreme Court and the role and effect of such lobbying through *amicus curiae* briefs. Other clauses of the First Amendment also guide the courts in receiving, using, or limiting information provided by religious organizations. Those other relevant clauses include the First Amendment rights to freedom of speech and the right to assembly. Although such constitutional provisions originally governed only the federal government, subsequent cases have incorporated these clauses into the Fourteenth Amendment

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177 Jeffrey M. Jones, *Some Americans Reluctant to Vote Mormon*, GALLUP, Feb. 20, 2007, *available at* http://www.gallup.com/poll/26611/Some-Americans-Reluctant-Vote-Mormon-72Year Old-Presidential-Candidates.aspx (last visited Mar. 16, 2009).

178 Andrew Kohut et al, *Many Americans Uneasy with Mix of Religion and Politics*, PEW, Aug. 24, 2006, *available at* http://pewforum.org/docs/?DocID=153 (last visited Mar. 16, 2009).

179 U.S. CONST. amend. I.

through the due process of law.[180] The provisions of the First Amendment at issue for religious organizations, therefore, apply to state and local governments.

The continued participation of religious organizations in "lobbying" the Supreme Court through the filing of *amicus curiae* briefs and almost complete silence of the Court in adopting or discussing positions set forth in such briefs reflects the tension between two competing doctrines in United States constitutional law concerning the Religion Clauses. First, the right of the religious organizations to free speech, exemplified through the filing of such briefs, is well protected and established as a primary right under the Constitution. Second, and in contradiction to that right to participate through such speech, the Supreme Court is extremely careful not to be seen adopting those positions because of its own jurisprudence on the Establishment Clause. That jurisprudence seeks to avoid any governmental action that may be seen as an endorsement of religion or the adoption of a non-secular basis for legal decision-making. Before examining each of these concerns in more detail, let us look at the broad motivating principles behind both the Free Exercise Clause and the Establishment Clause.

1. The First Amendment and Principles Governing Religion in the United States

Justice Harlan, concurring, in *Walz v. Tax Commission*, described three broad principles that appear to run throughout the jurisprudence of the Supreme Court on issues concerning the Free Exercise Clause and the Establishment Clause.[181] A review of these principles is useful in uniting what appears to be a wide variety of holdings (some conflicting) concerning the Religion Clauses. These principles provide the overall framework in which the two contradictory aspects of Supreme Court jurisprudence governing the participation of religious organizations in filing *amicus curiae* briefs (free speech and non-endorsement) are situated.

The first and primary purpose of the Religion Clauses, according to Justice Harlan, is to prevent "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to

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180 *See, e.g.*, Gitlow v. N.Y., 268 U.S. 652 (1925); Cantwell v. Conn., 310 U.S. 296 (1940); Everson v. Bd. of Educ., 330 U.S. 1 (1947).

181 Walz v. Tax Comm'n, 397 U.S. 664 (1970).

strife and frequently strains a political system to the breaking point."[182] Second, Justice Harlan described a concern with religious liberty, which he also called "voluntarism."[183] Under this second guiding principle, "the Government must neither legislate to accord benefits that favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion."[184] This principle may be seen as directly guiding the Court in considering the role of religious organization in filing *amicus curiae* briefs:

> [R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against. Although the very fact of neutrality may limit the intensity of involvement, government participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation.[185]

This concern over the overt political participation of religious organizations in the public political life of the state leads to the third principle, called by Justice Harlan "neutrality."[186] Neutrality requires an "equal protection mode of analysis."[187] Governmental categories must be meticulously surveyed to eliminate "religious gerrymanders."[188] "In any particular case," Justice Harlan advised, "the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter."[189]

Justice Harlan's first concern may also be described as the principle of separation of church of state.[190] A strict interpretation of the separa-

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182 *Id.* at 694.

183 *Id.* at 694-95.

184 *Id.* at 694.

185 *Id.*

186 *Id.* at 694-95.

187 *Id.* at 696.

188 *Id.*

189 *Id.*

190 This article does not analyze constitutional law concerning the restriction of religious conduct because *amicus curiae* briefs concerning the regulation of religious conduct and internal affairs were excluded from the research. Instead, the role of religious organizations in influencing general public policy was analyzed. This focus makes a review of the Religious Freedom

tion of church and state was enunciated in *Everson v. Board of Education*.[191] In that case, a New Jersey taxpayer challenged the right of the board of education to reimburse parents of parochial school students for transportation expenses. Justice Black adopted language that Thomas Jefferson used in an 1802 letter to a certain Baptist congregation in Danbury, Connecticut:

> 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 disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[192]

Despite the strong language, Justice Black, writing for the majority, allowed the reimbursement because reimbursement was provided to students attending public schools. Of course, this strict wall of separation has been lowered or eliminated by several recent Supreme Court decisions, as discussed further below.

The "neutrality" line of cases holds that one religious denomination should not be favored or preferred over any other religious denomination.[193] In *Larson v. Valente*, Justice Brennan delivered the opinion of the Court holding that a Minnesota registration law for religious organizations that solicited over 50% of the contributions from non-members violated the First Amendment Religion Clauses.[194] Justice Brennan wrote, "The clearest command of the Establishment Clause is that one

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Restoration Act and Religious Land Use and Institutionalized Person Act inapplicable to the analysis.

191 Everson v. Bd. of Educ., 330 U.S. 1 (1947).

192 *Id.* at 16.

193 *See, e.g.*, Larson v. Valente, 456 U.S. 228 (1982).

194 *Id.*

religious denomination cannot be officially preferred over another."[195] Other cases have held that religion should not be favored over non-religion.[196]

Another line of cases takes a different approach to the values underlying the provisions concerning religion in the First Amendment. These cases emphasize preserving religious liberty and religious choice as the primary value and protect that value even at the expense of the separation of church and state or neutral treatment. Advocates of such a position argue that religion is a positive force in public life.

These principles—separation of church and state, neutrality, and religious liberty—may conflict. Supreme Court decisions often emphasize one or two of these guiding principles over the other. With this general background, let us examine two aspects of the Religion Clauses and First Amendment in more detail—the right of religious organizations to free speech and the non-endorsement of religion by the government, especially the requirement that there be a secular purpose behind legislation.

2. The Protection of Religious Speech and Political Participation

Of particular importance to the question of the role of religious organizations as *amicus curiae* is the strong protection provided to "religious speech" under the Constitution. Religious speech is highly protected and cannot be prohibited or restricted because of its content, absent extraordinary circumstances.[197] In *Widmar*, the Court held that the university, by allowing secular groups to use the facilities for meetings, created a "public forum."[198] Religious organizations could not, therefore, be prohibited from meeting there without a showing of a compelling governmental interest (and none was found). The protection of religious "speech" has been expanded to apply to a wide range of

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195 *Id.* at 245.

196 *See, e.g.*, Epperson v. Ark., 393 U.S. 97 (1968); Buckley v. Valeo, 424 U.S. 1 (1975); *Everson*, 330 U.S. 1.

197 *See, e.g.*, Murdock v. Pa., 319 U.S. 105 (1943) (striking down licensing fee for door-to-door religious solicitation as challenged by Jehovah's Witnesses); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding freedom not to salute the flag was protected religious speech). These cases have been extended to allow religious expression in state educational institutions and governmental bodies. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981).

198 *Widmar*, 454 U.S. 263.

circumstances.[199] This protection of religious speech relates directly to the protection of individual liberty, discussed above.

One motivation of the Supreme Court in preventing state discrimination against religious speech is the avoidance of having the government define "religious worship" versus "religious speech." In *Widmar*, the dissent argued that while religious speech was protected, acts of religious worship were not.[200] The majority rejected this argument. Justice Powell, writing for the majority, stated that,

> even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. *Cf. Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953). Merely to draw the distinction would require the university — and ultimately the courts — to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.[201]

In another footnote, Justice Powell further questioned whether the state could distinguish what constitutes a religion:

> We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech." *See Chess v. Widmar*, 635 F.2d 1310, 1318 (CA8 1980). Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *O'Hair v. Andrus*, 198 U. S. App. D. C. 198, 203, 613 F.2d 931, 936 (1979) (footnote omitted).[202]

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199 *See, e.g.*, Capitol Square Review v. Pinette, 515 U.S. 753 (1995) (religious expression did not violate the Establishment Clause where it was purely private and occurred in a traditional or designated public forum, publicly announced and open to all on equal terms); Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995) (refusal by university to pay a third-party contractor for printing costs of petitioners' student publication, based on its religious editorials, was not supported by Establishment Clause concerns); Lambs Chapel v. Ctr. Moriches Sch. Dist., 508 U.S. 384 (1993) (to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint constitutes viewpoint discrimination against religion).

200 *Widmar*, 454 U.S. at 282-84.

201 *Id.* at 269-70 n.6.

202 *Id.* at 272 n.11.

In short, it is well-established constitutional doctrine that religious organizations have a right to free speech. Such a right extends to public participation in the political life of the nation. It also certainly extends to the filing of *amicus curiae* briefs with the Supreme Court, as well as other forms of speech, including lobbying.[203]

3. Expressions of Religion in the Political Life of the Nation

Let us now turn to a second issue that frames the participation of religious organizations in influencing the Supreme Court—how has the Supreme Court interpreted, limited, or allowed the expression of religious content by the government itself? Outside of the public school setting, the Court has been fairly lenient in allowing some expressions of religious belief in governmental activities. In *Marsh v. Chambers,* for example, the Court allowed legislatures to open sessions with a public prayer.[204] Robert E. Palmer, a Presbyterian minister, had served as chaplain since 1965 at a salary of $319.75 per month for each month the legislature was in session. A Nebraska legislator had sued the state over the opening of legislative sessions with a prayer and the employment of a minister.[205] The Eighth Circuit Court of Appeals held the prayer unconstitutional under the First Amendment.[206] The Supreme Court found the employment and prayer constitutional.[207] The justification circumvented the separation of church and state and relied simply on the long history of such a practice, including the appointment of a paid chaplain to lead prayers by Congress in 1789.[208] Justice Burger wrote for the majority:

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later

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203 Of course, religious organizations, as well as all other organizations exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code, are prohibited from participating or intervening, directly or indirectly, in a political campaign on behalf of or in opposition to any candidate for elective public office. This does not affect lobbying concerning issues.

204 Marsh v. Chambers, 463 U.S. 783 (1983).

205 *Id.* at 784-85.

206 *Id.* at 785.

207 *Id.*

208 *Id.*

> three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court . . . . Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress — their actions reveal their intent.[209]

Justice Burger and the majority did not find that the employment of a Presbyterian minister for such a long period of time favored one religion. "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[210] Further, "[t]hat being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer."[211] "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."[212]

At least two religious organizations filed *amicus curiae* briefs in this case. First, the Anti-Defamation League of B'Nai Brith brought to the Court's attention the fact that the published collection of the chaplain's prayers reflected widespread reference to Jesus, as the Christ, and Christian doctrine.[213] The Anti-Defamation League did not object to legislative chaplaincies in general, but narrowly objected to "the retention of a chaplain of one denomination for an extended length of time and payment of state funds to compensate the chaplain for reciting prayers which are religious and emphasize the precepts of one denomina-

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209 *Id.* at 786, 790.

210 *Id.* at 794-95.

211 *Id.*

212 *Id.* at 792.

213 Brief of Anti-Defamation League of B'Nai Brith as Amicus Curiae Supporting Respondent, Marsh v. Chambers, 463 U.S. 783 (1983) (No. 82-23), 1983 U.S. S. Ct. Briefs LEXIS 1438.

tion."[214] The American Jewish Congress also filed an *amicus curiae* brief opposing the chaplain's employment. That brief argued:

> By selecting and paying a chaplain of one faith over a protracted period, Nebraska has symbolically suggested that this person's faith is the civil religion of the state. When coupled with the printing of this person's prayers at state expense, Nebraska announces to its citizens that the state prefers a particular sect, that it is the official religion of the state, and that its prayers, but not those of others, are properly considered by the legislature, as it undertakes its tasks. The benefit conferred on that faith — be it one Protestant sect, Christianity, Judeo-Christianity, or the civil religion, is substantial and direct. Nebraska's practices do not become permissible merely because they are a small step in the institutionalization of state support for religion.[215]

As can be seen by the text of the opinion, these concerns were simply dismissed by the Court in its opinion.[216]

In *Lynch v. Donnelly*, the Court approved a city-owned depiction of the birth of Jesus in a nativity scene.[217] The decision is similar to that in *Marsh*. Justice Burger, writing for the majority, held that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[218] The Court held that the Constitution does not require a strict separation of church and state but rather calls for accommodation under some circumstances.[219] To hold otherwise, Justice Burger wrote, would show a "callous indifference" to the importance of religion in our culture.[220] The purpose and effect of the display of the crèche were to "take [ ] note of a significant historical religious event long celebrated in

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214 *Id.* at 5.

215 Brief of the American Jewish Congress as Amicus Curiae Supporting Respondent at 8-9, Marsh v. Chambers, 463 U.S. 783 (1983) (No. 82-23), 1983 U.S. S. Ct. Briefs LEXIS 1439.

216 *Marsh*, 463 U.S. 783.

217 Lynch v. Donnelly, 465 U.S. 668 (1984). The Anti-Defamation League of B'Nai Brith and the American Jewish Congress filed a joint *amicus curiae* brief arguing that the public display on government property through a government owned crèche depicting the birth of the Christian Messiah violated the Establishment Clause. A countervailing *amicus curiae* brief was filed jointly by the Freedom Council, the Coalition for Religious Liberty, and the Rutherford Institute. This coalition argued that "the crèche and the other symbols in the display are traditional symbols that are part of the historical-cultural celebration of Christmas by the American people" and therefore secular.

218 *Id.* at 674.

219 *Id.* at 673.

220 *Id.*

the Western World."[221] Justice O'Connor, in a concurring opinion, put forth a test for such public displays of religion that examined whether the action or display endorsed or disapproved of a religion or religious belief.[222]

That same session, the Court struck down a county crèche and Christmas tree display but, in the same decision, upheld a city display of both a menorah and Christmas tree accompanied by a sign stating "salute to liberty."[223] Five justices adopted Justice O'Connor's endorsement test from her concurring opinion in *Lynch*. Writing for the majority, Justice Blackmun stated, "Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion" and found that "[i]n recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence."[224] Noting that "endorsement" is obviously not self-defining, Justice Blackmun wrote, "Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same," that is, "the Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[225] The county display was held unconstitutional because the Christian symbols stood alone.[226] The city display, on the other hand, was found constitutional because the city was sending a message of pluralism.[227]

The decision was split into several parts endorsed by a shifting array of Justices. Justices Brennan, Stevens, and Marshal would have found both displays unconstitutional.[228] Justices O'Connor and Blackmun applied the non-endorsement test and swung the decision so that one display was found constitutional and other unconstitutional.[229] Justices Kennedy, Rehnquist, White and Scalia alternatively argued for

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221 *Id.* at 680.

222 *Id.* at 690 (O'Connor, J., concurring).

223 County of Allegheny v. ACLU, 492 U.S. 573 (1989).

224 *Id.* at 592.

225 *Id.* at 593-94.

226 *Id.* at 578-79.

227 *Id.*

228 *Id.* at 637 (Marshall, J., concurring in part and dissenting in part); *Id.* at 654 (Stevens, J., dissenting).

229 *Id.* at 623 (O'Conor, J., concurring in part and dissenting in part).

what is known as the non-coercion test. Justice Kennedy described that test as follows:

> Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."[230]

The Court has found excessive entanglement and violation of the Establishment Clause when religious organizations are given a more direct role in government. First, let us look at the easy case. Massachusetts had a statute that allowed churches within 500 feet of commercial establishments to veto the approval of liquor licenses. In *Larkin v. Grendel's Den*, the Court held that the state could not delegate functions to religious organizations.[231] The Supreme Court turned to the three-part test enunciated in *Lemon v. Kurtzman*: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion.'"[232] The Court found that "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred."[233] Such delegation of authority failed the *Lemon* test because its secular purpose could be accomplished in other ways, and it created the appearance of endorsement and entanglement.

Other cases have struggled to define what it means for legislation to have a "secular legislative purpose," as called for by *Lemon v. Kurtzman*.[234] One might expect, based on *Lemon* and the separation of church and state, that any legislation based openly on religious tenets or doctrines would be ruled unconstitutional under the Establishment Clause. In *Epperson v. Arkansas,* Justice Fortas, writing for the majority, indicated that Arkansas' legislation prohibiting the teaching of evolution was unconstitutional.[235] He stated that "the law must be stricken be-

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230 *Id.* at 659 (Kennedy, J., concurring in part and dissenting in part).

231 Larkin v. Grendel's Den, 459 U.S. 116, 123 (1982).

232 Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

233 *Larkin*, 459 U.S. at 125-26.

234 *Lemon*, 403 U.S. at 612.

235 Epperson v. Ark., 393 U.S. 97 (1968).

cause of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof."[236] Further, "the overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group."[237] The decision in *Edwards v. Aguillard* added to this line of reasoning in holding that a Louisiana statute requiring the teaching of creationism, along with evolution, was unconstitutional.[238] The state's articulation of a secular purpose, while subject to deference, must not be a sham. Examining the statements of the sponsoring legislator, the Court found that the purpose of the law was to advance and endorse a particular religion and that it therefore violated the Establishment Clause.[239]

In 1976, the "Hyde Amendment" was enacted by Congress and signed into law by the President. This law amended Title XIX of the Social Security Act to prohibit the federal funding of abortions under Medicaid. A group of affected women filed suit claiming, in part, that the Amendment violated the Religion Clauses of the First Amendment. In this case, *Harris v. McRae*, the Court rejected the claim that the law was based on religious doctrine and therefore violated the Establishment Clause:[240]

> It is well settled that "a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental entanglement with religion." *Committee for Public Education v. Regan*, 444 U.S. 646, 653 . . . . Although neither a State nor the Federal Government can constitutionally "pass laws which aid one religion, aid all religions, or prefer one religion over another," *Everson v. Board of Education*, 330 U.S. 1, 15, it does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442. That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establish-

236 *Id.* at 103.
237 *Id.* at 102.
238 Edwards v. Aguillard, 482 U.S. 578 (1987).
239 *Id.* at 593-94.
240 Harris v. McRae, 448 U.S. 297 (1980).

> ment Clause, enact laws prohibiting larceny. Ibid. . . . In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.[241]

The National Council of Churches of Christ in the U.S.A., considered a liberal denomination, filed an *amicus curiae* brief in this case. In that brief, the group urged the Supreme Court "to avoid the establishment issues altogether."[242] Instead, the National Council of Churches indicated that it "applauds the district court's reaffirmation of the right of religious groups to participate fully in the political process and its reminder that 'the healthy working of our political order cannot safely forego the political action of the churches, or discourage it.'"[243] The Presbyterian Church, U.S.A. joined in urging the avoidance of any establishment discussion.[244] These arguments demonstrate that even mainline Protestant denominations, often considered politically liberal, argue for a strong role for religious organizations in influencing or shaping public policy and law.

One of the cases briefed extensively by religious organizations, *Webster v. Reproductive Health Services*, contains a discussion of the lack of a secular purpose in the abortion legislation at issue in that case.[245] This discussion is found in the concurrence and dissent of Justice Stevens. Stevens looked in part to the preamble of the legislation:

> I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution. This conclusion does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions, *see McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *Harris v. McRae*, 448 U.S. 297, 319-320 (1980), or on the fact that the legislators who voted to enact it may have been motivated by religious considerations, *see Washington v. Davis*, 426 U.S.

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241 *Id.* at 319-20.

242 Brief of the National Council of Churches of Christ in the U.S.A. as Amicus Curiae for Respondents at 14, Harris v. McRae, 448 U.S. 297 (1980) (No. 79-1268), 1980 WL 339687.

243 *Id.*

244 Brief of the United Presbyterian Church in the U.S.A. as Amicus Curiae for Respondents at 5, Harris v. McRae, 448 U.S. 297 (1980) (No. 79-1268), 1980 WL 339689.

245 Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

> 229, 253 (1976) (Stevens, J., concurring). Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause.[246]

We can see that the Court's decisions on the need for a secular purpose behind any given law, most often expressed as the non-endorsement of religion, has evolved. Certain types of public displays of religion by the government, especially those rooted in long historical tradition, are given deference and perhaps even exempted from ordinary constitutional review. Concerning legislation, though, the Court has adopted a clear position. Legislation must not evince only a religious purpose or basis. If the secular purpose behind legislation is not a sham, the legislation may incidentally correspond to religious values or beliefs. Direct discussion of religious values and motivations, such as in the legislative discussion leading up to a vote, or in the preamble of legislation, may lead the Supreme Court to find the legislation unconstitutional.

The two doctrines discussed here—the freedom of speech of religious groups and the secular purpose of law (the non-endorsement of religion)—lead to the odd result this article discusses. No one, least of all the Supreme Court, is suggesting that religious organizations not participate fully in briefing issues before the Supreme Court. Indeed, any attempt to block the participation of such groups in politics, lobbying, or the filing of *amicus curiae* briefs would be immediately ruled unconstitutional. At the same time, the Court is constrained by its own holdings concerning the secular basis of legislation and the non-endorsement of religion. It appears that the Supreme Court holds itself to the same standard it expects of legislatures. That is, its decisions should not explicitly reference religious arguments. Incorporating or discussing the arguments of religious *amici* poses two dangers: (1) the Court may be seen as favoring, or endorsing, the religious group that presented the argument; and (2) such discussion could be no more than incidental to the legal reasoning for the holding or it would violate the secular purpose of the law (usually expressed as a concern about the basis of legislation). Given the constitutional minefield that the presentation of religious *amicus curiae* presents, the Court continues to accept such briefs and then avoids referencing them.

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246 *Id.* at 566-67 (Stevens, J., concurring in part and dissenting in part).

APPENDIX A: BRIEFS INCLUDED IN DATABASE

Case	Citation	Date	Issue	Amicus Curiae
Brown v. Board of Education	347 U.S. 483	1954	Segregation	American Jewish Congress; American Civil Liberties Union; American Ethical Union; American Jewish Committee; Anti-Defamation League of B'nai B'rith; Japanese American Citizens League; Unitarian Fellowship
Bowers v. Hardwick	478 U.S. 186	1986	Homosexuality	American Jewish Congress; Catholic League for Civil and Religious Rights; Presbyterian Church (U.S.A.); American Friends Service Committee; Unitarian Universalist Association; United Church of Christ; Episcopal Church
Cruzan v. Director, Missouri Dept. of Health	497 U.S. 261	1990	Euthanasia	United States Catholic Conference of Bishops; Agudath Israel; Evangelical Lutheran Church; United Methodist Church; Focus on the Family; Family Research Council
Planned Parenthood v. Casey	505 U.S. 833	1992	Abortion	United States Catholic Conference of Bishops Southern Baptist Convention; National Association of Evangelicals; Agudath Israel; Catholics United for Life; Focus on the Family; Family Research Council; American Family Association Law Center; Lutheran Church; Missouri Synod
Romer v. Evans	517 U.S. 620	1996	Homosexuality	Christian Legal Society; Catholic League for Civil and Religious Rights; Southern Baptist Convention; Focus on the Family; Lutheran Church; Missouri Synod; National Association of Evangelicals; American Friends Service Committee; American Jewish Committee; Anti-Defamation League; Episcopal Church; Unitarian Universalist Association; United Church of Christ; Presbyterian Church (U.S.A.)
Vacco v. Quill	521 U.S. 793	1997	Euthanasia	Agudath Israel; Institute for Public Affairs of the Union of Orthodox Jewish Congregations; Rabbinical Council of America
Boy Scouts of America v. James Dale	530 U.S. 640	2000	Homosexuality	Family Research Council; Agudath Israel; United States Catholic Conference of Bishops and the New Jersey Catholic Conference; Institute for Public Affairs of the Union of Orthodox Jewish Congregations

Case	Citation	Date	Issue	Amicus Curiae
McCarver v. North Carolina	533 U.S. 975	2001	Death Penalty	American Jewish Committee; Commission on Social Action of Reform Judaism; Evangelical Lutheran Church; Foundation for the Preservation of the Mahayana Tradition; United Methodist Church; United Church of Christ; Presbyterian Church (U.S.A.); Masjid Malcom Shabazz; Mennonite Central Committee; Progressive Jewish Alliance; Unitarian Universalist Association; United States Catholic Conference of Bishops
Grutter v. Bollinger	539 U.S. 306	2003	Affirmative Action	Anti-Defamation League; American Jewish Committee; Progressive Jewish Alliance; Union of American Hebrew Congregations
Lawrence v. State of Texas	539 U.S. 558	2003	Homosexuality	Family Research Council; Focus on the Family; and Alliance of Baptists; American Friends Service Committee; Commission on Social Action of Reform Judaism; Episcopal Church; United Methodist Church; More Light Presbyterians; United Church of Christ; Unitarian Universalist Association; 21 Religious Groups
Stenberg v. Carhart	530 U.S. 914	2004	Abortion	United States Catholic Conference of Bishops; Southern Baptist Convention; Greek Orthodox Church of America; Church of Jesus Christ of Latter-Day Saints; Lutheran Church; Missouri Synod; National Association of Evangelicals; Religious Coalition for Reproductive Choice
Ashcroft v. ACLU	542 U.S. 656	2004	Pornography	Family Research Council; Focus on the Family
Elk Grove Unified School District v. Newdow	542 U.S. 961	2004	Pledge of Allegiance	Family Research Council; Focus on the Family; Alliance Defense Fund; Unitarian Universalist Association and 32 Named Jewish and Christian Clergy

Case	Citation	Date	Issue	Amicus Curiae
Roper v. Simmons	543 U.S. 551	2005	Death Penalty	United States Catholic Conference of Bishops; Alliance of Baptists; American Association of Jewish Lawyers and Jurists; American Jewish Committee; The Bruderhof; Buddhist Peace Fellowship; Church Women United; Engaged Zen Foundation; Evangelical Lutheran Church; Foundation for the Preservation of the Mahayana Tradition; United Methodist Church; Greek Orthodox Church of America; Episcopal Church; Jewish Council for Public Affairs; Presbyterian Church (U.S.A.); American Baptist Churches; Mennonite Central Committee; Muslim Public Affairs Council; Muslim Women Lawyers for Human Rights; National Council of Synagogues; Prison Dharma Network; Progressive Jewish Alliance; Southern Christian Leadership Conference; Union for Reform Judaism; Unitarian Universalist Association; United Church of Christ; American Friends Service Committee
Crawford, US Immigration and Customs v. Sergio Saurez Martinez	543 U.S. 1095	2005	Detention of Illegal Aliens	Mennonite Central Committee; Presbyterian Church (U.S.A.); Evangelical Lutheran Church; Anglican Church World Service; Episcopal Church
Van Orden v. Perry	545 U.S. 677	2005	Ten Commandments	Focus on the Family; Family Research Council
McCreary County v. ACLU of Kentucky	545 U.S. 844	2005	Ten Commandments	Family Research Council; Focus on the Family
Gonzales v. Oregon	546 U.S. 243	2005	Euthanasia	Focus on the Family; Family Research Council; United States Catholic Conference of Bishops; Lutheran Church; Missouri Synod; and 52 Religious Organizations including: American Ethical Union American Humanist Association; Unitarian Universalist Association; United Church of Christ
Ayotte v. Planned Parenthood	546 U.S. 320	2006	Abortion	United States Catholic Conference of Bishops; Christian Legal Society; Christian Medical Association; Catholic Medical Association; Alliance Defense Fund; National Association of Evangelicals; Religious Coalition for Reproductive Choice

APPENDIX B: CASES CONSIDERED AND NOT INCLUDED IN DATABASE

Issue	Year	Case	Amicus or Amici
Abortion	1965	Griswold v. Connecticut, 381 U.S. 479 (1965)	Catholic Council on Civil Liberties
Abortion	1973	Roe v. Wade, 410 U.S. 113 (1973)	American Ethical Union; American Friends Service Committee; American Humanist Association; American Jewish Congress Catholic Laywers Guild of the Archdiocese of Boston
Death Penalty	1989	Stanford v. Kentucky, 492 U.S. 361 (1989)	American Baptist Churches; West Virginia Council of Churches
Contraception Information	2004	Catholic Charities of Sacramento, Inc. v. California, 543 U.S. 816 (2004)	Family Research Council
Church Property	1995	Russian Orthodox Church Outside of Russia v. The Russian Orthodox Church of the Holy Resurrection, 513 U.S. 1121 (1995)	Prebyterian Church (U.S.A.); Orthodox Church in America; National Council of Churches in Christ in the U.S.A.; Greek Orthodox Church; General Conference of the Seventh Day Adventists; and the Christian Legal Society
Church and State	1997	City of Boerne v. Flores, Archbishop of San Antonio, et al., 521 U.S. 507 (1997)	Coalition for the Free Exercise of Religion (60 religious and civil liberties groups)
Church and State	1998	Bronx Household of Faith v. The Board of Education, 524 U.S. 934 (1998)	Christian Legal Society; Baptist Joint Committee on Public Affairs; Council of Churches of the City of New York; Ethics and Religious Liberty Commission of the Southern Baptist Convention; [Family Research Council]; Focus on the Family; General Conference of Seventh-Day Adventists; Liberty Counsel; National Association of Evangelicals; New York City Church of Christ; Presbyterian Church (U.S.A.); Queens Federation of Churches; [Union of American Hebrew Congregations]; and Union of Orthodox Jews

APPENDIX C: RELIGIOUS ORGANIZATIONS THAT FILED FOUR OR MORE AMICUS BRIEFS

Party	Segregation	Death Penalty	Affirmative Action	Abortion	Euthanasia	Homosexuality	Ten Commandments	Pledge	Indefinite Detention	Pornography	TOTAL
Agudath Israel				1	2	1					4
American Friends (Quakers)		1				3					4
American Jewish Committee	1	2	1			1					5
Episcopal Church		1				3			1		5
Evangelical Lutheran Church		2			1				1		4
Family Research Council				2	2	2	2	1		1	10
Focus on the Family				1	2	2	2	1		1	9
Lutheran Church Missouri Synod				2	1	1					4
National Association of Evangelicals				3		1					4
Presbyterian Church (U.S.A.)		2				1			1		4
U.S. Conf. of Catholic Bishops		2		3	2	1					8
Unitarian Universalist Association	1	2			1	3		1			8
United Church of Christ		2		1	1	3					7
United Methodist Church		2			1	1					4
TOTAL	2	16	1	13	13	23	4	3	3	2	