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Law, Religion, and Kissing Your Sister

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INTRODUCTION

Two aspects of the Symposium contained within these pages are especially noteworthy. The first is its high quality. The reader holds in his or her hands an exceptionally strong collection addressing some of the most fundamental issues of church-state relations. One reason for this, perhaps, was the timeliness of the Symposium: coming as it did so soon after the oral arguments in the Supreme Court case of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,¹ its participants were closely focused on some sharp divisions within the field of law and religion, and the resulting papers show it.

The second is the outcome of the Symposium, which I can only characterize as a tie. Two participants—Caroline Mala Corbin and Corey Brettschneider—argue forcefully that religious liberty and church autonomy must sometimes give way to the needs and claims of the state, because certain widely shared state values—in particular, non-discrimination and of equal citizenship—enjoy primacy over the interests of subordinate private institutions such as churches. At the very least, the state can and should refuse to extend any significant accommodations to those groups, declining to accord them the same recognition that other groups, groups that follow a state-centered understanding of those public values, are entitled to receive. Even if the state allows these groups to express views that run contrary to those central state values, it certainly should not *subsidize* those organizations and their viewpoints. Rather, it should “criticize their discriminatory viewpoints and explain why they are inconsistent with a respect for all citizens as free and equal.”² By focusing on subsidies rather than direct regulation, Corbin and Brettschneider purport to leave some room for the autonomy of churches and other non-state entities. In reality, however, both papers subordinate those entities to the state, and are emphatic in allowing the state itself to frame our understanding of terms like “discrimination.”

On the other side, both Rick Garnett and Steve Smith present strong arguments for a broad understanding of church autonomy. Just as important, they argue that the “freedom of the church” is every bit as much a core public value as non-discrimination.³ That means that at times, as in the *Hosanna-Tabor* case, churches must remain free to “discriminate” no matter what some generally applicable law says.

Thus, we have a sharply joined conflict over whether state values or church autonomy are to prevail in important church-state

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disputes, a conflict that is all the more starkly represented here by the presence of a straight 2-2 tie between the contending positions.⁴

The tie made for an exciting conference. Now that the dust has settled, however, one may ask whether it allows us any room to move forward. In my position as a commenter, I do not seek to break the tie myself, although it will become evident that my sympathies lie on one side of the contest. Nor will I focus solely on the immediate paper I am considering, Rick Garnett's thoughtful paper on religious freedom and the many meanings of nondiscrimination.⁵ Instead, it is the tie itself that fascinates me, and what it suggests about the nature of both church-state disputes and law and religion scholarship.

Most legal academics are notoriously normative in their scholarly orientation: keen on pushing legal reforms or pet theories about what constitutes the "right" answer to some question, and less interested in simply trying to understand the law and its social background on a purely descriptive level.⁶ That is especially true of constitutional law professors,⁷ including those working in the field of law and religion. There is little professional reward, and rarely much internal motivation, for a law and religion scholar to content himself with simply describing church-state law as it is, or with exploring why this area is so prone to eternally recurring clashes of incommensurable values, leading to contests that are apparently incapable of any final resolution.⁸ Again and again, someone will insist that some value or approach—equality, liberty, "equal liberty,"⁹ public reason, originalism, and so on—holds the key to a better, and perhaps even a final, legal resolution of church-state conflict. For the most part, law and religion scholars are a gaggle of Gatsbys.¹⁰

That sentiment is not universally held, however. A few scholars of law and religion, including myself, have been interested in seeing the cup as half-empty, not half-full.¹¹ We have focused on the ways in which the nature of the individual and institutional conflicts involved in law and religion, and the incommensurable values at play, present us with ineluctable "tragic choices"—how they leave us time and again with "moral remainders," the leftovers that result from a decision that does not perfectly resolve a moral conflict.¹² We have emphasized the tragic, the sense of what can never be achieved, over the comic, the hope that thinking hard about law and religion can lead us to some kind of happy ending that more or less satisfies everyone.¹³ Not for us the

“green light, the orgiastic future.”¹⁴

In thinking about the role of ties or impasses in the scholarship and jurisprudence of law and religion—about their inevitability and *why* they are inevitable, about the moral remainders left in their wake, and about whether we can do anything to minimize those remainders or at least salve our wounds—we might look to another lawlike field in which ties used to be common. Once upon a time, many sporting contests ended in ties. That appears to be the case no longer. Most sports have instituted some form of tiebreaker, from overtime or sudden-death play, to rematches, to random decisions such as a coin toss.¹⁵

There are a number of possible reasons why ties have come to be disfavored in sports.¹⁶ Probably the most convincing have to do with baser motives: as championship play becomes more lucrative in sports, ties just won’t do. Others have suggested a more ethically and sociologically interesting justification, although perhaps one that isn’t so different in the end: as sports have ceased being “gentlemen’s” games, the tie has correspondingly fallen out of favor. Whatever the reason, it is evident that tie games in sports are disliked by many. A college football coach once famously likened such ties to “kissing your sister.”¹⁷

Although complementary in an instructive way,¹⁸ there are, of course, important differences between law and sports.¹⁹ Among other things, all but the most rabid sports fan (although there are surprisingly many of those, at least in places like South Bend and Tuscaloosa) would agree that the resolution of a real-life dispute over matters like the relationship between church and state is far more important than who wins a football game. Still, the comparison may refresh our thoughts on this matter. It may help us to think not about who ought to have won the tie-game that resulted from the *Matters of Faith* conference, but about the meaning of the tie itself.

The remainder of this commentary proceeds as follows. I begin by discussing why the papers in this book can aptly be called a tie. I then discuss standard ways of resolving those ties in legal scholarship and jurisprudence involving church-state relations, and why those attempts fail. I close with some reflections on how we might view law and religion as an eternal tie game, and what—if anything—we can or ought to do about it.

I. “MATTERS OF FAITH” AS A TIE GAME

The basic issue canvassed in this collection is basic enough: how

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and when must law accommodate religion, if it must do so at all? When should the general laws and policies of a state give way to the needs of religious individuals and groups, and when must the latter give way to the state? Stated so broadly, this is simply the basic issue of church-state relations in a nutshell. The speakers in this symposium chose to focus on two illustrative issues, one dealing with a question of positive constitutional law and the other dealing with an issue that might be characterized as one of state policy.

The first issue involves the case of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.²⁰ The question here, in brief, is whether a church is subject to the civil rights laws in its hiring or firing of so-called “ministerial” employees, or is entitled to an exemption from those laws by virtue of the Free Exercise and/or Establishment Clauses of the First Amendment. Answering that question raises a subsidiary question: how to determine whether a church employee *is* a “ministerial” employee.

Hosanna-Tabor involved Cheryl Perich, a teacher at a church-run primary school in Redford, Michigan.²¹ As the suit arose, Perich was a “called teacher”: one chosen by the congregation because it believes the teacher has been called by God. To achieve that status, Perich had become a commissioned minister in the church, which involved receiving instruction in theological and other church-related wisdom. Although she was a called teacher and a commissioned minister, Perich’s job on its face was identical to the work she had performed as a teacher at the school as a “lay” teacher prior to her call. Most of her day consisted of teaching secular subjects. She was, however, expected to integrate religious instruction into her classes; and both lay and called teachers led prayers, taught religion classes a few times a week, and occasionally led services and delivered homilies.

In 2004, Perich developed narcolepsy and went on disability leave. When she sought to return to her duties, the school balked, wondering whether she would be able to care for her students and how best to reintegrate her into her classes and deal with the substitute teacher who had been working with the students all year. Perich persisted in wanting to return to work, and ultimately warned that she would sue under the federal civil rights laws if she were not allowed back. That was the final straw for the congregation, which rescinded her call, telling her by letter that her threat to sue had “damaged” her relationship with them “beyond repair.”²² Perich filed suit, alleging both that she had

been discriminated against on the basis of a physical disability and that the church had unlawfully retaliated against her for asserting her legal rights.

If Perich had been an auto mechanic, the case would likely have been an easy victory for her. The fact that she was alleged to be a ministerial employee in a church changed matters, however. Under what is called the “ministerial exception,” the courts have held that “churches are generally immune from employment-related claims brought by their ministers (and others with highly religious duties).”²³ Although the courts have struggled to find a proper home for this doctrine within one or the other of the Religion Clauses, the basic justification for the exception is simple enough: religious liberty demands that churches have the “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”²⁴ Courts in such cases will end up having to examine whether an employment decision was legitimate or a pretext for illegal discrimination; but doing so will violate the basic principle of state non-interference in matters of church governance. Thus, these suits must be dismissed.

I think it is fair to say that, of the participants in this symposium, Garnett and Smith are strong supporters of the ministerial exception;²⁵ Corbin and (probably) Brettschneider are strong opponents.²⁶ That needn’t mean the tie is a true deadlock; perhaps one side of the argument is uncontroversially wrong. But it *is* a deadlock.

The reason it is distinguishes it from a sporting contest. A game is tied when two competitors, playing the same game by the same rules, have amassed the same number of points. *Hosanna-Tabor*, by contrast, is a true tie because the competing sides are not playing the same game, and cannot even agree on what constitute “points” in their favor. The fundamental position of the opponents of the ministerial exception is that the church in such circumstances is engaged in “discrimination” plain and simple; that discrimination is wrong; and that churches no less than other employers are obliged, both as a matter of First Amendment law and of general rule-of-law principles, to obey the law.²⁷ The exception’s champions, on the other hand, believe that a purely secular definition of “discrimination” is inapplicable here, and that judicial non-interference in matters of religious governance and internal church relationships is a fundamental tenet of the American constitutional church-state settlement.²⁸

Put at its most basic, we might say that the competing positions

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pit equality against liberty. (Each side might deny that it is neglecting one value in favor of the other. But both sides, if put to the test, would probably give priority to one or the other value.) That gives us a fairly accurate flavor of the unbridgeable nature of the conflict. But even that statement is too optimistic; the two sides probably cannot agree on how to define either “liberty” or “equality,” or even “the rule of law.”

We could say something similar about the other fundamental conflict that arises in the symposium papers. It is less about what the Constitution requires or forbids with respect to church-state relations, and more about what the state *ought* to do in this area, assuming that the Constitution permits it. In a well-known case decided some 30 years ago, *Bob Jones University v. United States*,²⁹ the Supreme Court upheld the IRS’s revocation of tax-exempt status for two religious schools that engaged in religiously motivated racially discriminatory behavior. The Court did not say the IRS was constitutionally *required* to do so. Rather, it said that the revocation decision was consistent with the strong public policy interest in ending racial discrimination, and not barred by the schools’ claim that they were engaging in religiously protected behavior, because a denial of tax benefits, unlike a direct restriction on the churches’ conduct, did not significantly burden the churches’ free exercise of religion. Especially given the context, which involved the American original sin of racism, few critics call for *Bob Jones*’s outright reversal.³⁰ In a famous article, however, Robert Cover argued that we should not be blind to *Bob Jones*’s effect on what he calls *nomie* communities. In other words, we should be aware of the tragic dimensions of the decision for the groups it affects, and the moral remainder it leaves behind for all of us.³¹

Both Corbin and Brettschneider, whose papers represent “the state” (or one vision of the state, at least) in this conference, argue that far from wringing our hands about *Bob Jones*, we ought to extend its reach. Corbin argues that the policy upheld in *Bob Jones* should be applied to religious organizations that discriminate invidiously on the basis of *gender* as well as race. She argues further that it ought to apply not just to the case of tax-exempt status, but to *any* eligibility for government subsidies of any kind, including the kinds of subsidies for which religious associations compete on equal ground with other groups, such as grants to participate in government social-services programs and vouchers for religious schools. Here is the basic statement of her

proposal: “if an organization, whether secular or religious, has an explicit policy of discriminating against women, then it should be ineligible for any kind of government funding.”³²

Corbin’s proposal is somewhat limited in scope. It would not apply to religious organizations that merely teach that women have some kind of religiously “inferior” status. But it is still broad. It would, for instance, apply to any religious organization that does not grant full and equal status to women in leadership positions, and thus cover institutions like the Roman Catholic Church and many Jewish synagogues. It is irrelevant to her that those institutions believe that denying women the right to act as priests or rabbis is religiously required, or that they do not view it as invidious discrimination: “religiously mandated invidious discrimination is still invidious discrimination.”³³

Brettschneider takes a similar position, one grounded on his advocacy of a thick substantive view of the duties of democratic states. His project is a Goldilocks’-porridge effort to steer between two unacceptable visions of the state: one that champions a “neutral” state, and one that believes that “free speech rights should not extend to viewpoints that are hostile to the values of a liberal society.”³⁴ The state should not use its “coercive power” to prohibit discriminatory speech; but it *should* use its “expressive power,” or what he calls “democratic persuasion,” to publicly criticize groups that “advance discriminatory viewpoints.”³⁵ This is not as unobtrusive an approach as it may sound at first. Brettschneider takes a broad view of what it means for the state to engage in democratic “persuasion”: “[T]he legitimate state’s criticism of discriminatory viewpoints should not be limited to reason-giving, but should extend to the refusal to officially fund these groups. In some cases, the tax-exempt and tax-deductible privileges of publicly recognized non-profit status should be revoked.”³⁶

The state’s “persuasive” writ does not run as far as it would under Corbin’s proposal: Brettschneider argues, for instance, that “the ban on female priests is not the same as refusing to allow women equal status in society at large,” and thus that the Catholic Church ought not have its tax-exempt status revoked for this reason.³⁷ In other circumstances, however, his proposal might go further than Corbin’s by including penalties for discriminatory speech. For example, if the Church “were to engage in policies that seek to dissuade gays and women from serving in public life, the case would become stronger for discontinuing its state funded tax privileges. . . . [T]he more the Church engages in public debate

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opposing gay rights, the argument on behalf of their retaining tax privileges would be weaker.”³⁸ So the state could, in appropriate circumstances, penalize a religious group for engaging in mere *speech* advocating discrimination, if that speech reached outside the four walls of the church.

In contrast, Smith and Garnett’s position³⁹ is best characterized not as representing the “church” side of the church-state debate, but as representing the “non-state” side of the state/non-state debate.⁴⁰ Thus, Smith argues that the whole architecture of the religious freedom debate today may be missing something: that its focus on “religion” per se represents a kind of move away from the original nature of the church-state settlement, and that this move has left courts, and the rest of us, in a state of confusion. Instead of focusing on freedom of *religion*, we ought to focus on “freedom of the *church*”—on the idea of the church as an institution that exists separate and apart from the state, as a kind of quasi-sovereign. And Garnett argues that the kinds of norms and values regularly applied to a host of institutions and actors by the state, norms like non-discrimination, do not map easily onto the separate realm represented by the church. The law has no business enforcing its values in that distinct and independent realm.

For Smith and Garnett, the resolution of the *Hosanna-Tabor* case is easy: the case involves a matter of internal church governance, and thus falls outside the jurisdiction of the state, or the courts.⁴¹ The question of what to do about state funding and benefits, in cases like *Bob Jones* or elsewhere, is less easily answered. But this approach suggests that any thumb placed on the scales is more likely to favor the church than the state. For one thing, the caution against applying state norms like “nondiscrimination” in the radically different context of the church would still apply—although with less force, because the state would have greater justification in letting its own norms follow its own money. For another, to the extent that the state would be unqualified to call what churches do “discrimination,” it would have less justification for denying churches funding in cases where that funding is available to other groups.⁴²

Where does that leave us? More or less in a deadlock. That’s plainly so in a constitutional case like *Hosanna-Tabor*: one side of the debate believes the ministerial exception is required, the other (at least as represented by Professor Corbin in other work) believes it is forbidden. Even in matters of *policy*, like those discussed here by Professors Corbin and Brettschneider, which

involve a much wider range of conduct that is neither forbidden nor mandatory, we essentially have a tie as well. The point is nicely put by David Runciman. “Essentially, the choices are two: either it must be held that the life of the law determines the life of the state in general,” in which case “it will be to the activities of the state’s legal representatives that we look in order to discover the truth about the state itself,” or “it must be held that the life of the state in general”—including non-governmental institutions like the church—“determines the life of the law.”⁴³ For Corbin and Brettschneider, “the whole life of the state [is] determined by law”; for Garnett and Smith, “law [is] to be determined by the life of the state, taken as a whole.”⁴⁴ In the former case, matters like the treatment of “discriminatory” conduct by churches and other non-state organs fall within the cognizance of the state, although softened by legal side-constraints such as free speech. In the latter, the state’s policies must conform to the rights and structural role of churches and other non-state organs at least as much as those organs must conform to the state’s vision of justice. We are at an impasse.⁴⁵ The game apparently ends in a tie.

II. (UNAVAILING) TIE-BREAKING STRATEGIES IN LAW AND RELIGION

As I observed earlier, however, however, people don’t like ties. In law as everywhere else in life (except for modern American children’s sports leagues, apparently), we can’t all be winners. In the words of an important cultural document, “There can be only one.”⁴⁶ Legal deadlocks are not settled by coin tosses or sudden-death overtime. So what is to be done? In law and religion, and elsewhere in constitutional law, there are several standard strategies by which the scholarly combatants, at least, attempt to award the extra point to one side. None of them really succeed.⁴⁷

Methodological Supremacism. Probably the most familiar approach in constitutional law as a whole is to assert the primacy of some particular method of interpreting the Constitution or one of its provisions. This is the tediously standard ground of debates over originalism versus living constitutionalism, and the like.⁴⁸ This is the easiest approach to dispense with, both in general and in this symposium in particular. Aside from a relatively small number of academics who are convinced not only that their interpretive method is right but—another thing entirely—that the others are wrong, most of us believe that a number of interpretive

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methods have reasonably strong provenances and justifications. Some of this view is probably a product of scholarly modesty, or perhaps laziness; maybe if we worked a little harder, we could single out the correct interpretive method. But that seems doubtful. To determine which method is the correct one itself requires a metric for that decision, and that brings us back to the very clash of values that produces ties in the first place. In any event, we need say no more about it here, for neither Garnett nor any of the other writers in this collection are fighting on the ground of methodology.

Loaded Monism. In law and religion scholarship, probably the most common way to attempt to break the deadlock is to assert that some value is *the* lodestar by which church-state disputes must be steered. The key for Religion Clause interpretation is liberty. Wait, it's equality. Or, no, it's "equal liberty."⁴⁹ Or formal neutrality.⁵⁰ Or, better yet, substantive neutrality.⁵¹ Or it's religion itself.⁵² Or, actually, it's secularism.⁵³ And so on.

These kinds of lines of debate are productive—and a mug's game. We can learn a great deal about the theory and practice of church-state relations by exploring these values and their limits. But theories of this sort do precisely what theory is supposed to do: they offer sweeping explanatory clarity but sacrifice accuracy on the ground. Downhill from Olympus, at least, no one theory can capture everything that is going on. The more it seems to, the more likely it is that the "value" itself turns out to contain multitudes—to be capacious and malleable enough to incorporate *sub rosa* one or more competing values.⁵⁴ At that point, the theory itself more or less collapses back into mere description.

Professor Garnett's paper also makes this point. One of the most popular bases for opposition to the ministerial exception is the value of equality.⁵⁵ Similarly, the arguments in favor of denying tax-exempt status and other benefits to discriminatory organizations, including churches, are grounded on thicker (in Brettschneider's case) or thinner (in Corbin's case) conceptions of equality. As Garnett notes, however, discrimination, like equality, is a slippery term. It requires the similar treatment of similarly situated individuals. But when and whether individuals are similarly situated is a contested question, even if we accept the state's presumptively secular setting of the terms.⁵⁶ Are men and women similarly situated with respect to their qualification to serve as priests? The question hardly answers itself. It depends on the contested question of what constitute proper qualifications

for the priesthood. The matter becomes no clearer if we add the word “invidious” before the word “discrimination,” as Corbin does. “Invidious” is, if anything, a thicker and more contested term. Nor does it resolve the question if we simply insist that the state have the final word on what it means to be similarly situated, or to be treated invidiously. It resolves the tie, to be sure; but it does so by sweeping the board clear of opposing arguments, not by answering them. That is ultimately what value monism does: it asserts itself rather than justify itself.

Weighted Lexical Priority, Visible or Otherwise. Another way of attempting to break the deadlock, albeit one that pays lip service to value pluralism, is to argue that a variety of values are relevant to the resolution of church-state conflicts, but one must ultimately take priority. So one might agree that church-state issues raise questions of both liberty and equality, but insist that equality, for one reason or another, takes priority over liberty. I find it hard to distinguish this position from value monism. Like that approach, its justification of some primary value ultimately wins, if not by fiat, then at least without resolving the question why some other lexical ordering should be rejected.⁵⁷

A similar approach—though it is not always seen that way—is to argue that, as long as judges are forbidden to decide cases by calling it a draw, they must just “muddle through.”⁵⁸ Or, to substitute the more formal language of one of the official referees of our legal game, one may conclude that there is “no test-related substitute for the exercise of legal judgment.”⁵⁹ That may be quite right. But it only settles the tie by arguing that because the game is hard to call, we ought to respect the ref’s judgment. At best, it obscures the fact that “muddling through,” if consistent, will still end up as a form of weighted lexical priority, which in turn is not much different or more successful than value monism.⁶⁰ At worst, muddling through will produce just that: a muddle.

*Force Majeure; Or, “How Many Divisions Does the Pope Have?”*⁶¹ Finally, and probably inevitably, we can resolve deadlocks of the kind that characterize this Symposium by resort to force. Perhaps some would see it differently; they might describe it as a resort to “the sword of sweet reason.”⁶² That is no answer. Popes and policy wonks both employ “reason”; the trick lies in figuring out whose reasons are sweeter. And the fact that a sword-bearing figure is sweetly reasonable cannot disguise the fact that she bears a sword.⁶³

To be clear, my point is not that there is no neutral ground in the debate between “reason” and religiosity that can satisfy both sides

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that the resolution of deadlocks in this area is sound. That gives too little credit to religiosity, which is hardly devoid of reason.⁶⁴ Nor is it to deny the force of “secular” reasons, including those offered by Professors Corbin and Brettschneider. Rather, it is to suggest that neither the general terms on which church and state do battle, nor any specific single value or set of values, are capable of justifying themselves *on terms other than their own* to their opponents’ satisfaction. When deadlocks cannot be resolved by reason, they will perforce be resolved by power.⁶⁵ So it is here.

This may all sound a little gloomy. So be it. The point is simply this. In sports, if one wants to avoid a tie, one need simply introduce a rule designed to break ties. That rule need not, and *cannot*, be justified on any terms other than its own. There is no reason a tie in football needs to be settled by sudden-death overtime rather than a kicking contest, or a foot-race, or even a coin toss. (We use coin tosses at the beginning of the game, after all!) To assert that reason demands a different tie-breaking method is not so much to engage one’s opponent as to argue in favor of playing a different game entirely. Things are not so different in the general contest between church and state itself, or even in the contest between different competing values that might resolve “ties” in that field, such as liberty or equality. The deadlock that readers encounter in this book is a genuine tie. In many respects, it is both an inevitable and an irresolvable one.

III. WHAT IS TO BE DONE?

Let me develop further for a moment the comparison between sports and legal conflicts involving incommensurable values and tragic choices, particularly those involving church-state issues. The kinship between law and sports, or between law and games, has been observed for some time.⁶⁶ So there are plausible reasons to think about tie games in the law by considering how ties are dealt with in sports.

There, as we have seen, the trend is against ties and toward forced resolutions. The reasons for this can be both internal and external to the game. The participants in the game might believe that there is something “un-sporting” about leaving the game at a tie, or that the structure of championship play demands a decisive resolution of individual games—or they might simply be following customer preference, or the demands of advertisers or broadcasters. But, unless one is deeply invested in the game, it

matters little whether the tie is resolved or not. And if one *is* deeply invested in the game, then everyone who wants to continue playing or watching it will have an incentive to abide by whatever tie-breaking mechanism is selected, even if it is fairly arbitrary.

Here is where the similarities between sports and law break down—or so Frank Michelman has argued in an intriguing piece. A “proper” game, Michelman writes, is one that all the participants have agreed to play, and in which “justice” consists simply in playing by a finite and ultimately incontestable set of rules. He continues: “Now, if you ask how playing by the rules comes to be the sole measure of correctness—or call it of justice—in the determinations of the internal rewards of proper games, the obvious, inescapable answer is that the players have *chosen* to play *that* game, the one constituted by those very rules.”⁶⁷ Participants in the game called “baseball” may argue over things like the designated hitter rule, but they do so from within the context of continued voluntary participation. At some point, someone who obstinately insists that designated hitters do not exist is no longer playing “baseball” as presently constituted; he is out of the game.

Adjudication, on the other hand, is a game that is played without everyone’s agreement, according to rules on which there is no consensus. “For such activities,” Michelman writes, “playing by the rules cannot possibly be all there is to justice. By definition, such activities arise within some general regime of coercive social ordering, and the question necessarily remains of the justice of the coercive regime.”⁶⁸ Neither church nor state have the option of exiting the “church-state game,” even when they do not agree either on the same rules or the justification for those rules.

So there is, in the end, a curious mirror-image disjunction between sports and law. Sports can easily afford ties, as long as everyone in the game agrees to have them; and yet, because sport is a game—both in the sense that it is “just” a game, and in the sense that it is a ludic activity in which all the participants appear willingly—it doesn’t *need* to have them. The rulemakers and referees can implement a kickoff rule, or a coin toss for that matter, and that rule does not need to meet a high or independent threshold of justification. It can stand comfortably on its own bottom.

Law, on the other hand, resolves (or tries to resolve) serious disputes between parties who may not be fully voluntary participants in the system of adjudication, and who certainly need not agree on the fundamental rules of the game. As long as the

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point of the activity is to resolve disputes, law cannot afford ties. But because of value pluralism and fundamental disagreement among the (often unwilling) participants over what those values mean and which should have priority, law also cannot offer successful and independent justifications for the tie-breaking rules it adopts.

In short, the church-state tie game represented by the *Matters of Faith* papers is both unavoidable and intolerable.

How, then, should we feel about this, and what if anything is to be done? In my view, the only truly unavailable option is the comic one: the insistence that there *is* a solution to the church-state conflicts illustrated so superbly by this collection, that there *is* a value or metric or approach that can resolve these conflicts well, consensually, and with little or no moral remainder. Church-state scholars—and jurists, however poorly the role suits them⁶⁹—*must* be tragedians.

To be fully aware of the tragedy of the situation, however, is not to say we cannot or should not act. Even Hamlet, the modern model of a tragic doubter, ultimately acted. In law and religion, as elsewhere, the motto of the tragedian is Beckett's: "I can't go on, I'll go on."⁷⁰ Neither paralysis nor abdication is an option. Because law is not just a game, we must go on playing it, whether we agree on the rules or their justifications or not.

We can, of course, choose to play it with a sense of confidence and certitude. We can insist, with Brettschneider and Corbin—or, they would doubtless reply, with Garnett and Smith—on some value or set of values that ought to prevail. If we are to play the game in good faith, however,⁷¹ we must acknowledge that our certitude about some prevailing value—equality, or church autonomy, or thick democracy—cannot overcome the equal certitude of others that some other value, or none at all, is just as plausible a lodestar. We must thus recognize that any victory in such disputes will be won not by sweet reason, but by her sword.

Nor can any single metric or approach do away with the tragic choices forced upon us by church-state conflicts. There will always be a tragic remainder. In a sense, the church-state game is not just one that exists in a seemingly perpetual tie. It is also one that we all always lose, to some extent. We cannot ultimately break the tie, at least other than by force—and even then, not without significant moral remainders.

Perhaps, then, we would do better not to spend our time looking for a way of *eliminating* moral remainders by finding the right

way of breaking the tie. Perhaps we should instead focus on how we might *reduce* the moral remainders, even as we remain aware that any tie-breaking mechanism is bound to be imperfect and impossible to justify to all the players.

For my part, I think that entails at least two complementary approaches.⁷² The first involves thinking about church-state relations *outside* the law game altogether. As important as it is, law is not the only way to enhance or restrain the church—or the state. It is not clearly even the best way. Both church and state are moral, social, cultural, political, and institutional actors. They are subject to a host of influences, motivations, and mechanisms that range well beyond legal coercion or the granting or withholding of public benefits. We might do well to think about the role of *internal* constraints within both church and state, and the role of *external* constraints such as public monitoring and criticism (or praise) of these institutions.⁷³

The other approach is to think less about who *wins*, and more about how we speak to the *loser*. Recall that a salient difference between law and sports, one that is highly relevant to the unbreakable tie between different positions in the church-state relationships and the consequent inevitability of tragic choices, is the fact that we are all more or less unwilling participants in the law game. It is much easier to break a tie, and for the loser to learn to live with her loss, if one is a willing participant.⁷⁴ One of the central problems of church-state conflict is that the tendency of both courts and scholars to adopt the winner's language—often, although not always, the language of the state—also tends to encourage the loser to reject the game, to find it incomprehensible or oppressive, and ultimately to reinforce the illiberal group's rejection of the liberal state.⁷⁵ If we want our pluralist society to include all groups and encourage them to continue participating in the “game,” we need to strive more to adopt the loser's perspective and understand his perspective and language. We need to speak to the losing group in such terms that, even when they lose, they will still remain within the fold rather than being driven further away. This empathetic approach will hardly eliminate the tragic remainders inherent when we break the tie in church-state conflicts; nothing can do that. But it may keep the game going longer and more peaceably.⁷⁶

CONCLUSION

As a commentator, I have given lamentably short shrift to

Professor Garnett's own views.⁷⁷ *Law, Religion, and Kissing Your Sister* If there is any justification for that, it lies in the notion that sometimes it can be more fruitful to examine a game as a whole rather than to play it. In playing their parts so well, both Garnett and Smith and their "opponents" have done the rest of us a great favor. They have led us to wonder what can be done when both sides have played the game to a standstill, or when each has played the game in subtly different ways, with subtly different rules, until we are forced to ask whether they are not just playing two different games.

If church-state conflict, like a tie game in sports, is both inevitable and dissatisfying, if it is like "kissing your sister," perhaps it is even more important to focus on the tragic fault itself. Doing so may even allow us a form of chastened hope. Speaking as the brother to a sister whom I have loved and fought with in equal measure over a lifetime, allow me to suggest that, instead of seeking an end to the church-state struggle, perhaps we can instead find some solace in our familial bonds, even as the struggle continues.

¹ ___ S.Ct. ___, 2012 WL 75047 (Jan. 11, 2012); *see also* 131 S. Ct. 1783 (2011) (granting cert); Transcript of Oral Argument, *Hosanna-Tabor*, 131 S. Ct. 1783 (No. 10533), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-553.pdf.

² Corey Brettschneider, *How Should Liberal Democracies Respond to Faith Based Groups That Advocate Discrimination?: State Funding and Non-Profit Status*, in this volume at ___ [ms. at 4]. *See also* Caroline Mala Corbin, *Expanding the Bob Jones*

Compromise, in this volume at __ [ms. at 1] (“On the one hand, religious institutions have an interest in being able to practice their religion beliefs and shape their religious messages. On the other hand, the state interest in eradicating invidious discrimination should extend at least as far as not condoning or subsidizing it, wherever it may occur.”)

³ Steven D. Smith, *Freedom of Religion or Freedom of the Church?*, in this volume at __; see also Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, in this volume at __.

⁴ The fifth major paper in this collection, Amanda Porterfield’s *How Religion Has Grown to Accommodate American Law*, does not break the tie. Her piece avoids the normative perspective that characterizes the other four papers. Instead, it offers an overview of the history of American church-state relations, drawing on both historical source materials and religious studies scholarship. One may sympathize. She is not even like a referee or mediator between the contending sides; she’s more like a respected historian of sports who wanders accidentally and dangerously onto a soccer pitch in the middle of a hotly played game. In any event, she does not serve as a tiebreaker here.

⁵ See Garnett, *supra* note __.

⁶ See, e.g., Richard A. Posner, *The Economic Approach to Law*, 53 Tex. L. Rev. 757, 768 (1975) (“It is a general, and in my opinion deplorable, characteristic of legal scholarship that normative analysis vastly preponderates over positive. Academic lawyers are in general happier preaching reform of the legal system than trying to understand how it operates”).

⁷ See, e.g., Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. Rev. 1, 2 (1998) (“Constitutional theorists are normativists; their theories are meant to influence the way judges decide difficult constitutional cases; when the theorists are law-trained, as most of them are, they cannot resist telling their readers which cases they think were decided consistently with or contrary to their theory.”).

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⁸ Naturally, there are exceptions. See, e.g., Frederick Mark Gedicks, *The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence* (1995); Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (1995).

⁹ See Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* (2007).

¹⁰ See F. Scott Fitzgerald, *The Great Gatsby* 182 (Charles Scribner's Sons 1953) (1925) ("Gatsby believed in the green light, the orgiastic future that year by year recedes before us. It eluded us then, but that's no matter—tomorrow we will run faster, stretch our arms out farther And one fine morning—...").

¹¹ I take this approach at times in my recent book, *The Agnostic Age: Law, Religion, and the Constitution* (2011). Like most legal scholars, I am still presumptuous enough to introduce an approach, "constitutional agnosticism," that might offer the best available resolution of tragic choices. Even so, I emphasize that "[t]he tensions between religion and liberal democracy are encoded into the very DNA of our society," and "admit no final resolution." *Id.* at 306. Marc DeGirolami, in a forthcoming book on law and religion, emphasizes the tragic even more than I do, although he too offers an interpretive approach intended to minimize moral remainders. See Marc O. DeGirolami, *Tragedy and History: The Quality of Religious Liberty* (forthcoming). Steven D. Smith's work also generally emphasizes the tragic over the comic.

¹² On tragic remainders, see Bernard Williams, *Ethical Consistency*, in *Moral Dilemmas* 115, 129 (Christopher W. Gowans ed., 1987); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 Md. L. Rev. 1502, 1569 (1998) (defining a moral remainder as "the moral residue from the competing moral positions that simply could not be accommodated in the final action").

¹³ See, e.g., Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 Chi.-Kent L. Rev. 49, 79 (2007) (describing the "comic" approach to constitutional interpretation

and arguing that “most people, including most theorists, prefer a ‘comic’ approach to the Constitution.”).

¹⁴ Fitzgerald, *supra* note __, at 182.

¹⁵ See

[http://en.wikipedia.org/wiki/Tie_\(draw\)#Ties_in_tournament_play](http://en.wikipedia.org/wiki/Tie_(draw)#Ties_in_tournament_play)
(last visited Dec. 24, 2011).

¹⁶ See the comments to a blog post at the Prawfsblawg blog:

<http://prawfsblawg.blogs.com/prawfsblawg/2011/12/ties-in-sports-a-request.html> (last viewed Dec. 24, 2011).

¹⁷ See, e.g., C. Paul Rogers II, *The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust, and the Winner Take All Solution*, 18 Marq. Sports L. Rev. 285, 300 (2008) (citing *Duffy Daugherty Quotes*, <http://thinkexist.com/quotation/a-tie-is-like-kissing-your-sister/533067.html> (last visited Jan. 23, 2008)).

¹⁸ For some excellent and entertaining recent work on the connection, see Mitchell N. Berman, “Let ‘Em Play”: *A Study in the Jurisprudence of Sport*, 99 Geo. L.J. 1325 (2011); Mitchell N. Berman, *Replay*, 99 Cal. L. Rev. 1683 (2011).

¹⁹ See Frank I. Michelman, *Adjudication as Sport: Rhetoric Astray?*, 38 Osgoode Hall L.J. 583 (2000).

²⁰ *Hosanna-Tabor* is not discussed in all of the papers in this collection, but was discussed several times during the symposium itself, which came not long after the oral arguments in that case.

²¹ The facts here are taken from the Sixth Circuit decision in the case, 597 F.3d 769 (6th Cir. 2010), and from an excellent article by Christopher Lund. See Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1, 61-64 (2011). For the Supreme Court’s own version of the facts and its resolution of the case in favor of the church and the ministerial exception, see *Hosanna-Tabor*, __ S. Ct. __.

²² *Hosanna-Tabor*, 597 F.3d at 774.

²³ Lund, *supra* note __, at 3.

²⁴ *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

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²⁵ Garnett co-authored a “friend of the Court” brief supporting the church’s position in *Hosanna-Tabor*. See *Brief Amici Curiae of Professor Eugene Volokh et al. in Support of Petitioner, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 131 S. Ct. 1783 (2011) (No. 10-533), 2011 WL 2470847.

²⁶ Corbin, too, co-authored an amicus brief in *Hosanna-Tabor*, on the other side. See *Brief of Amici Curiae Law and Religion Professors in Support of Respondents, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 131 S. Ct. 1783 (2011) (No. 10-533), 2011 WL 3532698.

²⁷ See, e.g., Caroline Mala Corbin, *Above the Law?: The Constitutionality of the Ministerial Exemption From Antidiscrimination Law*, 75 Fordham L. Rev. 1965 (2007).

²⁸ See, e.g., Paul Horwitz, *Act III of the Ministerial Exception*, 106 Nw. U.L. Rev. Colloquy 156 (2011).

²⁹ 461 U.S. 574 (1983).

³⁰ In a forthcoming book, *First Amendment Institutions* (Harvard University Press, 2012), I express strong unease with the *Bob Jones* decision and suggest that it may be inconsistent with my institutionally based theory of the First Amendment. Even there, I keep my fingers lightly crossed behind my back.

³¹ See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983).

³² Corbin, *supra* note __, at [ms. at 11].

³³ *Id.* at [ms. at 28].

³⁴ Brettschneider, *supra* note __, at [ms. at 2].

³⁵ *Id.* at __ [ms. at 3-4].

³⁶ *Id.* at __ [ms. at 4].

³⁷ *Id.* at __ [ms. at 41-42].

³⁸ *Id.* at __ [ms. at 42].

³⁹ And mine. See Horwitz, *supra* note __.

⁴⁰ Cf. Franklin G. Snyder, *Sharing Sovereignty: Non-State Associations and the Limits of State Power*, 54 Am. U. L. Rev. 365 (2004).

⁴¹ See also Gregory A. Kalscheur, S.J., *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception*,

Subject-Matter Jurisdiction, and the Freedom of the Church, 17 Wm. & Mary Bill Rts. J. 43 (2008). Note, however, that the Supreme Court in *Hosanna-Tabor* concluded that suits raising the ministerial exception do not fall outside the subject-matter jurisdiction of the federal courts.

⁴² I pass lightly over a third possibility: that under this view, just as government can give foreign aid to other sovereigns, so a church-centered approach to religious freedom “would not necessarily prohibit government from giving aid to churches.” Smith, *supra* note __, at __ [ms. at n.114]. For one thing, as I have argued elsewhere, a church-centered approach to the Establishment Clause might counsel a *stronger* set of anti-establishmentarian commitments. See Horwitz, *supra* note __ [CFAI]. More important, however, is that Smith does not say here that the state could not decline to grant funding or subsidies to churches, just as the state regularly picks and chooses among the subjects of foreign aid.

⁴³ David Runciman, *Political Pluralism and the Personality of the State* 119 (1997).

⁴⁴ *Id.* at 120.

⁴⁵ Although, as I said earlier, Professor Porterfield’s paper does not break this impasse, it is still a vital part of this collection, since it explores this impasse, and the subtle negotiations and mutual influences of church and state across their respective barricades, over the course of American history.

⁴⁶ See Horwitz, *supra* note __, at 305 & n.85 [TAA] (quoting *Highlander*) (Thorn EMI Screen Entertainment 1986).

⁴⁷ For more on this, see chapter 2 of Horwitz, *id.*, as well as Marc DeGirolami’s forthcoming book, *supra* note __.

⁴⁸ For an overview, see, e.g., Daniel A. Farber & Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (2002).

⁴⁹ See Christopher L. Eisgruber & Lawrence G. Sager, *Religion and the Constitution* (2007).

⁵⁰ See Marci A. Hamilton, *God vs. the Gavel: Religion and the Rule of Law* (2005).

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⁵¹ See, e.g., Douglas Laycock, *Religious Liberty, Volume 1: Overviews and History* (2010).

⁵² See John H. Garvey, *What are Freedoms For?* (2000).

⁵³ See Isaac Kramnick & R. Laurence Moore, *The Godless Constitution: A Moral Defense of the Secular State* (2005).

⁵⁴ See also Steven D. Smith, *The Disenchantment of Secular Discourse* (2010) (arguing that many secular arguments prized by value monists, such as equality or neutrality, inevitably end up “smuggling in” additional substantive values and/or disguising the non-secular sources of those values).

⁵⁵ Another prominent argument against the ministerial exception is that it violates rule-of-law values, which suggest that the laws must apply equally to all equally situated individuals. This is essentially the equality argument put in other terms.

⁵⁶ A point made long ago, and convincingly in my view, in Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982).

⁵⁷ Cf. Dennis Patterson, *Conscience and the Constitution*, 93 Colum. L. Rev. 270, 305-06 (1993); *id.* at 305 n.111 (arguing of a similar approach elsewhere in constitutional theory that it “states, rather than solves, the problems under consideration”) (discussing Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987)); Jamal Greene, *How Constitutional Theory Matters*, 72 Ohio St. L.J. 1183, 1190 (2011) (“The hard work of Supreme Court judging is not syllogism but reconciliation of existing doctrine with first principles, whether sourced in some totalizing theory or simply in an intuition, a ‘law sense,’ about the right outcome in a hard case. That process of reconciliation, a version of what Richard Fallon has called ‘constitutional constructivism,’ is a necessary step in all constitutional cases, but it cannot be dictated by the totalizing theory itself.”).

⁵⁸ Smith, *supra* note ___, at 58 [FF].

⁵⁹ *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in the judgment).

⁶⁰ See also Paul Horwitz, *The Philosopher’s Brief*, 25 Const. Comm. 285, 286-88 (2008); Christopher L. Eisgruber & Lawrence

G. Sager, *Unthinking Religious Freedom*, 74 Tex. L. Rev. 577, 592 (1996) (one cannot muddle through in religious freedom issues “without the benefit of a defensible metric by which we can know when we are doing better or doing worse in the service of religious liberty”).

⁶¹ See, e.g., Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 Colum. L. Rev. 1396, 1412-13 (2005) (“Stalin was reputed to have responded to news that the Vatican opposed his policies by asking: ‘How many divisions has the Pope?’”).

⁶² Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 Yale L.J. 1394, 1420 (2009) (noting the perception, in the abortion debate, that “[t]he Court epitomizes reason, dispassion, and principled discussion. The debate in the public square epitomizes the hysteria against which the Courts, law, and rights themselves do combat, with the sword of sweet reason. The Court and its products—opinions—jointly constitute and embody the nobility of law.”).

⁶³ Another quote seems relevant here: “Strange women lying in ponds distributing swords is no basis for a system of government.” For the sake of the dignity of both reader and author, I will omit a citation.

⁶⁴ It may also, if one credits Steven Smith’s argument, give too much credit to secular reason, which may seek to justify itself by drawing on values and concepts that are themselves seemingly excluded from the terms of debate by their own rules. See Smith, *supra* note __ [DSD].

⁶⁵ See also Stanley Fish, *The Trouble With Principle* 185 (1999) (noting that one solution to the “inevitability of difference” is to “institute a regime of power but don’t identify it as such—instead, claim for it the status of an impersonal law tied to the interests of no one but capable of safeguarding the interests of everyone”).

⁶⁶ The two central examples are Wittgenstein’s discussion of social activities (including, possibly, law) as “language games,” see, e.g., Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe trans., Blackwell 3d ed. 1967), and H.L.A.

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Hart's discussion of the similarity between law and games, see, e.g., Frederick Schauer, *(Re)taking Hart*, 119 Harv. L. Rev. 852, 871 (2006). See also Johan Huizinga, *Homo Ludens: A Study of the Play-Element in Culture* (Boston: Beacon Press, 1955) (1949); Jack L. Sammons, *Justice as Play*, 61 Mercer L. Rev. 517 (2010); Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 Stan. L. Rev. 81 (1975).

⁶⁷ Michelman, *supra* note __, at 586. See also Lief H. Carter, *Law and Politics as Play*, 83 Chi.-Kent L. Rev. 1333 (2008).

⁶⁸ Michelman, *supra* note __, at 589.

⁶⁹ See, e.g., Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31, 56 (2005) (noting that "the duty to decide is the primary judicial duty" and adding, "No one likes to be tormented; and judges do not like to look back and worry about how many of their thousands of votes may have been mistaken So as the years pass they become more confident, because they have behind them an ever-longer train of decisions that they no longer doubt are sound.") The classic example of an American judge who lived in a constant state of doubt about his work is Supreme Court Justice Charles Whittaker—and Whittaker broke down under the strain and left the Court.

⁷⁰ Samuel Beckett, *The Unnamable*, in *Three Novels by Samuel Beckett* 291, 414 (Samuel Beckett trans., 1958).

⁷¹ See Allan C. Hutchinson, *It's All in the Game: A Nonfoundationalist Account of Law and Adjudication* (2000) (arguing that law is a game that must be played in good faith).

⁷² In saying so, I should make quite clear that I am playing the game too.

⁷³ See, e.g., Horwitz, *supra* note __ [Act III]; Horwitz, *supra* note __ [FAI]. For a parallel exploration of the role of honor and other virtue-centered values as internal and external constraints on *state* actors, see Paul Horwitz, *Judicial Character (And Does it Matter)*, 26 Const. Comment. 97 (2009); Paul Horwitz, *Honor's Constitutional Moment: The Oath and Presidential Transitions*, 103 Nw. U. L. Rev. 1067 (2009).

⁷⁴ Cf. Carter, *supra* note __, at 1362-33 (discussing the acceptance of losing as an element of “good games”).

⁷⁵ See, e.g., Nomi Maya Stolzenberg, “*He Drew a Circle That Shut Me Out:*” *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 Harv. L. Rev. 582 (1993).

⁷⁶ See Horwitz, *supra* note __, at 205-07, 215-21; see also Emily M. Calhoun, *Losing Twice: Harms of Indifference in the Supreme Court* (2011); Robert A. Burt, *The Constitution in Conflict* (1992).

⁷⁷ It does not help any that I generally agree with him.