

THE DELIBERATIVE-PRIVACY PRINCIPLE: ABORTION, FREE SPEECH, AND RELIGIOUS FREEDOM

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INTRODUCTION

In this Article, I propose that there is a deep connection among at least three seemingly disparate types of constitutional rights claims. Those three rights claims are the right to make the abortion decision for any reason one chooses,¹ the right against compelled ideological speech,² and the right of religious institutions to freely hire and fire their ministers (also known as the “ministerial exception”).³ In particular, there is a thread that unites all of these types of claims. That unifying thread is the concept of deliberative privacy. I use the term “privacy” in a specific sense, which will be described in more detail below.⁴

The connection among these rights claims has not been previously made explicit by courts or commentators. One goal of this Article, then, is simply to reveal this underlying connection among constitutional rights. The other goal is to analyze the implications of considering all of these rights claims in relation to one another and as sharing a particular normative underpinning.

This Article proceeds as follows. Part I describes each of the three constitutional rights claims in more detail and demonstrates that a shared concept of privacy underlies each of them. Then, Part II analyzes the nature of the privacy concept in greater depth and considers its implications for constitutional doctrine.

I. THREE TYPES OF CLAIMS

This Part describes the three different types of claims, all of which implicate a certain kind of privacy interest. As discussed further below, all three are claims to a right to make a particular decision or take a particular action for any reason one chooses. In this Article, I characterize this right as a sort of deliberative-privacy right, which is in essence a right against governmental “mind control.” It protects against governmental intrusion into protected deliberative processes.

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¹ *See, e.g.,* *Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dep’t of Health*, 888 F.3d 300, 306 (7th Cir. 2018).

² *See, e.g.,* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

³ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181 (2012).

⁴ I also note that there may be additional rights claims that rely upon this concept of privacy, in exactly the sense the term is used here. I do not mean to suggest that the three types of claims described here constitute an exhaustive list, but rather that they constitute an illustrative one.

A. Freedom to Terminate a Pregnancy Pre-viability for Any Reason

In the past several years, states have passed laws that make it a crime to terminate a pregnancy, at any stage of the pregnancy,⁵ for various forbidden reasons—such as fetal anomaly, or the sex or race of the fetus. For example, an Arizona law passed in 2011 prohibits an abortion if “the abortion is sought based on the sex or race of the child or the race of a parent” of the fetus.⁶ Ohio’s law singles out Down syndrome as a forbidden reason for terminating a pregnancy.⁷ Because these reason-based abortion bans are of relatively recent vintage, there are only two federal appeals court cases addressing their constitutionality.⁸ In *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner of Indiana State Department of Health*, the Seventh Circuit struck down Indiana’s law forbidding abortions for reasons of fetal anomaly or the sex or race of the fetus.⁹ The Sixth Circuit similarly struck down Ohio’s reason-based ban in *Preterm-Cleveland v. Himes*.¹⁰

⁵ See Carolyn Jacobs Chachkin, *What Potent Blood: Non-Invasive Prenatal Genetic Diagnosis and the Transformation of Modern Prenatal Care*, 33 AM. J.L. & MED. 9, 11 (2007) (describing prenatal genetic testing, which can detect possible fetal anomalies in the first trimester of pregnancy).

⁶ ARIZ. REV. STAT. ANN. § 13-3603.02 (LexisNexis 2019).

⁷ Specifically, the law provides:

No person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman if the person has knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of any of the following:

- (1) A test result indicating Down syndrome in an unborn child;
- (2) A prenatal diagnosis of Down syndrome in an unborn child;
- (3) Any other reason to believe that an unborn child has Down syndrome.

OHIO REV. CODE ANN. § 2919.10(B) (LexisNexis 2018). This law, which was passed in 2017, is currently enjoined. *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746, 749 (S.D. Ohio 2018), *appeal docketed*, No. 18-3329 (6th Cir. Apr. 12, 2018). Note that Ohio’s law, like most if not all criminal abortion restrictions, is written as a prohibition that applies to the doctor providing the abortion rather than the woman seeking it. Nonetheless, it is evident that the law is aimed at controlling the woman’s decision, by making abortion unavailable when the doctor knows she is seeking it for a particular reason.

⁸ A challenge to Arizona’s law, which was brought by the NAACP and the National Asian Pacific American Women’s Forum, was dismissed for lack of standing. *NAACP v. Horne*, 626 F. App’x 200, 201 (9th Cir. 2015).

⁹ 888 F.3d 300, 303 (7th Cir. 2018), *reh’g en banc granted, judgment vacated*, 727 F. App’x 208 (7th Cir. 2018), *vacated*, 917 F.3d 532 (7th Cir. 2018), *and opinion reinstated*, 917 F.3d 532 (7th Cir. 2018), *cert. granted in part, judgment rev’d in part on other grounds sub nom.* *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019). In *Box*, the U.S. Supreme Court summarily reversed the Seventh Circuit’s decision on a different issue—pertaining to an Indiana law regulating the disposition of fetal tissue—but denied certiorari on the issue of the constitutionality of Indiana’s reason-based ban. *Box*, 139 S. Ct. at 1780.

¹⁰ *Preterm-Cleveland v. Himes*, No. 18-3229 (6th Cir. Oct. 11, 2019).

The Seventh Circuit's decision was deceptively straightforward. Since the Indiana law banned abortions before viability, it would seem to be an obvious violation of the rule, announced in *Roe v. Wade*,¹¹ reformulated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹² and reaffirmed repeatedly since then by the U.S. Supreme Court that the state may regulate but may not ban abortion before fetal viability.¹³ Not all judges agreed with this assessment, however, which was also disputed by the state. The State of Indiana, in defending the law, argued that the Indiana law “represent[ed] a ‘qualitatively new type of abortion regulation,’ and that [the state] has compelling interests in prohibiting discrimination of particular fetuses in light of technological advances in genetic screening.”¹⁴ The U.S. Supreme Court has never considered the constitutionality of a law just like this one, banning abortions when they are sought for a particular reason.¹⁵ Thus, the law's defenders have suggested, a framework other than the “undue burden” test set forth in *Casey* must be applied—such as strict scrutiny.¹⁶

¹¹ 410 U.S. 113, 163 (1973) (holding that the state may ban abortion only after viability).

¹² 505 U.S. 833, 846 (1992) (reaffirming the “right of the woman to choose to have an abortion before viability” and holding that “[b]efore viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure”).

¹³ *See, e.g.*, *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (“[A] provision of law is constitutionally invalid, if the ‘purpose or effect’ of the provision ‘is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.’” (quoting *Casey*, 505 U.S. at 878)).

¹⁴ *Planned Parenthood of Ind. & Ky., Inc.*, 888 F.3d at 307; *cf. Box*, 139 S. Ct. at 1792 (Thomas, J., concurring) (“Whatever else might be said about *Casey*, it did not decide whether the Constitution requires States to allow eugenic abortions.”). Alternate arguments have also been put forward in support of reason-based bans. In *Planned Parenthood of Indiana & Kentucky, Inc.*, the state argued that the Indiana law lay outside the core prohibitions of *Roe* and *Casey*, because those cases protect only a “binary choice” to choose abortion or to carry a particular pregnancy to term, not a right to abort a *particular* fetus depending on the fetus’s characteristics. 888 F.3d at 306–07. In addition, in a case involving an Ohio law banning abortions due to fetal Down syndrome, the state suggested that courts have upheld laws that may be characterized as pre-viability abortion bans. Brief of Defendants-Appellants Lance Himes, Kim G. Rothermel, & Bruce R. Saferin at 45, *Preterm-Cleveland v. Himes*, No. 18-3329 (6th Cir. June 22, 2018), 2018 WL 3109485, at *45 [hereinafter Brief of Defendants-Appellants]. As Joseph Blocher has recently argued, it may be difficult in some instances to determine whether a law is truly a “ban,” and the label itself is highly manipulable. Joseph Blocher, *Bans*, 129 YALE L.J. (forthcoming 2019) (manuscript at 25–26), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353911.

¹⁵ *See, e.g.*, *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting) (“None of the Court’s abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children.”).

¹⁶ *Planned Parenthood of Ind. & Ky., Inc.*, 888 F.3d at 314 (Manion, J., dissenting) (applying strict scrutiny); *see also* Brief of Defendants-Appellants, *supra* note 14, at 42 (arguing that the Ohio reason-based abortion ban should be judged by, “at most,” strict scrutiny).

The laws' opponents, by contrast, insist that such restrictions, although perhaps in some sense novel, strike at the very heart of the constitutional right to choose abortion and therefore are not only unconstitutional but *per se* unconstitutional.¹⁷ They commandeer the woman's private decision-making process in a way that is fundamentally incompatible with recognition of a constitutional privacy right—a right to autonomous decision-making.¹⁸ Essentially, laws regulating reasons why an abortion may or may not be sought reach into women's minds, interfere with their most intimate deliberations, and tell them what reasons for this private action are acceptable or not in the eyes of the state.¹⁹ Courts have, so far, also accepted this reasoning.²⁰

The opponents' view has considerable support in the case law. The language of *Roe* itself is explicit in stating that it is the woman's "decision" that merits Fourteenth Amendment protection, and that she must be permitted to engage in consultation with her physician to make that decision.²¹ Thus, in the words of one scholar, "[t]he existence and recognition of this constitutional right means that the choice whether to exercise it—including the reasons why—ultimately belongs to the pregnant woman when the decision is hers to make"; she has a right to make it "without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties."²² This understanding of the constitutional privacy right implies that *Casey*'s undue-burden framework for analyzing the constitutionality of abortion restrictions is ancillary to the primary question courts are meant to answer. The key question, under the Fourteenth Amendment, is whether a particular abortion restriction prevents a woman from making the "ultimate decision to terminate her pregnancy before viability."²³ The undue-burden framework, which asks whether a law has the purpose or effect of imposing "a substantial obstacle in the path of a woman seeking" a pre-viability abortion, is simply a way of determining whether the opportunity to make the ultimate decision has been taken away from her.²⁴

¹⁷ B. Jessie Hill, *Regulating Reasons: Governmental Regulation of Private Deliberation in Reproductive Decision-Making*, in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES* 348, 348–52 (Holly Fernandez Lynch et al. eds., 2017).

¹⁸ See, e.g., *id.*; Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 *UCLA L. REV.* 351, 387 (2008).

¹⁹ See Hill, *supra* note 17, at 349–55.

²⁰ *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746, 754–55 (S.D. Ohio 2018) (treating the right as categorical and striking down Ohio's law without engaging in undue-burden analysis), *aff'd*, 940 F.3d 318 (6th Cir. 2019).

²¹ *Roe v. Wade*, 410 U.S. 113, 153 (1973); see also *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 987 (7th Cir. 2012) (noting that the abortion right is, in part, "a constitutionally protected interest 'in making certain kinds of important decisions' free from governmental compulsion" (quoting *Maher v. Roe*, 432 U.S. 464, 473 (1977))).

²² Marc Spindelman, *On the Constitutionality of Ohio's "Down Syndrome Abortion Ban,"* 79 *OHIO ST. L.J. FURTHERMORE* 19, 38 (2018) (quoting *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring in the judgment)).

²³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992).

²⁴ *Id.* at 877, 879.

B. The Right Against Compelled Ideological Speech

Despite the expansiveness of the First Amendment right to free speech,²⁵ it is possible to identify at least one truly core aspect of that right: the right to be free from compelled ideological speech, exemplified in cases such as *West Virginia State Board of Education v. Barnette*.²⁶ *Barnette* is almost self-consciously written to be a canonical First Amendment case, declaring that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”²⁷ As Professor Timothy Zick has explained, *Barnette*, which in fact drew on both the free-speech and the free-exercise aspects of the First Amendment, “establish[es] a broad anti-orthodoxy principle.”²⁸ Thus, *Barnette* places the concept of “freedom of mind” at the center of First Amendment doctrine.²⁹

Since *Barnette* was decided, the Supreme Court has repeatedly reaffirmed the principle that individuals cannot be compelled to promote a government-prescribed ideological message. Thus, *Wooley v. Maynard*, in which the Supreme Court struck down a New Hampshire law requiring drivers’ license plates to carry the state motto (which was, ironically, “Live Free or Die”), quotes the “freedom of mind” language from *Barnette* and opines that the law “invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”³⁰ This language suggests not only that the Free Speech Clause³¹ protects against compelled ideological speech, but that this protection is at the very center or core of the First Amendment.³² Indeed, in a different context, the Court

²⁵ See generally Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1200 (2015) (discussing how “the First Amendment’s territory pushes outward to encompass ever more areas of law”).

²⁶ 319 U.S. 624, 642 (1943).

²⁷ *Id.*

²⁸ TIMOTHY ZICK, *THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS* 130 (2018). One can also see the interrelatedness of free speech and free exercise principles relating in cases such as *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, in which the baker asserted that creating a cake for a same-sex wedding, in violation of his religious beliefs, violated both his right to free exercise of religion and his right against compelled speech, largely for identical reasons. 138 S. Ct. 1719, 1723 (2018).

²⁹ *Barnette*, 319 U.S. at 637.

³⁰ *Wooley v. Maynard*, 430 U.S. 705, 714–15 (1977).

³¹ “Congress shall make no law . . . abridging the freedom of speech” U.S. CONST. amend. I.

³² Some scholars have articulated different rationales and interests served by the prohibition on compelled speech, including compelled ideological speech. For example, the case law is driven partly by a concern with avoiding “misattribution,” or giving a false impression of someone’s views to the outside world. See, e.g., Abner S. Greene, *(Mis)attribution*, 87 DENV. U. L. REV. 833, 839–40 (2010); Abner S. Greene, “*Not in My Name*” *Claims of Constitutional Right*, 98 B.U. L. REV. 1475, 1525 (2018).

asserted: “At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”³³

As noted above, the free-speech right against compelled ideological speech shares an affiliation with other aspects of the First Amendment—especially the Free Exercise Clause.³⁴ In fact, the famous “fixed star” quote from *Barnette* refers not simply to a bedrock principle of the First Amendment, but more generally to the “constitutional constellation” itself—lending credence to the notion that the right against governmental interference in private deliberation is a more general constitutional principle—one that underlies numerous constitutional provisions.³⁵ For this reason, too, the Supreme Court observed in *Rochin v. California*, the case holding that pumping a suspect’s stomach for evidence was a conscience-shocking violation of Due Process, that “[i]t would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.”³⁶ In other words, the principle that the state cannot reach into individuals’ minds in a coercive manner was already well-established, even prior to the right to bodily integrity.

C. *The Ministerial Exception and the Protection for Religious Belief*

The ministerial exception is a rule derived from both the Free Exercise Clause and the Establishment Clause³⁷ of the First Amendment, providing that ministerial employees are barred from suing their religious institutions for at least some employment-related claims, such as wrongful discharge and violations of civil rights laws pertaining to hiring, firing, and other employment actions.³⁸ In other words, the religious institution is constitutionally entitled freely “to choose those who will guide it on its way,” and therefore antidiscrimination laws do not apply to decisions about

³³ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

³⁴ *See supra* note 28 and accompanying text.

³⁵ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

³⁶ *Rochin v. California*, 342 U.S. 165, 173 (1952).

³⁷ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I.

³⁸ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181 (2012) (“Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”); *see also* Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265, 1282 (2017) (“First and foremost, the [ministerial] exception forecloses judicial inquiry into the criteria that religious communities use to measure eligibility for positions involving communication of the faith. For some traditional communities, these criteria include sex, but they might also include marital status, sexual orientation, age, education, experience, ancestry, or even race.”).

hiring, firing, and promotion.³⁹ Though long applied by lower courts, the ministerial exception was officially recognized by the U.S. Supreme Court in the 2012 decision *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.⁴⁰

The constitutional doctrine of the ministerial exception may appear to be somewhat different from the other doctrines discussed in this Part. It does not seem to be a true “privacy” right, in the sense of protecting individual autonomy to make private decisions about matters that are central to one’s personhood, dignity, or identity. Structurally, however, ministerial exception claims resemble compelled-speech claims and claims to be free from reason-based abortion bans in some important respects. The ministerial exception protects a right to collective or institutional decision-making, rather than individual decision-making. Although it may be problematic to do so, the ministerial exception essentially treats churches and other religious employers like individuals who must be free to make certain individual decisions in order to maintain their identity.⁴¹

The logic and structure of the ministerial exception suggest either that the church is a sort of private domain, immune from governmental interference, or that the reasons that go into ministerial employment decisions are the sort of decisions that should be protected by a constitutional privacy right.⁴² The latter view has arguably been embraced by Professors Ira Lupu and Robert Tuttle. They contend that *Hosanna-Tabor* is a manifestation of the long-standing principle that the government has no power to resolve ecclesiastical questions.⁴³ The rule that the state is not competent to adjudicate specifically religious questions, which is undergirded by anti-establishment and free exercise principles, is a long-standing and relatively uncontroversial one.⁴⁴ The fact that the ministerial exception implicates this rule is explained by Lupu and Tuttle as follows:

“Courts cannot decide whether a congregation has engaged in discriminatory conduct toward a ministerial employee without first determining a set of qualifications for holding the role, or a standard of performance within the role, and then measuring the employee’s conduct . . . against these standards. Such acts of measurement are beyond the state’s adjudicative competence.” If civil

³⁹ *Hosanna-Tabor*, 565 U.S. at 196.

⁴⁰ *Id.*

⁴¹ For critiques of the ministerial exception, see, for example, B. Jessie Hill, *Change, Dissent, and the Problem of Consent in Religious Organizations*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* (Chad Flanders et al. eds., 2016); Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965 (2007).

⁴² See Hill, *supra* note 41, at 419 n.2, 439; see also Lupu & Tuttle, *supra* note 38, at 1281.

⁴³ Lupu & Tuttle, *supra* note 38, at 1282.

⁴⁴ *Id.* at 1282 (citing *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871)).

courts were free to invalidate decisions made by religious authorities under these circumstances, the courts would be substituting the judgment of the state for that of the religious community with respect to the role and content of ministry.⁴⁵

Because ministerial hiring and firing decisions are inherently religious in nature, then, they cannot be examined by courts without running afoul of this principle.⁴⁶

The notion that the right to private decision-making protected by the ministerial exception is a kind of privacy right may also reflect the exception's relationship to the free exercise right, which protects religious individuals' religiously motivated conduct, as well as their beliefs.⁴⁷ While the constitutional protection for the former has at times been put into question, the constitutional protection for the latter—for religious beliefs themselves—has never been doubted.⁴⁸ While religious employers engage in religiously motivated conduct in hiring and firing ministerial employees, they also engage in religiously motivated reasoning in making those hiring and firing decisions.⁴⁹ For this reason, courts may not even examine protected religious employers' asserted reasons for an employment decision to determine whether they are pretextual.⁵⁰ They must instead simply dismiss the lawsuit if the hiring or firing decision is found to be one involving a ministerial employee, in which the ministerial exception is properly invoked.⁵¹

Alternatively, it is possible to conceive of the entire religious institution as a sort of private domain that is protected from governmental interference. Although this concept may seem extreme, some scholars have suggested that religious institutions should be viewed as possessing the kind of sovereignty possessed by sovereign nations, such that the government presumptively lacks jurisdiction to interfere in their affairs.⁵² Though less akin to the concept of a privacy right to autonomous deliberation,

⁴⁵ *Id.* at 1283–84 (quoting Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119, 144 (2009)).

⁴⁶ See also Hill, *supra* note 17, at 353 (discussing the private nature of religious deliberation).

⁴⁷ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993).

⁴⁸ See, e.g., *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (“[W]hile [laws] cannot interfere with mere religious belief and opinions, they may with practices.”).

⁴⁹ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194–95 (2012).

⁵⁰ *Id.* (“The purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical,’ is the church’s alone.” (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952))).

⁵¹ *Id.* at 173.

⁵² Steven D. Smith, *The Jurisdictional Conception of Church Autonomy*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 19, 21–22 (Chad Flanders et al. eds., 2016). For critiques

this notion of the religious institution as a separate sphere that is presumptively immune from government interference also seems to demarcate a zone of privacy.⁵³ One might analogize to *Griswold v. Connecticut*, in which the Court held that a law prohibiting the use of contraception violated the privacy right of married persons to make childbearing decisions just as it simultaneously and relatedly violated the sanctity of a private space—the marital bedroom.⁵⁴ The bedroom is thus a metaphor for a sovereign and sacred space of procreative decision-making that the state cannot enter.

D. What Kind of Privacy Right?

Having described three sets of cases involving three different kinds of rights claims, it is now possible to identify and characterize the thread that unites them. Each of these rights claims is comprised in part of a claim to be free from governmental interference in private decision-making—a claim that is often considered synonymous with the constitutional privacy right protected by the doctrine of substantive due process.⁵⁵ Indeed, in one sense the above description does suggest a deep affiliation of all of these constitutional rights with the concept of privacy that is most familiar from reproductive rights jurisprudence. At the same time, however, the concept of privacy that unites these three strands of doctrine is not necessarily coextensive with the privacy right as it has been recognized in cases such as *Griswold v. Connecticut*⁵⁶ and *Roe v. Wade*.⁵⁷ Further specification is required to understand the precise nature of this privacy right. This privacy right is referred to in this Article as a “deliberative-privacy” right, in order to distinguish it from the privacy right protected under the Due Process Clause, while still recognizing its relationship to that right.

The concept that underlies the three strands of doctrine described above is that there is a deep-seated constitutional protection against the government invading and commandeering individuals’ minds. The individual’s mind and mental processes are seen as a sort of sovereign space in which the state has no jurisdiction. As discussed further below, this right is treated as a sort of special protection, a “core” liberty, governed by *per se* rules. It appears to be protected because of the effect that government commandeering of individuals’ thought processes have on individual dignity and personhood. In *Planned Parenthood v. Casey*, for example, the plurality explained that “[a]t the heart of liberty is the right to define one’s own concept of existence,

of this view, see Lupu & Tuttle, *supra* note 38, at 1297–99; Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 936 (2013).

⁵³ See Smith, *supra* note 52, at 21, 26.

⁵⁴ 381 U.S. 479, 485–86 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).

⁵⁵ Cf. Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS. L. REV. 715, 739–41 (2010) (noting that in political discourse, the “right to privacy” is basically synonymous with the right to choose abortion).

⁵⁶ 381 U.S. 479; see also *supra* note 52 accompanying text.

⁵⁷ 410 U.S. 113 (1973); see also *supra* note 18 accompanying text.

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 of the State.”⁵⁸ Similarly, in the context of compelled speech, the Court has explained that “[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning”⁵⁹ In strikingly similar terms, Professor Seana Shiffrin has described the harm of compelled speech as comprising “the illicit influence compelled speech may have on the character and autonomous thinking process of the compelled speaker”⁶⁰ In Shiffrin’s view, being forced to mouth a message with which one disagrees may ultimately affect the individual’s own deliberative process and moral reasoning.⁶¹

Unquestionably, too, the rights discussed above are interrelated on a profound level. Religious or spiritual considerations may play a part in the decision whether to terminate a pregnancy after a fetal anomaly diagnosis. Speech that the state seeks to compel may have religious implications for the individual, as it did in *Barnette*—a case that is often understood as being about both religious freedom and free speech⁶²—or in the more recent case of *National Institute of Family and Life Advocates v. Becerra*, in which nonprofit crisis pregnancy centers claimed that their free speech rights were infringed by speech mandates that violated their religious beliefs.⁶³ This interrelationship, too, suggests a sort of deeper, procrustean privacy right that undergirds the constitutional structure of the right against compelled speech, the right against reason-based abortion bans, and the ministerial exception.⁶⁴

A caveat is in order, however. In the area of reproductive decision-making autonomy, the Supreme Court has nonetheless left some room for the state to involve itself in individuals’ private decisions. For example, the Court has repeatedly acknowledged that the state may express a preference for childbirth over abortion.⁶⁵ And courts have almost universally upheld even highly ideological and intrusive informational mandates for women seeking abortions, all in the name of providing informed consent.⁶⁶ Such

⁵⁸ 505 U.S. 833, 851 (1992).

⁵⁹ *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018).

⁶⁰ Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 *Nw. U. L. REV.* 839, 840 (2005).

⁶¹ Shiffrin argues that this effect is achieved partly through the “surreptitious influence on one’s thoughts that rote recitations may exert over time” and partly through the cognitive dissonance that arises from being forced to behave insincerely when one espouses statements with which one does not agree. *Id.* at 859–63.

⁶² See *ZICK*, *supra* note 28, at 130.

⁶³ 138 S. Ct. 2361, 2368–70 (2018).

⁶⁴ As noted above, this list of rights should not be taken as exclusive. One could point to other rights claims, such as the rights of parents to make decisions about the care and custody of their children, that partake of a similar structure. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000).

⁶⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883 (1992).

⁶⁶ *Id.*; see, e.g., *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 424–35

mandates have included ultrasound procedures in which the person performing the ultrasound is required to describe the fetal anatomy and make the fetal cardiac activity visible or audible; and a requirement that women be told they are about to terminate the life of a “whole, separate, unique, living human being.”⁶⁷ In deciding that such information is “relevant” to the woman’s abortion decision, the state is necessarily deciding what sorts of “inputs” should go into her decision.⁶⁸ Yet, courts appear to draw the line, at least, at measures that attempt to direct the “output” of women’s decision-making processes—such as by making certain reasons for terminating a pregnancy illegal.⁶⁹ Thus, “much as [courts] may appear to accept a role for the state in encouraging deliberation, the structure and logic of the decisional privacy right run counter to the notion that the government may actually *control* or *commandeer* the reasoning process.”⁷⁰ In the context of the ministerial exception and compelled speech, the protection may be even greater; the case law generally does not support the notion that the government can force individuals to listen to it before deciding what to say, or to consider particular ideas when making hiring and firing decisions with respect to religious ministers.⁷¹

II. THE NATURE AND IMPLICATIONS OF DELIBERATIVE-PRIVACY CLAIMS

This Part aims to examine more closely the nature and implications of the sort of privacy claims described in Part I. As discussed in Section II.A, one particularly striking feature of all the above claims is that they are treated as categorical rights—rights that are not subject to balancing against any state interests and that, instead, are protected by per se rules of invalidity. Section II.B then considers the implications of taking the underlying deliberative-privacy right seriously and protecting it

(6th Cir. 2019); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 735 (8th Cir. 2008) (en banc). *But see* *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014) (striking down such a requirement).

⁶⁷ *EMW Women’s Surgical Ctr.*, 920 F.3d at 430; *Rounds*, 530 F.3d at 735.

⁶⁸ *See Rounds*, 530 F.3d at 734–36; *see also* CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA 110–20 (2017).

⁶⁹ *See Hill*, *supra* note 17, at 351–52.

⁷⁰ *Id.* at 352. Indeed, at least one court has struck down an ultrasound mandate in the abortion context because it not only required that the ultrasound technician provide certain information, but also because it did not permit the woman to decline the information—at least not without going to great lengths to physically block out the information by covering her ears and eyes. *Stuart*, 774 F.3d at 242. This suggests that the Fourth Circuit court would draw the line at forcing women to *consider* certain information, though the state may require that women be *offered* that information. A recent case from the Sixth Circuit, however, rejects this distinction. *See EMW Women’s Surgical Ctr.*, 920 F.3d at 436.

⁷¹ *See, e.g.*, *Grussgott v. Milwaukee Jewish Day Sch.*, 882 F.3d 655, 657 (7th Cir. 2018); *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 887 (Wis. 2012); *see also* Sanger, *supra* note 18, at 387–91.

explicitly. I suggest that the deliberative-privacy right, once recognized, has a tendency to expand, which could ultimately result in undesirable consequences.

A. Deliberative Privacy as a Categorical Right

Categorical rights are uncommon beasts in U.S. constitutional law. Most constitutional rights are subject to various forms of balancing against state interests, in which the state's reasons for passing a law and the degree to which the law advances those interests are weighed against the burden on the individual's right. The nature of the balancing—whether it takes the form of strict scrutiny, intermediate scrutiny, rational basis scrutiny, or something else—depends on the particular right claimed to be infringed and its position within the constitutional hierarchy.⁷² Thus, a claim that the government is penalizing private speech based upon its content generally invokes strict scrutiny,⁷³ whereas a simple time, place, or manner restriction on speech would invoke only a form of intermediate scrutiny.⁷⁴ This distinction reflects the notion that the interests to be served by the Free Speech Clause are more directly burdened by a content-based restriction than by most content-neutral, time-place-manner restrictions, and therefore that content-based restrictions are more threatening to constitutional norms than content-neutral ones.⁷⁵ But the deliberative-privacy right is protected by a *per se* rule. As such, even the strongest, most compelling government interests cannot justify or validate the government intruding into and commandeering the individual's deliberative mental process. Courts have already recognized the categorical nature of this deliberative-privacy right, albeit without always making that nature explicit. For example, while the Supreme Court has not expressly called the ministerial exception a categorical right or protection, it used categorical terms in describing the doctrine. In particular, the Court explained, "The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit."⁷⁶ The Court did not mention or apply any level of scrutiny or describe any conditions under which the church's interest in choosing its ministers might be outweighed by the state's interests.⁷⁷ In fact, given that the ministerial exception provides an exception to antidiscrimination laws, it seems self-evident that interests

⁷² See Blocher, *supra* note 14, at 3.

⁷³ See, e.g., *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

⁷⁴ See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁷⁵ Cf. Blocher, *supra* note 14, at 37 (arguing that "bans" are laws, "subject to *per se* invalidity," that are judged to significantly impair the interests at the heart of a particular constitutional provision).

⁷⁶ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (Thomas, J., concurring).

⁷⁷ See *id.* at 176–96.

normally considered compelling, such as eradicating race discrimination, could not trump the privilege.⁷⁸ Indeed, scholars have observed that the Court avoided applying any particular mode of scrutiny in *Hosanna-Tabor*, inferring that the rule is therefore categorical.⁷⁹

The categorical depiction of the ministerial exception evokes a long-standing though by no means uncontroversial understanding of the rule as one that is quasi-judicial in nature—meaning that the state has no authority to intervene in the internal decision-making of a religious institution, and therefore balancing state interests against private interests would be altogether inappropriate.⁸⁰ Although the Supreme Court in *Hosanna-Tabor* declined to embrace this specific view, commentators have nonetheless argued that “the rule is . . . best understood as a ‘jurisdictional’ doctrine” in that it constrains that power of the state to regulate at all in a particular realm, and it constitutes a threshold question limiting the ability of courts to examine the facts behind a ministerial employment decision.⁸¹ Indeed, *Hosanna-Tabor* made clear that

⁷⁸ See, e.g., *Petruska v. Gannon Univ.*, 462 F.3d 294, 307–08 (3d Cir. 2006) (dismissing a minister’s claim of sex discrimination under Title VII based on the ministerial exception).

⁷⁹ B. Jessie Hill, *Kingdom Without End? The Inevitable Expansion of Religious Sovereignty Claims*, 20 LEWIS & CLARK L. REV. 1177, 1198 (2017); Ira C. Lupu & Robert W. Tuttle, *#MeToo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment’s Religion Clauses*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 249, 301–02 n.435 (2019) (“*Hosanna-Tabor* relies considerably on the Establishment Clause as a bar to judicial decision of ecclesiastical questions. Accordingly and wisely, the Court avoids ‘strict scrutiny’ or any other method of interest balancing in such cases.”); Lupu & Tuttle, *supra* note 38, at 1301 (“The bar on state decisions of ecclesiastical questions has never included interest balancing in any context, ministerial exception or otherwise.”). Notably, the Supreme Court has also used categorical language when describing the constitutional protection for religious belief (as opposed to religiously motivated conduct). In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court stated that a law specifically targeting religious beliefs “is never permissible.” 508 U.S. 520, 533 (1993) (emphasis added).

⁸⁰ See Lupu & Tuttle, *supra* note 38, at 1291 (“*Hosanna-Tabor* extended a very longstanding recognition that the Constitution precludes judicial determination of ecclesiastical questions.”).

⁸¹ *Hosanna-Tabor*, 565 U.S. at 195 n.4 (“We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.”). *But see* Richard W. Garnett & John M. Robinson, *Hosanna-Tabor, Religious Freedom, and the Constitutional Structure*, 2012 CATO SUP. CT. REV. 307, 327 (arguing the ministerial exception is best understood as a jurisdictional doctrine). In this way, the ministerial exception defense is unlike other exemption claims, such as those raised by religious companies or individuals who do not wish to comply with certain antidiscrimination laws. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018) (considering the claim of a religious baker to be exempted from a public accommodations law requiring him to create wedding cakes for same-sex couples); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (upholding the right of a closely held corporation to deny contraceptive coverage to its employees on religious grounds, despite the requirement of the Affordable Care Act). In those cases, the claimants simply seek exemption from the antidiscrimination law on religious grounds and do not claim that the government is powerless to examine their reasons for not wishing to provide

the reasons behind an employment decision may not be challenged, even as being pretextual—thus affirming that once the exception is found to apply, courts have no power to inquire further.⁸²

To be fair, this categorical understanding of the ministerial exception has not been universal. Some courts have instead suggested that strict scrutiny applies to ministerial exception claims and have indeed even found in favor of the individual challenging application of the exception under that balancing test. For example, in *Bollard v. California Province of the Society of Jesus*, the U.S. Court of Appeals for the Ninth Circuit held that the application of antidiscrimination law to a claim by a Roman Catholic novice that he was sexually harassed by his superiors, resulting in constructive discharge must satisfy strict scrutiny.⁸³ However, even that case acknowledged that “[s]ome religious interests under the Free Exercise Clause are so strong that no compelling state interest justifies government intrusion into the ecclesiastical sphere.”⁸⁴ In fact, *Bollard* may best be read as concluding simply that the sexual harassment claim at issue did not fall within the scope of the categorical ministerial exception, and for that reason it was subject to balancing.⁸⁵ By contrast, if the case had involved the religious institution’s “choice of representative,” the court stated that it “would simply defer [to that choice] without further inquiry.”⁸⁶

Similarly, though less obviously, the Supreme Court has generally given certain types of compelled-speech claims categorical treatment. When the compelled speech is political or ideological in nature, the Court has simply assumed unconstitutionality without applying any sort of balancing test. Thus, in *Janus*, the Court hypothesized:

Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this.⁸⁷

a particular good or service. I have argued elsewhere, however, that these “true” exemption claims are starting to converge with ministerial exception claims, especially given courts’ hesitation to examine religious individuals’ assertions about their beliefs and what their beliefs require. See Hill, *supra* note 79, at 1192.

⁸² *Hosanna-Tabor*, 565 U.S. at 194–95.

⁸³ 196 F.3d 940, 946–48 (9th Cir. 1999).

⁸⁴ *Id.* at 946.

⁸⁵ *Id.* at 947–48.

⁸⁶ *Id.* at 947. At least one prominent scholar of law and religion has also argued that strict scrutiny is the appropriate framework for all sorts of autonomy claims asserted by religious institutions. See Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 579–80 (2015).

⁸⁷ *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463–64 (2018).

The Court's confident assertion was not accompanied by the application of any balancing test or the mention of any state interests.⁸⁸ In making this categorical assertion, the Court might have been recalling the famous "fixed star" language from *Barnette*, explaining that the state may not prescribe any orthodoxy, which the Court had quickly followed up with the observation that "[i]f there are any circumstances which permit an exception, they do not now occur to us."⁸⁹ In other words, there are no state interests that might outweigh the interest in avoiding state-compelled ideological speech.

Nonetheless, as is true of the ministerial exception, the Court has not always made it entirely clear that compelled ideological speech is barred by a per se rule. While suggesting that its rule was categorical (i.e., not subject to balancing), the *Barnette* Court also stated in passing that "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence"—thus suggesting that some state interest might exist to justify a compelled flag salute.⁹⁰ In *Wooley v. Maynard*, too, the Court appeared to apply strict scrutiny, examining the asserted justifications for the New Hampshire law requiring drivers to carry a state-sponsored message on their license plates.⁹¹ The Court first noted that the state's interest in having an identifiable license plate did not explain the need for the particular message required by the state; it was therefore insufficiently tailored to the state motto requirement.⁹² Indeed, this argument seemed not to answer the plaintiff's compelled-speech claim at all.⁹³ With respect to the need for drivers to display a specific, ideologically charged message, however, the Court's language became more categorical: "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."⁹⁴ Thus, an interest in compelling speech by private individuals that is ideological in nature must be rejected out of hand and individuals must remain free to reject state-sponsored ideological messages.⁹⁵ Likewise, in *Janus* the Court did ultimately apply a balancing test—an "exacting scrutiny" standard slightly less demanding than strict

⁸⁸ *See id.*

⁸⁹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁹⁰ *Id.* at 633.

⁹¹ *Wooley v. Maynard*, 430 U.S. 705, 716 (1977).

⁹² *Id.* at 716–17 ("Even were we to credit the State's reasons and 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.'" (footnotes omitted)).

⁹³ *See id.* at 715–17.

⁹⁴ *Id.* at 717.

⁹⁵ *See* Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 977–80 (2009).

scrutiny—but made it clear that this standard applies in the context of compelled monetary *subsidies* for speech in the employment context, which are similar to, but somewhat less troubling than, compelled speech itself.⁹⁶

Finally, in the cases decided to date dealing with the constitutionality of reason-based abortion bans, the courts have, in fact, been explicit in applying a *per se* rule. For example, in the Indiana case, the Seventh Circuit Court of Appeals stated that the woman’s “right to terminate her pregnancy prior to viability is categorical: ‘a State *may not prohibit* any woman from making the ultimate decision to terminate her pregnancy *before viability*.’”⁹⁷ Putting an even finer point on it, the Ohio district court in *Preterm-Cleveland v. Himes* stated, “*The interest protected by the Due Process Clause is a woman’s right to choose to terminate her pregnancy pre-viability, and that right is categorical.* The State cannot dictate what factors a woman is permitted to consider in making her choice.”⁹⁸ Because of this categorical conception, states’ attempts to cast reason-based abortion bans as antidiscrimination measures, serving vital state interests in prohibiting discrimination against “unborn” individuals based on characteristics such as race, sex, or disability, have thus far universally failed.⁹⁹

Again, some have doubted this categorical characterization. In dissenting from the denial of en banc rehearing in the Indiana case, Judge Easterbrook acknowledged that no exceptions to the categorical rule against pre-viability abortion bans had thus far been recognized.¹⁰⁰ Yet, he argued, “Judges often said that employers could fire workers for any or no reason. That’s the doctrine of employment at will. But by the late twentieth century courts regularly created exceptions when the discharge was based on race, sex, or disability.”¹⁰¹ Thus, in Judge Easterbrook’s view, since the Supreme Court has never decided a case just like the one before the Court involving a reason-based ban, one cannot assume *Casey*’s categorical language applies.¹⁰²

Judge Easterbrook’s argument is an intriguing one, and it is one that may bring the entire notion of a deliberative-privacy right into question. After all, the law often regulates the reasons for which individuals may or may not take particular actions.

⁹⁶ *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464–65 (2018); *cf.* Shiffrin, *supra* note 60, at 860 (describing the harms of compelled speech).

⁹⁷ *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 888 F.3d 300, 305 (7th Cir. 2018) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992)).

⁹⁸ 294 F. Supp. 3d 746, 755 (S.D. Ohio 2018) (citing *Casey*, 505 U.S. at 879) (emphasis added).

⁹⁹ *See supra* Section I.A.

¹⁰⁰ *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting).

¹⁰¹ *Id.* The State of Indiana had not asked the Seventh Circuit to rehear its appeal of the decision striking down the ban on abortions for reasons of fetal anomaly—only a different provision of the abortion law regulating the disposition of fetal tissue. Thus, Judge Easterbrook technically did not dissent from the denial of rehearing en banc with respect to the reason-based ban.

¹⁰² *Id.*

As he points out, the employment context is one area where the law picks and chooses among acceptable and unacceptable reasons for an action.¹⁰³ Why would it be forbidden to do so with respect to reasons for choosing abortion? The answer must be that the abortion decision is protected by the Constitution, so the deliberative process that leads up to it must also be protected.¹⁰⁴ Similarly, the right of religious institutions to choose their ministers is constitutionally protected; thus, the right to hire or fire for any reason (notwithstanding the antidiscrimination laws highlighted by Judge Easterbrook) must also be protected.

The right of secular employers to hire and fire employees, by contrast, is simply a common-law right, not derived from any constitutional authority.¹⁰⁵ It can be altered at will by statutory or judicial fiat.¹⁰⁶ Similarly, hate crime laws can regulate the reasons for which individuals commit violent acts.¹⁰⁷ The Supreme Court has upheld such regulations against constitutional challenge, rejecting the notion that they “punish bigoted thought.”¹⁰⁸ Like the ability to fire employees at will, the ability to engage in racially motivated violence is not protected by any constitutional right.

Perhaps, then, the deliberative-privacy right can best be understood as an aspect of various already-recognized constitutional rights. Rather than a free-standing constitutional right, the deliberative-privacy right may best be understood as the root or core of several different rights. In each case—whether one considers the right to speak, the right to make childbearing decisions, or the right of religious organizations to choose their leaders—it is the private deliberative process leading to the protected decision that lies at the very center of the right, so fundamental that it must be protected by a *per se* rule against government interference.¹⁰⁹ But it is also meaningful only in the context of a right or decision that is *already* protected by a constitutional entitlement.¹¹⁰

¹⁰³ *Id.*

¹⁰⁴ Professor Carol Sanger has made the same argument with respect to abortion and mandatory ultrasound laws. Sanger, *supra* note 18, at 387.

¹⁰⁵ In Hohfeldian terms, the ability of employers to fire employees at will is more of a “privilege” than a “right,” i.e., an absence of a duty to abstain from the action. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32–33 (1914).

¹⁰⁶ See *Planned Parenthood of Ind. & Ky., Inc.*, 917 F.3d at 536 (Easterbrook, J., dissenting); *U.S. Steel Corp. v. Nichols*, 229 F.2d 396, 399 (6th Cir. 1956) (finding the common-law rights of an employer to hire and fire employees at will exists except to the extent it may be modified by legislation or contract).

¹⁰⁷ See, e.g., 18 U.S.C. § 249 (2012) (making it a federal crime to willfully cause or attempt to cause “bodily injury to any person *because of* the actual or perceived race, color, religion, or national origin of any person” (emphasis added)).

¹⁰⁸ *Wisconsin v. Mitchell*, 508 U.S. 476, 484, 490 (1993).

¹⁰⁹ Cf. Sanger, *supra* note 18, at 387–89 (arguing that not only the abortion decision but also the path to reaching that decision is protected, and analogizing to religious belief and to voting).

¹¹⁰ *Id.*

In light of this possibility, one might conceive of the categorical nature of the deliberative-privacy right in a slightly different way than I have outlined above. It might be a more correct understanding of the deliberative-privacy right to say that it is not actually categorical or protected by a *per se* rule. After all, if the deliberative-privacy right is not subject to balancing or provisos, it is something of an aberration in constitutional doctrine. A more sensible approach might be to say that each of the tests normally applied in each area of the law described in this Article—free exercise of religion, free speech, and abortion rights—inevitably leads to the same result that a *per se* rule would yield. Because the right to deliberate and arrive at one’s personal decisions without government interference is at the core of several constitutional provisions, any law that infringes on deliberative privacy will always strike at the very core of the constitutional provision at issue, constituting a burden so significant that it cannot be outweighed by any government interests. Because it strikes at the core of the constitutional provision, any balancing test will result in the law being found unconstitutional.

Thus, any application of strict scrutiny will find that a requirement on private individuals to carry a state-sponsored ideological message can never serve a sufficiently compelling government interest. As *Wooley* pointed out, such a requirement can only be tailored to a governmental interest in “disseminat[ing] an ideology,” and this government interest will never be weighty enough to counterbalance the individual’s interest in avoiding the dignitary and mental harm that arises from being forced to foster a message with which one disagrees.¹¹¹ When considering whether churches must conform their hiring practices to antidiscrimination laws, one might reason that the government never has a sufficiently compelling interest in deciding who should lead a religious organization—even if the religious organization’s hiring practices (such as the Catholic Church’s prohibition on female priests) might otherwise constitute racial or gender discrimination. Finally, under the undue burden framework, a reason-based ban on abortion will always fail. If the central question that the undue burden framework is meant to answer is whether a law prevents a woman from making the ultimate decision whether or not to carry her (pre-viability) pregnancy to term, then a reason-based abortion ban (like any abortion ban) will always prevent her from making the ultimate decision. Instead, it dictates the outcome of her deliberation. In this sense, then, the *per se* rule protecting the deliberative-privacy right is simply a short cut—a way of avoiding a doctrinal analysis that is likely to be straightforward and reach a result that was apparent from the outset.

B. Expansionist Tendencies

In addition to its strong constitutional protection in the form of a *per se* rule, the deliberative-privacy right possesses a second notable characteristic. It has a tendency

¹¹¹ *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (White, J., dissenting in part).

to expand. The structure of this right is such that litigants have a tremendous incentive to assert it, for the reasons discussed below. And the more litigants assert a given claim, the more likely that some courts may eventually accept it. At the same time, however, there is a risk that this expansionist tendency may ultimately work to undermine the right.

The tendency of deliberative-privacy claims to expand is most visible in the First Amendment context, with respect to both free speech and religious freedom. For example, several scholars have recently observed that First Amendment doctrine seems to be expanding its coverage with respect to what is considered protected free speech, such that claims previously considered meritless or even laughable may now have a decent chance of succeeding.¹¹² Thus, litigants have argued that the prohibition on compelled speech “limits the ability of the Securities and Exchange Commission to mandate financial disclosures, restricts the power of regulatory agencies to compel disclosure of conflicts of interest in the pharmaceutical industry, . . . [and] prohibits the government from requiring employers to inform employees of their legal rights.”¹¹³ Most recently, in 2018, the Supreme Court cast extreme doubt on the ability of governments to require organizations that provide pregnancy-related services to disclose factual information about the availability of free, government-provided healthcare services, opining that one such requirement compelled speech in violation of the First Amendment.¹¹⁴ Although the Court in that case applied strict scrutiny, describing the compelled disclosure as content-based¹¹⁵ but not ideological, the plaintiff organization insisted in its brief that it was being forced to espouse ideas it found morally objectionable¹¹⁶ and urged the explicit adoption of a per se rule “that the government can never mandate or suppress speech based on an ideological disagreement.”¹¹⁷

Similarly, the ministerial exception seems to have exerted a magnetic force on litigants, especially after the Supreme Court officially recognized this immunity in *Hosanna-Tabor*.¹¹⁸ In some cases, litigants have attempted (unsuccessfully) to assert

¹¹² Kendrick, *supra* note 25, at 1200; Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1629, 1633–34 (2015); *see also* ZICK, *supra* note 28, at 10, 35.

¹¹³ Schauer, *supra* note 112, at 1614–15 (footnotes omitted).

¹¹⁴ Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2370 (2018).

¹¹⁵ *Id.* at 2371.

¹¹⁶ Brief for Petitioners at 25, Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (No. 16-1140), 2018 WL 347510, at *25 (arguing that the disclosure requirement “creates duplicity of thought and mental conflict for Petitioners—requiring them ‘to affirm in one breath that which they deny in the next’” and “to foster . . . an idea they find morally objectionable”).

¹¹⁷ *Id.* at 57, 59–60 (arguing that “[a] per se rule has been a long time coming” and that “[t]hrough the level of scrutiny has never been decided, it operates as the functional equivalent of a per se rule”).

¹¹⁸ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (noting that lower courts had previously recognized the ministerial exception, but that the Supreme Court had not had occasion to do so).

the ministerial exception as an affirmative cause of action to challenge government regulation, rather than as a shield or defense against employment discrimination claims.¹¹⁹ And in *General Conference Corporation of Seventh-day Adventists v. McGill*, decided before *Hosanna-Tabor* but after several circuit courts had recognized the ministerial exception, a church attempted to apply the exception to a trademark infringement dispute between a church and its pastor.¹²⁰ Long before *Hosanna-Tabor* and long after it, moreover, litigants sought to apply the ministerial exception to situations well outside the classic scenario of an employment dispute between a religious organization and its minister. In one case, for example, a hospital successfully claimed the exception to avoid an Americans with Disabilities Act Claim by a resident in the hospital's pastoral training program.¹²¹

The reproductive rights context has largely been an exception to this expansionist trend. Few claims have been made for per se rules in the abortion context. As noted above, however, at least one prominent scholar has argued, in apparently categorical terms, for a prohibition on laws regulating the woman's deliberative process in the abortion context.¹²² This argument would suggest that mandatory ultrasound laws and potentially many other state-mandated counseling requirements in the abortion context would be unconstitutional—a conclusion that stands in contrast to existing precedent almost universally upholding such requirements.¹²³

There are likely several reasons for the tendency of deliberative-privacy claims to expand beyond their original doctrinal bounds. Most obviously, a categorical rule is highly advantageous to the party asserting it. Per se rules are clear-cut, thus requiring little judicial discretion and entailing minimal uncertainty for the parties.¹²⁴ Claims governed by per se rules are generally also less expensive to litigate. Since no balancing of state interests against individual interests is required, minimal or no fact discovery is necessary; if a claim is found to fall within the scope of a per se rule, no factual questions remain and the case is generally over very quickly. Perhaps equally importantly, the robust protection for First Amendment claims (both free speech and religious freedom claims) provided by per se rules may be attractive to both judges and litigants from either end of the political spectrum. First Amendment claims, especially those invoking deliberative privacy, sound in individual liberty

¹¹⁹ *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 750 F.3d 184, 203 (2d Cir. 2014); *Bus. Leaders in Christ v. Univ. of Iowa*, 360 F. Supp. 3d 885, 904 (S.D. Iowa 2019).

¹²⁰ 617 F.3d 402, 408 (6th Cir. 2010) (“*McGill* asks us to create an exception to jurisdiction for situations in which ‘there is (1) religious use of (2) intellectual religious property and the application of neutral principles could, in effect, (3) decide a doctrinal dispute and (4) deprive one party the right to the free exercise of its religion.’” (citation omitted)).

¹²¹ *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 224–25 (6th Cir. 2007).

¹²² *Supra* note 104 and accompanying text.

¹²³ *See, e.g., EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 446 (6th Cir. 2019); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 738 (8th Cir. 2008) (en banc). *But cf. Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014).

¹²⁴ *See Blocher, supra* note 14, at 6–7.

and autonomy—values that are important to progressives.¹²⁵ But strong First Amendment protections have also proven useful in striking down a variety of regulations that are disfavored by businesses and by conservatives.¹²⁶

Yet, some unintended consequences may arise from the embrace and expansion of deliberative-privacy protections that demand the application of per se rules. Ultimately, these consequences may undermine the strength of the deliberative-privacy right. In particular, if a right is too powerful and threatens too many desirable government regulations, courts may feel pressure to find ways of cutting back on it. Granting too much power to plaintiffs may undermine important government interests and make courts question the value of the underlying right.

For example, if the ministerial exception were often used to defend blatantly racially discriminatory hiring and firing decisions—against which there is likely broad societal consensus—courts might become less comfortable defending a robust deliberative-privacy right in this context. Similarly, it is arguable that reason-based bans on abortion are designed to exploit concerns about sex, race, and disability discrimination in order to generate support for cutting back on the abortion right. The notion that courts are in some sense sanctioning eugenic abortion decisions, if accepted by them may make courts increasingly uncomfortable with vindicating a per se right to choose abortion before viability for any reason. Indeed, Justice Thomas’s concurrence in the denial of certiorari in *Box*, the Indiana reason-based abortion ban case, reflects precisely this anxiety about the use of abortion to select against a disability and argues that reason-based abortion bans would pass strict scrutiny.¹²⁷

Moreover, given the simplicity and the strength of the per se rule protecting the deliberative-privacy right, it might be anticipated that litigation may occur not over the *application* of the rule but rather over its *applicability*, or scope. The result in a ministerial exception case or a compelled speech may therefore hinge on whether the discharged employee is actually a minister, or whether the particular conduct at issue constitutes “speech” in a constitutional sense. In the abortion context, courts may disagree over whether a law actually bans abortion for a particular reason, as opposed to regulating it.¹²⁸ Indeed, as Professor Joseph Blocher has demonstrated

¹²⁵ See, e.g., Kendrick, *supra* note 25, at 1214 (“If the value underlying ‘the freedom of speech’ is individual autonomy, employers and manufacturers may cast themselves as unwilling speakers whose autonomy rights are being violated.”).

¹²⁶ See Schauer, *supra* note 112, at 1626; Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1457 (2015).

¹²⁷ *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring).

¹²⁸ Cf. *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 888 F.3d 300, 306 (7th Cir. 2018) (“[A]ccording to the State, *Casey* only recognized a privacy right in the binary decision of whether to bear or beget a child, but that right is not extended to the decision to terminate a particular child.”), *reh’g en banc granted, judgment vacated*, 727 F. App’x 208 (7th Cir. 2018), *vacated*, 917 F.3d 532 (7th Cir. 2018), and *opinion reinstated*, 917 F.3d 532 (7th Cir. 2018), and *cert. granted in part, judgment rev’d in part sub nom. Box*, 139 S. Ct. 1780.

with respect to bans—legal regulations that are often subject to per se rules—the category of “ban” usually reflects a decision on the merits of a particular challenge rather than any particular characteristics of the challenged law.¹²⁹ In the end, courts may find a way to limit the scope of the robust protection for deliberative privacy, thus undermining the principle at the core of several constitutional provisions.

CONCLUSION

The goal of this Article has been to reveal a connection among several disparate-seeming rights claims and to show how the thread of deliberative privacy connects all of them. My contention is not that deliberative privacy is itself a freestanding constitutional right, but rather that it is a concept at the core of several other constitutional rights that sound in individual privacy and autonomy. This Article has not made any prescriptive claims about how the right should be understood or whether it should be made stronger or weaker. It does suggest, however, that consistent recognition of the deliberative-privacy right would lead to courts protecting the right through the application of a per se rule against government intervention in the private deliberations leading to a constitutionally protected decision.

¹²⁹ Blocher, *supra* note 14, at 25 (“One need not be a full-fledged legal realist to recognize the possibility that the ban label is a conclusion of invalidity rather than a basis for it.”).