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**THE POLLING PLACE PRIMING (PPP) EFFECT:  
IS VOTING IN CHURCHES (OR ANYWHERE ELSE)  
UNCONSTITUTIONAL?**

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INTRODUCTION .....	563
I. THE FUNDAMENTAL RIGHT TO VOTE.....	567
II. WHERE YOU VOTE AFFECTS HOW YOU VOTE.....	569
A. <i>Berger et al.</i> .....	570
B. <i>Rutchick</i> .....	571
C. <i>Discussion</i> .....	573
III. LEGAL AND POLICY IMPLICATIONS .....	575
A. <i>Voting in Churches</i> .....	575
B. <i>Standards</i> .....	577
1. <i>The Lemon Test</i> .....	577
2. <i>The Endorsement Test</i> .....	577
3. <i>The Coercion Test</i> .....	580
C. <i>Voting in Church Buildings</i> .....	581
IV. ANALOGIES.....	584
V. THE UNCONSCIOUS NATURE OF THE PPP EFFECT .....	587
VI. CONVENIENCE VOTING .....	592
VII. FURTHER DIRECTIONS .....	594
A. <i>Abortion</i> .....	594
B. <i>Negotiation</i> .....	596
CONCLUSION.....	598

*A substantial social science literature has demonstrated the power of situational cues on behavior, decisions, choices, attitudes, and emotions. Moreover, recent findings demonstrate that the place in which a citizen casts a*

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*ballot – Town Hall, a fire station, a school, a church, a library – can itself influence that citizen’s vote, by priming particular concepts, values, or ideals that nudge the voter in a particular direction. More important, that effect – what we call the “Polling Place Priming” Effect or the “PPP Effect” – nudges voters in a predictable direction; that is, it leads to a systematic, non-random bias in individuals’ decision-making. For example, school locations activate pro-education concepts and norms, and thus lead to votes supportive of education, specifically, allocating more tax dollars toward education. Voting in churches activates conservative Christian values, such as anti-abortion norms, leading to support for conservative candidates who express such values.*

*Here we discuss the legal and policy implications of the PPP Effect, highlighting the specific question of the constitutionality of voting in churches. We then connect these findings with similar challenges to voting procedures. We suggest that both the church challenges and these other analogous disputes – and courts’ responses to these challenges – fail to fully take into account the unconscious nature of the influence on a citizen’s decision-making and warrant a reconsideration of First Amendment and Equal Protection jurisprudence. Drawing on recent scholarship in the abortion rights context, we articulate a plausible approach to grounding such challenges that considers that unconscious influence. We then connect our discussion with recent steps toward reducing or altogether eliminating the use of polling places, by addressing its relationship to calls for absentee or convenience voting. We close by broadening our discussion and identifying other legal and policy contexts to which the PPP Effect might be relevant and suggesting empirical research that might address such possibilities.*

## INTRODUCTION

*In the Fall of 2004, one of the Authors voted in a church for the first time. It was a very convenient Lutheran church two blocks from his house. As the Author walked into the room to vote, he noticed several crosses, bibles, hymnals, pulpits, and religious artifacts scattered about. After waiting in line – looking around all the time while waiting with nothing else to do – he finally walked into the polling booth to pull a variety of levers, some for candidates and some for ballot measures. Was he affected by his surroundings? He did not think so, but who knows. He had just made all of these ballot decisions after walking through a church parking lot, walking through a large, ornate church door, past multiple religious symbols, and into the voting room that contained a mountain of religious artifacts. The Author said to himself: no, of course he was not affected. And for him, that may be accurate – at least on a conscious level. But little did he realize that he might have been quite affected on an unconscious level by a well-documented psychological effect called priming. Years later, after reviewing the extensive psychological studies directly on this point, the Authors conclude that a non-trivial percentage of the population is affected on an unconscious level by voting in churches. As we will argue, this represents an unconstitutional line-crossing between the separation of church and state. Indeed, what could be a more fundamental representation of the state than voting, and what could be a more fundamental representation of the church than, well, a church?*

In her 1995 psychology dissertation at Harvard University, Becca Levy asked elderly adults to sit before a computer screen on which words were flashed too quickly for the subjects to perceive the words as anything but brief flashes.<sup>1</sup> The words were associated with stereotypes of the elderly, both positive (“wise,” “learned”) and negative (“senile,” “dementia”).<sup>2</sup> This subliminal presentation of stereotypes – “priming” – was completely outside the participants’ conscious awareness; nevertheless, it powerfully influenced their subsequent behavior. Specifically, those who unconsciously “saw” positive words exhibited better memory in subsequent tasks than those primed with negative stereotypes.<sup>3</sup> In follow-up research, Levy and colleagues

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<sup>1</sup> Becca Ruth Levy, *Shifting Stereotypes by Culture and Priming: The Dynamic Between Stereotypes of Old Age and Memory* (May 1995) (unpublished Ph.D. dissertation, Harvard University) (on file with Harvard University Archives) (describing the methodology of a study on priming, specifically detailing the use of subliminally presented words as a priming condition of self-stereotypes).

<sup>2</sup> *Id.*; see also Becca Levy, *Improving Memory in Old Age Through Implicit Self-Stereotyping*, 71 J. PERSONALITY & SOC. PSYCHOL. 1092, 1093-1101 (1996) [hereinafter *Improving Memory*] (detailing the methodology and results of a study which explored the effects of “priming” on elderly individuals).

<sup>3</sup> *Improving Memory*, *supra* note 1, at 1094-98.

showed that older people who were primed with subliminal positive stereotypes walked faster, had better physical balance,<sup>4</sup> and had other positive mental and physical outcomes.<sup>5</sup> Even more extreme findings showed that primes worked in the opposite direction as well: when younger people were subliminally primed with stereotypes of the elderly, they themselves walked more slowly and cautiously.<sup>6</sup>

Extreme as they are, such findings are perhaps not surprising. A substantial social science literature has demonstrated the power of situational cues on behavior, decisions, choices, attitudes, and emotions.<sup>7</sup> Walking more slowly,<sup>8</sup> acting rudely,<sup>9</sup> forgetting,<sup>10</sup> helping others,<sup>11</sup> and a host of interpersonal behaviors<sup>12</sup> can be elicited or altered by simple cues in an individual's environment, even when – especially when – those cues (a face, a word, an object, a picture, a person) are outside that individual's awareness. For

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<sup>4</sup> Jeffrey M. Hausdorff, Becca R. Levy & Jeanne Y. Wei, *The Power of Ageism on Physical Function of Older Persons: Reversibility of Age-Related Gait Changes*, 47 J. AM. GERIATRIC SOC'Y 1346, 1347-48 (1999) (demonstrating that walking time and gait speed increased in elderly subjects who received positive priming).

<sup>5</sup> Becca R. Levy, *Mind Matters: Cognitive and Physical Effects of Aging Self-Stereotypes*, 58B J. GERONTOLOGY SERIES B: PSYCHOL. SCI. P203, P206-07 (2003) (highlighting studies which have shown that elderly people primed with positive stereotypes had better memory, a stronger will to live, and less cardiovascular stress than those primed with negative stereotypes).

<sup>6</sup> John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 237 (1996).

<sup>7</sup> For reviews, see Ap Dijksterhuis & John A. Bargh, *The Perception-Behavior Expressway: Automatic Effects of Social Perception on Social Behavior*, in 33 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1 (Mark P. Zanna ed., 2001) (reviewing findings that suggest that social perceptions automatically produce imitating social behavior); S. Christian Wheeler & Richard E. Petty, *The Effects of Stereotype Activation on Behavior: A Review of Possible Mechanisms*, 127 PSYCHOL. BULL. 797 (2001) (comparing and contrasting research on stereotype priming, specifically focusing on the difference between self-stereotypes and other-stereotypes); S. Christian Wheeler et al., *Understanding the Role of the Self in Prime-to-Behavior Effects: The Active-Self Account*, 11 PERSONALITY & SOC. PSYCHOL. REV. 234 (2007) [hereinafter *Understanding the Role*] (detailing studies that reveal both simple and complex perception-behavior connections).

<sup>8</sup> Bargh et al., *supra* note 6 at 237.

<sup>9</sup> *Id.* at 234.

<sup>10</sup> Ap Dijksterhuis et al., *On the Relation Between Associative Strength and Automatic Behavior*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 531, 531-32 (2000) (finding that people who had significant previous contact with elderly persons suffered from memory impairment after being primed with elderly stereotypes or associations).

<sup>11</sup> C. Neil Macrae & Lucy Johnston, *Help, I Need Somebody: Automatic Action and Inaction*, 16 SOC. COGNITION 400, 410-11 (1998) (finding that the priming condition of starting the experiment on time prompted participants to be more helpful, while priming other participants by starting the experiment five minutes late produced less helpfulness).

<sup>12</sup> *E.g.*, *Understanding the Role*, *supra* note 7, at 234.

instance, it has long been known that individuals in the presence of weapons behave more aggressively on *unrelated* tasks than those in a setting where weapons are absent.<sup>13</sup> Recent research building on those findings has shown that individuals primed with a corporate or financial cue – for example, simply having a briefcase present in the room – behave more competitively than those not so primed.<sup>14</sup> The most recent extension of that work showed that subtle priming with money (even pictures of money) led to less prosocial behavior, more desire to work alone on tasks, and a lessened likelihood of requesting help from others on difficult tasks.<sup>15</sup> Other research demonstrates that, for individuals who expected to go to a library later, just showing those individuals pictures of a library caused them to speak more quietly in a separate, unrelated task.<sup>16</sup> Even music being played during a shopping trip can affect purchases – playing French music in a wine store leads to increased purchases of French wine, while German music leads to an increase in sales of German wine.<sup>17</sup>

All of these “priming” effects – and many more<sup>18</sup> – demonstrate the powerful influence of an individual’s surroundings on his or her perceptions, thoughts, attitudes, and emotions, especially when the individual is unaware of these cues or their effects. Such findings provide, perhaps, amusing fodder for cocktail party discussion, or for (nevertheless unfounded) jeremiads against

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<sup>13</sup> E.g., Leonard Berkowitz & Anthony LePage, *Weapons as Aggression-Eliciting Stimuli*, 7 J. PERSONALITY & SOC. PSYCHOL. 202, 204-05 (1967) (finding that male participants in the presence of weapons administered more shocks to a fictional peer than those who were not in the presence of weapons).

<sup>14</sup> Aaron C. Kay et al., *Material Priming: The Influence of Mundane Physical Objects on Situational Construal and Competitive Behavioral Choice*, 95 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 83, 85-92 (2004) (discussing five studies that revealed that participants primed with business-related materials were more competitive when completing tasks); see also Ruud Custers & Henk Aarts, *The Unconscious Will: How the Pursuit of Goals Operates Outside of Conscious Awareness*, 329 SCI. 47, 47-48 (2010) (reviewing, briefly, studies which demonstrate that persons exposed to business-related primes are more competitive and work harder when money is at stake).

<sup>15</sup> Kathleen D. Vohs et al., *Merely Activating the Concept of Money Changes Personal and Interpersonal Behavior*, 17 CURRENT DIRECTIONS PSYCHOL. SCI. 208, 209-11 (2008) [hereinafter *Concept of Money*] (finding that participants who were given subtle reminders of money worked harder to complete tasks and were less helpful and less willing to get close to others); Kathleen D. Vohs et al., *The Psychological Consequences of Money*, 314 SCI. 1154, 1154 (2006) (reviewing nine experiments that suggest that monetary primes produce a level of self-sufficiency in participants).

<sup>16</sup> Henk Aarts & Ap Dijksterhuis, *The Silence of the Library: Environmental Control over Social Behavior*, 84 J. PERSONALITY & SOC. PSYCHOL. 18, 25 (2003) (finding that library priming conditions “enhanced the accessibility of mental representations of being silent and made participants talk less loud when they had a goal to visit the library”).

<sup>17</sup> Adrian C. North et al., *In-Store Music Affects Product Choice*, 390 NATURE 132, 132 (1997).

<sup>18</sup> See sources cited *supra* note 7.

“subliminal advertising.”<sup>19</sup> But new research shows that priming can in fact have even more serious repercussions, which go to the heart of the democratic process itself. Specifically, recent findings demonstrate that the place where a citizen casts a ballot – Town Hall, a fire station, a school, a church, a library – can itself influence that citizen’s vote by priming particular concepts, values, or ideals that nudge the voter in a particular direction.<sup>20</sup> More important, that effect – what we call the *Polling Place Priming Effect*, or the *PPP Effect* – nudges voters in a *predictable* direction; that is, it leads to a systematic, non-random bias in individuals’ decision-making.

Here we examine for the first time the implications of this priming research for the law and policy of voting. Not only do the findings raise important policy questions for voting procedures, but they also give new insight into the recurring question of the constitutionality of voting in church buildings in particular. We suggest that the case law rebuffing challenges to voting in churches is largely inapposite given this research, and that, under the relevant First Amendment standards, voting in church buildings is constitutionally suspect. More broadly, we point to the difficulties this research presents for polling locations generally.

After a brief review of the constitutional importance of a citizen’s free, autonomous vote, we discuss in detail this emerging line of research showing that the location in which someone votes can influence his or her actual choices.<sup>21</sup> We then discuss constitutional challenges to voting procedures, including, but not limited to, voting in church buildings.<sup>22</sup> We show here that traditional Establishment Clause jurisprudence must be seen differently in light of this new research.

We then make three further novel contributions. First, we emphasize the unconscious nature of the PPP Effect, and, drawing on recent scholarship in other areas, further illustrate how existing case law must be reconsidered.<sup>23</sup> Next, we synthesize the foregoing discussion and suggest, as others have done in other circumstances, that absentee balloting may be the best remedy for the dangers we identify.<sup>24</sup> Third, we generalize the priming research to other legal contexts, and suggest both further empirical research that could be conducted

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<sup>19</sup> “Unfounded” because, despite the power of unconscious primes, and notwithstanding public suspicion and a formal FCC ban, “subliminal advertising” in fact does not seem to be particularly effective. *E.g.*, Sheri J. Broyles, *Misplaced Paranoia over Subliminal Advertising: What’s the Big Uproar This Time?*, 23 J. CONSUMER MARKETING 312, 312 (2006); Patrick T. Vargas, *Implicit Consumer Cognition*, in HANDBOOK OF CONSUMER PSYCHOLOGY 477, 478 (Curtis P. Haugtvedt et al. eds., 2008).

<sup>20</sup> *See infra* Part II.

<sup>21</sup> *See infra* Parts I and II.

<sup>22</sup> *See infra* Part III and IV.

<sup>23</sup> *See infra* Part V.

<sup>24</sup> *See infra* Part VI.

and the potential constitutional and policy implications that such research might have.<sup>25</sup>

### I. THE FUNDAMENTAL RIGHT TO VOTE

A free, autonomous vote for each individual voter is the hallmark of the democratic process.<sup>26</sup> The right to vote is constitutionally protected<sup>27</sup> and is considered one of the “basic civil rights of man,”<sup>28</sup> one that grounds and preserves other fundamental rights.<sup>29</sup> As such, any infringement on the exercise of the right to vote in a “free and unimpaired manner . . . must be carefully and meticulously scrutinized.”<sup>30</sup>

In the 1960s, legislatures began to address physical barriers that made it difficult for individuals to vote, and similar efforts are ongoing.<sup>31</sup> But the imposition of specific requirements or conditions on the right to vote (or on the ability to register to vote) has also come under judicial review. Thus, the United States Supreme Court has struck down state statutes or practices that infringe overmuch on the right to vote, some of which exhibited explicit

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<sup>25</sup> See *infra* Part VII.

<sup>26</sup> *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (“We deal here with matters close to the core of our constitutional system. ‘The right . . . to choose.’” (quoting *United States v. Classic*, 313 U.S. 299, 314 (1941))); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (“[T]he right of suffrage is a fundamental matter in a free and democratic society.”).

<sup>27</sup> The Constitution explicitly grants the right to vote in federal elections. U.S. CONST. art. I, § 2, cl. 1 (voting for representatives); U.S. CONST. amend. XVII (voting for senators); see *Bush v. Gore*, 531 U.S. 98, 104 (2000). The right to vote in state elections is not explicitly granted. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966). However, the Court seems to have found the right implicit in the First Amendment. Bryan P. Jensen, Comment, *Crawford v. Marion County Election Board: The Missed Opportunity to Remedy the Ambiguity and Unpredictability of Burdick*, 86 DENV. U. L. REV. 535, 536 (2009).

<sup>28</sup> *Burdick v. Takushi*, 504 U.S. 428, 441 (1992); *Reynolds*, 377 U.S. at 561. *But cf.* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL’Y 143, 150 (2008).

<sup>29</sup> *Yick-Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>30</sup> *Reynolds*, 377 U.S. at 562.

<sup>31</sup> The 1965 Voting Rights Acts not only addressed civil rights, but also allowed citizens with physical disabilities to receive “assistance by a person of the voter’s choice.” 42 U.S.C. § 1973aa-6 (2006). Subsequently, the 1984 Voting Accessibility for Elderly and Handicapped Act required that Federal elections be “accessible to handicapped and elderly voters.” 42 U.S.C. § 1973ee-1(a) (2006). The Americans with Disabilities Act of 1990 was designed to address voting difficulties by those with disabilities. *E.g.*, 42 U.S.C. § 12101(a)(3) (2006) (“[D]iscrimination against individuals with disabilities persists in . . . voting”). Most recently, debate has turned to discrimination against citizens with cognitive disabilities. *E.g.*, Nina A. Kohn, *Cognitive Impairment and the Right to Vote: Rethinking the Meaning of Accessible Elections*, 1 CANADIAN ELDER L.J. 29, 51 (2008); Kay Schriener et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437, 453 (2000).

racism.<sup>32</sup> For instance, in *Harper v. Virginia Board of Elections*, the Court held that a poll tax on citizens in order to allow them to register to vote was unconstitutional, in part because of the imposition on that “precious, . . . fundamental” right to vote.<sup>33</sup> A year earlier, the Court struck down a Texas statute prohibiting members of the armed forces who moved to Texas from voting in any state election while still in service.<sup>34</sup> The Court found even less stringent residency requirements unconstitutional some years later, in *Dunn v. Blumstein*, where Tennessee had enacted a statute that restricted the voting rights of citizens who had lived in-state for less than a year or in-county for less than three months.<sup>35</sup>

States clearly have the authority to determine the means and procedures of voting, including how to establish the districts from which representatives would be elected.<sup>36</sup> Nevertheless, finding that the right to a vote should be “free of arbitrary impairment by state action,”<sup>37</sup> the Court held in *Baker v. Carr* that a particular state apportionment scheme could be challenged under the Fourteenth Amendment.<sup>38</sup> *Reynolds v. Sims*<sup>39</sup> developed *Baker* further and confirmed that elaborate redistricting – or gerrymandering – infringed citizens’ voting rights, despite states’ express apportionment power.<sup>40</sup>

A variety of state legislation has thus been subordinated to the “fundamental” individual right to vote.<sup>41</sup> In other instances, however, the Court has *upheld* certain practices in order to vindicate that fundamental right. Most directly relevant to the present discussion, the Court has condoned restrictions on campaign speech within certain distances of a polling place<sup>42</sup> on the basis of the “obviously” compelling government interest in preserving

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<sup>32</sup> *Nixon v. Herndon*, 273 U.S. 535, 540-41 (1927) (reversing the lower court dismissal for non-justiciability of suit challenging a state statute barring African-Americans from participating in Democratic primary elections).

<sup>33</sup> *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (stating that “the right to vote is too precious, too fundamental to be . . . burdened or conditioned” by the poll tax at issue).

<sup>34</sup> *Carrington v. Rash*, 380 U.S. 89, 96 (1965).

<sup>35</sup> *Dunn v. Blumstein*, 405 U.S. 330, 359-60 (1972).

<sup>36</sup> *E.g., id.* at 336; *Carrington*, 380 U.S. at 91.

<sup>37</sup> *Baker v. Carr*, 369 U.S. 186, 208 (1962) (“A citizen’s right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . .”).

<sup>38</sup> *Id.* at 237.

<sup>39</sup> 377 U.S. 533 (1964).

<sup>40</sup> *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); see William J. Phelan IV, Esq., *Political Gerrymandering after Lulac v. Perry: Considering Political Science for Legislative Action*, 32 SETON HALL LEGIS. J. 89, 100-01 (2007) (discussing *Baker* and *Reynolds*).

<sup>41</sup> See generally RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 14-46 (2003).

<sup>42</sup> *Burson v. Freeman*, 504 U.S. 191, 208 (1992).



voters' "right to vote free of intimidation."<sup>43</sup> Many states thus restrict what would otherwise be protected political speech, subordinating that First Amendment right to the belief that a citizen will best be able to exercise her constitutional right to vote freely if she is not bombarded with information as she enters a polling place.

## II. WHERE YOU VOTE AFFECTS HOW YOU VOTE

But what happens when the polling place itself is, in fact, what influences the citizen's vote? Property in the sense of physical place, of geography, has long been thought to affect citizens' mindsets generally – influencing autonomy, preferences for types of government, senses of honor, attitudes toward capital punishment, and opinions about substantive laws.<sup>44</sup> But, more narrowly, and perhaps more controversially, recent social science findings demonstrate that voting locations themselves can influence how people vote.<sup>45</sup> To repeat, we refer to this as the PPP Effect, or the Polling Place Priming Effect. Immediately below, we review the substantive findings demonstrating the PPP Effect; in the next Part we turn to a discussion of legal and policy implications.

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<sup>43</sup> Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321 n.304 (2007) (citing *Burson*, 504 U.S. at 198-99).

<sup>44</sup> CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* 285-86 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748); RICHARD E. NISBETT & DOV COHEN, *CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH* xv-xviii (1996); Jeremy A. Blumenthal, "To Be Human": *A Psychological Perspective on Property Law*, 83 TUL. L. REV. 609, 638-40 (2009).

<sup>45</sup> Abraham Rutchick, *Deus ex Machina: The Influence of Polling Place on Voting Behavior*, 31 POL. PSYCHOL. 209, 221-23 (2010); Jonah Berger et al., *Contextual Priming: Where People Vote Affects How They Vote*, 105 PROC. OF THE NATL. ACAD. OF SCI. (PNAS) 8846, 8848 (2008) [hereinafter *Contextual Priming*]; Jonah Berger et al., *Can Where People Vote Influence How They Vote? The Influence of Polling Location Type on Voting Behavior* 23-26 (Stanford GSB Research Paper No. 1926, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=890660](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=890660) [hereinafter *Where People Vote*]. The research seems to have been conducted independently, and the scholars were apparently not aware of each other's work. For instance, Berger et al. speculate whether voting in a church might affect preferences regarding stem cell or gay marriage issues, or for candidates linked to certain religious issues – as Rutchick investigates. *Compare Contextual Priming, supra* ("Could voting in a church, for example, influence support for gay marriage or stem cell research? Could these effects extend to preferences for candidates strongly associated with educational or religious issues?"), *with* Rutchick, *supra*, at 221 ("Churches were associated with support . . . for a conservative constitutional amendment, but only if the amendment was relevant to Christian values."). Similarly, Rutchick suggests that there may be an effect of voting in a school, as Berger and colleagues demonstrate. *Compare* Rutchick, *supra*, at 222 ("[S]chools might activate intellectual curiosity."), *with* *Contextual Priming, supra*, at 8847 ("[P]articipants were more likely to support the school funding initiative if they had been exposed to school voting environments . . . as opposed to control environments . . .").

A. *Berger et al.*

In the first set of studies, Jonah Berger and his colleagues analyzed specific ballot initiative results from Arizona's 2000 general election.<sup>46</sup> Examining precinct-level returns concerning an initiative that would raise the state sales tax in order to increase funding for education, they compared the support from those who voted in a school to that from voters in another location.<sup>47</sup> Consistent with the priming literature discussed above, their prediction was that those voting in schools would support the initiative more because of cues in the polling place that unconsciously activated positive school-related norms.<sup>48</sup>

In absolute numbers, those voting in schools were indeed more likely to support the ballot initiative relative to voters at other locations (56% versus 54%).<sup>49</sup> Cognizant of other potentially confounding factors, however, the authors controlled for variables such as political orientation or preferences, residential factors (e.g., someone more favorably inclined toward education in the first place might be more likely to live near a school), and other demographics.<sup>50</sup> Even after controlling for such factors, however, citizens who voted in a school supported the initiative more strongly than those who did not.<sup>51</sup> Importantly, this difference did not extend to preferences on other initiatives, suggesting a *focused* PPP Effect; that is, a close connection exists between voting location and the specific topic that that location might prime.<sup>52</sup> Finally, the PPP Effect seemed driven by the unconscious cues present in *any* school; that is, a specific school's condition did not lead to more conscious, deliberative thought about the importance of school funding.<sup>53</sup> Specifically, voters in older schools, which presumably are in inferior physical condition, did not support the initiative more than those who voted in newer, presumably better-quality schools.<sup>54</sup>

To supplement this field experiment demonstrating differences attributable to voting location, the researchers conducted a lab experiment to verify the causal priming mechanism involved. Here, the authors randomly exposed participants<sup>55</sup> to fifteen images on a computer; ten images were of schools and

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<sup>46</sup> *Contextual Priming*, *supra* note 45, at 8846-47.

<sup>47</sup> *Id.* at 8846.

<sup>48</sup> *Id.* at 8846-47.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 8847.

<sup>52</sup> *See e.g.*, Rutchick, *supra* note 44, at 211.

<sup>53</sup> *Contextual Priming*, *supra* note 45, at 8847.

<sup>54</sup> *Id.*

<sup>55</sup> Three hundred and twenty-seven people were recruited through a web survey database. Although measures were taken of attitudes and demographics, the only demographic information reported is an age range (18-69, mean age of 35). *Where People Vote*, *supra* note 45, at 19.

five were of generic buildings.<sup>56</sup> In one control condition, the same five generic filler images were used, but the ten other images were of a church; in another control condition, all fifteen images were generic.<sup>57</sup> All participants then read a description of the Arizona ballot initiative and were asked to “vote” on it.<sup>58</sup> In this experiment as well, those participants exposed to a school-related prime supported the initiative more strongly than those in either control condition (64% versus 56%), which supports a causal interpretation of the PPP Effect.<sup>59</sup>

#### B. *Rutchick*

More recently, a second set of studies was broadly consistent with Berger and colleagues’ findings, with some additional nuances. Rather than focusing on the influence of schools, Abraham Rutchick’s research examined the effect on voter decisions of voting in churches. Broadly speaking, the hypothesis was that voting in churches would prime relatively conservative attitudes, especially ones related to Christian values.<sup>60</sup> The increased accessibility to such values would influence voters’ choices.<sup>61</sup>

Rutchick’s real-world and laboratory studies supported this hypothesis. In two studies similar to the Arizona ballot initiative study described above, Rutchick looked at 2004 general election voting patterns in South Carolina’s Sixth Congressional District, where a relatively conservative Republican challenged a Democratic incumbent.<sup>62</sup> The prediction, supported by precinct-level voting data, was that the conservative Republican would receive more votes when citizens voted in churches relative to when they voted in secular locations.<sup>63</sup> A second, follow-up study compared support for a proposed amendment to the South Carolina Constitution that would define marriage as only between a man and a woman. Here, the author again compared support from church locations relative to secular locations, also controlling for additional demographic characteristics such as age, race, sex, and party affiliation.<sup>64</sup> As did Berger and colleagues, Rutchick also compared the effect of voting in a church with support for a non-Christian-values-related issue, an

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 19-20. Participants were asked to rate the brightness of each image. *Contextual Priming*, *supra* note 45, at 8849. Thus, the priming was not subliminal, as in the Levy works, *see supra* notes 1-2, but because there was no connection between the priming images and the target questions that followed, the activation was unconscious.

<sup>58</sup> *Where People Vote*, *supra* note 45, at 20.

<sup>59</sup> *Contextual Priming*, *supra* note 45, at 8847.

<sup>60</sup> Rutchick, *supra* note 45, at 211.

<sup>61</sup> *Id.* at 209.

<sup>62</sup> *Id.* at 212-13.

<sup>63</sup> The Republican candidate, Gary McLeod, received 41% of the vote in church locations as compared to 32% in secular locations. *Id.* at 212.

<sup>64</sup> *Id.* at 213.

amendment concerning the state's eminent domain powers.<sup>65</sup> Again, citizens who voted in churches supported the marriage amendment more strongly than those who voted in secular locations – which suggests that conservative, Christian values were unconsciously activated.<sup>66</sup> There was no such distinction, however, for the eminent domain amendment, which implicated an issue that does involve political preferences, but that is less likely to be tied to Christian values in particular.<sup>67</sup> Thus, the findings again demonstrated the focused nature of the PPP Effect.

As did Berger and colleagues, Rutchick followed up these real-world findings with more controlled experiments, though these were not specifically focused on voting. First, he randomly assigned study participants to complete a decision-making experiment either in a campus chapel, which was non-denominational but similar in appearance to a Christian church, or a similarly ornate academic building on the university campus.<sup>68</sup> Participants took the role of insurance claim adjusters evaluating claims concerning abortion pills and workmen's compensation and assigned some dollar amount to the claimants.<sup>69</sup> Presumably, participants completing the task in the campus chapel would have conservative Christian values activated, and would thus give lower awards to the abortion pill claimant than participants who completed the task in the academic building. The results were consistent with this prediction: chapel participants awarded less money, measured as a percentage of the maximum award allowed, than academic building participants.<sup>70</sup> Chapel participants also awarded more money to the worker's compensation claimant relative to academic building participants. As with the comparison between the marriage and eminent domain amendments, this result suggests an effect for an issue relevant to Christian values, but not for an unrelated one.

Stronger results appeared in a follow-up study that compared this effect in Christians versus non-Christians. In a lab experiment, different participants were primed subliminally with ecclesiastical images (churches, crucifixes, images of Jesus) or control images (abstract paintings), then asked to evaluate abortion-pill and workmen's compensation claimants and assign awards.<sup>71</sup> Again, church-primed participants awarded less money to the abortion pill claimant than did those primed with the non-ecclesiastical images, but there

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 214.

<sup>67</sup> *Id.* A third study confirmed that certain Christian values were generally considered "conservative" and that same-sex marriage was seen as an issue relevant to Christian values, setting the groundwork for the Rutchick study. *Id.* at 216.

<sup>68</sup> *Id.* at 217.

<sup>69</sup> *Id.* at 217-18.

<sup>70</sup> *Id.* at 218.

<sup>71</sup> *Id.* at 219-20.

was no prime-related difference for the workmen's compensation claim.<sup>72</sup> More important, Christian participants' answers were driven by the experimental condition they were in, rather than by attitudes toward abortion – for non-Christian participants, however, abortion attitudes were more powerful than the priming stimuli.<sup>73</sup> That is, “priming with Christian ecclesiastical stimuli influenced the awards made by Christians; conversely, priming with ecclesiastical stimuli did not affect the awards made by non-Christians, whose decisions were driven by their preexisting attitudes about abortion.”<sup>74</sup>

### C. Discussion

Broadly speaking, the social science findings seem clear: both in the laboratory and in the real world, subtle – subliminal – contextual cues can activate particular mindsets in voters and influence the way that they vote. Moreover, this PPP Effect is focused. School locations seem to activate pro-education concepts and norms, and thus lead to votes supportive of education, specifically, allocating more tax dollars toward education. Churches seem to activate conservative Christian values as well as anti-abortion norms, which lead to support for conservative candidates who express such values. This focused nature of the PPP Effect is also apparent when the studies are compared. For instance, Rutchick found that churches activated particular norms that influenced particular voting patterns;<sup>75</sup> however, Berger and colleagues found no effect of priming churches and, in fact, found no difference between “voting” when primed with church-related or religious cues and other, “generic” building cues.<sup>76</sup> Thus, churches work for one set of issues, schools for another; as the researchers suggest, it will be important to conduct research on the potential effect of other locales as well, such as public municipal buildings or fraternal lodges.

One of the most important questions raised by the research, however, is whether the PPP Effect functions differently for different people. A long line of research in political science, for instance, demonstrates that politically knowledgeable citizens are differentially susceptible to political frames or primes, and are thus potentially less vulnerable to manipulation than those who are less politically aware or educated.<sup>77</sup> Here the data are less clear.

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<sup>72</sup> *Id.* at 220.

<sup>73</sup> *Id.* at 221.

<sup>74</sup> *Id.*

<sup>75</sup> See *supra* Part II.B.

<sup>76</sup> *Where People Vote*, *supra* note 45, at 19-20.

<sup>77</sup> See, e.g., Cindy D. Kam, *Implicit Attitudes, Explicit Choices: When Subliminal Priming Predicts Candidate Preference*, 29 *POL. BEHAV.* 343, 348 (2007); Rune Slothuus, *More Than Weighing Cognitive Importance: A Dual-Process Model of Issue Framing Effects*, 29 *POL. PSYCH.* 1, 20-21 (2008) (finding that issue framing affects those who are more politically aware or have stronger political values differently than those who are less politically aware or have weaker values).

Rutchick's findings comparing Christians and non-Christians suggest that the PPP Effect serves more to reinforce existing attitudes; that is, it primarily affects those whose attitudes are consistent with the expected effect of the polling place.<sup>78</sup> In contrast, Berger et al. found that priming raised *non-parents'* support for the education initiative up to that of parents.<sup>79</sup> If the effect simply reinforced existing attitudes, however, we might expect parents' support to be influenced instead.

It is not clear whether this is in fact a substantive difference, or whether there are other explanations; additional research may help parse the effect. Both findings occurred in the researchers' follow-up lab studies, so it is not clear whether any such difference generalizes to real world voting places. Indeed, neither data set allows us to test whether the reinforcing effect occurred in the earlier, actual voting studies. One hint that it did *not* occur in Rutchick's studies is the absence of an effect of demographics in his Study 2, in which the author examined the results of the 2006 South Carolina election; on the other hand, although demographics were controlled for there, those characteristics only included sex, race, age, and political affiliation, not religion.<sup>80</sup> Thus, we are unable to determine whether the church-based PPP Effect he demonstrated there differentially influenced Christian and non-Christian voters. In their lab study, Berger et al. did ask about attitudes toward schools and toward taxes, finding that priming mostly strongly influenced those not already "predisposed to vote for the proposal."<sup>81</sup>

One explanation might involve the task in question. In Berger et al., participants in fact provided a vote on a proposal;<sup>82</sup> in Rutchick's laboratory study the question was compensation on insurance claims.<sup>83</sup> As a psychological matter, however, it is not clear why that might lead to different effects for different groups of respondents. Perhaps the most parsimonious explanation is the ceiling effect that Berger et al. suggest.<sup>84</sup> That is, all citizens might be subject to the PPP Effect; however, those initially predisposed to support the particular issue have less "room" to be affected before reaching a ceiling level of support. Those not initially predisposed to support the

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<sup>78</sup> Rutchick, *supra* note 45, at 221 (in Study 5, Rutchick found that "priming with Christian ecclesiastical stimuli influenced the awards made by Christians; conversely, priming with ecclesiastical stimuli did not affect the awards made by non-Christians, whose decisions were driven by their preexisting attitudes . . ."); *see supra* notes 72-74 and accompanying text.

<sup>79</sup> *Where People Vote*, *supra* note 45, at 21, 24 ("[T]he pattern indicated that priming non-parents with school images brought their support for the schools initiative up to the level of parents. . . . [E]xposure to school related environmental cues can make people more likely to support a schools initiative, even if they are not parents . . .").

<sup>80</sup> Rutchick, *supra* note 45, at 213-14.

<sup>81</sup> *Where People Vote*, *supra* note 45, at 24.

<sup>82</sup> *Id.* at 20.

<sup>83</sup> Rutchick, *supra* note 45, at 217.

<sup>84</sup> *Where People Vote*, *supra* note 45, at 24.

particular candidate or proposal, however, may fluctuate more as a result of the effect. Importantly, this may mean that the PPP Effect will be stronger on those who are relatively more “undecided” about a particular issue or candidate as they enter the voting booth, or who lack information about races or choices on a ballot about which they may not have been aware. Overall, additional research will be useful to parse the boundary conditions of the effect and, especially, address what may be the most important question for both theoretical and practical purposes: What primes affect which people?

### III. LEGAL AND POLICY IMPLICATIONS

Despite such nuances, and despite the obvious utility of developing a broader base of research findings, the available data suggest the potential for the actual location in which a citizen casts his vote to influence that vote. Importantly, the citizen is not responding to explicit political persuasion in an informed, deliberative manner; rather, the PPP Effect occurs without his knowledge.<sup>85</sup>

We turn now to a discussion of legal and policy implications of such an unwanted influence. First, we examine the specific question of the constitutionality of voting in churches.<sup>86</sup> We then connect these findings with similar challenges to voting procedures.<sup>87</sup> We suggest that both the church challenges and these other analogous disputes – and courts’ responses to these challenges – fail to fully take into account the *unconscious* nature of the state’s influence on a citizen’s decision-making. Drawing on recent scholarship in the abortion rights context, we articulate a plausible approach to grounding such challenges that does consider that unconscious influence.<sup>88</sup> We then connect our discussion with recent steps toward reducing or altogether eliminating the use of polling places, by addressing its relationship to calls for absentee or convenience voting.<sup>89</sup> We close by broadening our discussion and identifying other legal and policy contexts to which the PPP Effect might be relevant, and suggesting empirical research that might address such possibilities.<sup>90</sup>

#### A. *Voting in Churches*

In the past, courts have considered violations of separation of church and state when the voting forum is a church. Although the United States Supreme Court has yet to address the issue, other courts have repeatedly – but, we

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<sup>85</sup> See *infra* notes 184-185 and accompanying text.

<sup>86</sup> See *infra* Parts III.A-C.

<sup>87</sup> See *infra* Part IV.

<sup>88</sup> See *infra* Part V.

<sup>89</sup> See *infra* Part VI; cf. Paul Gronke et al., *Convenience Voting*, 11 ANN. REV. POL. SCI. 437, 438 (2008) (suggesting the possibility of “getting rid of the traditional polling place altogether”).

<sup>90</sup> See *infra* Part VII.

suggest, wrongly – held in favor of the use of churches as voting places.<sup>91</sup> One rationale is the availability of voting alternatives for the plaintiffs, including absentee voting and moving one’s polling place. Although re-accommodations may appear to remedy any problems with regard to people who knew or thought they had been consciously affected by voting in a church, any suggested solutions and alternatives fail to address a more fundamental issue: these available re-accommodations require that a person actually be aware of the potential effects. Someone who is unconsciously affected by voting in churches will not know to take advantage of absentee voting or ask to move her voting place.

In fact, it seems highly unlikely that many people will even consider the potential effects that voting in a church may have on the way that they vote. However, the effects are real. The studies reviewed above have shown that certain locations, cues, or stimuli in the environment can facilitate memory and activate related concepts in one’s mind that carry over to influence behavior, even outside of a person’s awareness.<sup>92</sup> More specifically, churches and related stimuli have been shown to prime Christian values, resulting in more conservative voting even if the voter is not aware of the effect.<sup>93</sup> This PPP Effect, coupled with the notion that a person who is unaware of these influences on her behavior will not have opportunities to alter her voting behavior, is unsettling. As such, existing case law should be reconsidered.

That case law, of course, rests on the First Amendment’s Establishment Clause, which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>94</sup> In the seminal case of *Everson v. Board of Education*, the Establishment Clause was held to be one of the liberties protected by due process.<sup>95</sup> Therefore, no state can “pass laws which aid one religion” or that “prefer one religion over another.”<sup>96</sup>

The Court has applied several slightly different “tests” in evaluating whether a particular law or practice violates the Establishment Clause. However, as evidenced by recent split decisions, no theory commands support from a majority.

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<sup>91</sup> See, e.g., *Otero v. State Election Bd. of Okla.*, 975 F.2d 738, 740-41 (10th Cir. 1992); *Rabinowitz v. Anderson*, No. 06-81117 Civ., at 14 (S.D. Fla. 2007) (order granting defendant’s motion for summary judgment).

<sup>92</sup> See *supra* notes 1-18 and accompanying text.

<sup>93</sup> See *supra* notes 63-74 and accompanying text.

<sup>94</sup> U.S. CONST. amend. I.

<sup>95</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 14-15 (1947).

<sup>96</sup> *Id.* at 15.



## B. Standards

### 1. The *Lemon* Test

To determine if a governmental action violates the Establishment Clause, several tests have emerged. The first, generally referred to as the *Lemon* test<sup>97</sup> has three elements: 1) “the statute must have a secular legislative purpose;” 2) “its principal or primary effect must be one that neither fosters nor inhibits religion;” and 3) “the statute must not foster an ‘excessive government entanglement with religion.’”<sup>98</sup>

However, in *Agostini v. Felton*, the Court refined the test, concluding that when applying it, the factors used to assess whether an entanglement is “excessive” are similar to the factors used to examine “effect.”<sup>99</sup> Thus, the Court combined the second and third *Lemon* prongs into a single inquiry, reducing the test to a two-prong analysis.<sup>100</sup>

Although the test was once the dominant force in determining whether a violation has occurred, commentators have harshly criticized it.<sup>101</sup> With increasingly inconsistent application, the test’s future remains uncertain, leading many legal commentators to believe its days are numbered.<sup>102</sup> Although the *Lemon* test has not been overruled and is often incorporated into the Court’s decisions, it is often no longer explicitly used.<sup>103</sup> Recent Court decisions demonstrate tension over how an alleged Establishment Clause violation should instead be analyzed.<sup>104</sup>

### 2. The Endorsement Test

Recently, courts have looked simply to whether the government action “endorses” religion.<sup>105</sup> Under the endorsement test, a practice is examined to see if it unconstitutionally endorses religion by conveying “a message that religion or a particular religious belief is *favored*[,] or *preferred*,” or even

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<sup>97</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

<sup>98</sup> *Id.* (citation omitted) (quoting *Walz v. Tax Comm’r*, 397 U.S. 664, 674 (1970)).

<sup>99</sup> *Agostini v. Felton*, 521 U.S. 203, 223-33 (1997).

<sup>100</sup> *See id.*

<sup>101</sup> Some critics are harsher than others: “Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . .” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

<sup>102</sup> *See, e.g.*, William B. Peterson, “*A Picture Held Us Captive*”: *Conceptual Confusion and the Lemon Test*, 137 U. PA. L. REV. 1827, 1827 (1989).

<sup>103</sup> *See infra* Part II.B.2-3.

<sup>104</sup> *See, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 756 (1995).

<sup>105</sup> *See, e.g.*, *Allegheny County v. ACLU*, 492 U.S. 573, 593 (1989).

promoted over other beliefs.<sup>106</sup> This test has been defended as a desirable approach because it is a way to determine whether the government is neutral or whether it is favoring religion.<sup>107</sup> In aiming for neutrality, the objective is to prevent the government from making those who are not part of the favored religion feel unwelcome. Therefore, the main focus of the endorsement test is to assess likely perceptions of, and reactions to, government conduct.<sup>108</sup> The endorsement test originated in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*.<sup>109</sup> There, in proposing that the endorsement test would serve as a meaningful way to clarify the *Lemon* test, Justice O'Connor reasoned that the city did not intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions in its holiday display.<sup>110</sup> Under her analysis, when part of a larger holiday display, a crèche was not a promotion of the religious content and, further, was part of a public holiday that had cultural significance and, therefore, a legitimate secular purpose.<sup>111</sup>

The problem with government endorsement or approval of religion, Justice O'Connor articulated, is that it sends a message "to non-adherents that they are outsiders, not fully members of the political community."<sup>112</sup> Further, it sends "an accompanying message to adherents that they are insiders and favored members of the political community."<sup>113</sup>

Applying the test in *Allegheny County v. ACLU*, the Court, in a split decision, ruled that a crèche inside a courthouse endorsed Christianity in violation of the Establishment Clause.<sup>114</sup> Through the prominent display of the words "Glory to God in the Highest!," the county sent a clear message that it supported and promoted Christian orthodoxy.<sup>115</sup> The other display that was challenged, a menorah next to a Christmas tree outside of the courthouse, was held not to be an endorsement of religion, given its "particular physical setting" and its simultaneous endorsement of both the Christian and Jewish faith.<sup>116</sup>

The holding places great importance on the location of the display. In the present voting argument, the churches are not government property, but they *are* being used for a government purpose. Although religious symbols are clearly connected to the church in which they are present, they are not similarly connected to the purpose of voting. If the church is being used for

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<sup>106</sup> *Id.* (emphasis added) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985)).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

<sup>110</sup> *Id.* at 689, 691.

<sup>111</sup> *Id.* at 691.

<sup>112</sup> *Id.* at 688.

<sup>113</sup> *Id.*

<sup>114</sup> *Allegheny County v. ACLU*, 492 U.S. 573, 593 (1989).

<sup>115</sup> *Id.* at 598.

<sup>116</sup> *Id.* at 620.

voting, then the concept of the church itself and its particular endorsements would seem to be placed above other beliefs, non-beliefs, or religions.

Thus, if particular religious cues directly coincide with certain outcomes, such as a more conservative vote or opposition to issues such as abortion, then the use of the church as a voting place is, in effect, causing the particular belief to be favored over others. Similarly, when a church is a voting forum, there is no “simultaneous endorsement of religion,” thereby eliminating part of the rationale that has been used in cases such as *Allegheny*, where the context of the display was deemed appropriate because it included more than one religious icon.<sup>117</sup>

Some courts have also required a determination of what message the challenged governmental policy or enactment conveys to a “reasonable, objective observer.”<sup>118</sup> The reasonable observer is an “informed citizen who is more knowledgeable than the average passerby,” and one who, in addition to “knowing the challenged conduct’s history,” is able to “glean other relevant facts from the face of the policy in light of its context.”<sup>119</sup> The objective observer does not need to ascertain what the governmental purpose actually was, but, instead, evaluates the evidence and facts to ascertain whether the policy “in fact conveys a message of endorsement or disapproval of religion, irrespective of what the government might have intended by it.”<sup>120</sup>

Drawing a parallel between the unconscious effects of voting in churches and the idea of what makes a “reasonable, objective observer” highlights the potential unconstitutionality of the situation.<sup>121</sup> Although an observer may very well understand that the government is merely trying to use an available and accessible site for a voting forum, an *informed* observer would have trouble denying the evidence of the implications that this setting has on a voter’s unconscious. Further, although the government may not be attempting to sway votes through its use of churches,<sup>122</sup> the fact that churches prime voters, resulting in a variant outcome, may be enough to convey a message of endorsement, regardless of the government’s actual intent.

The standard is better understood in *Kitzmiller v. Dover Area School District*, where the court was presented with the constitutionality of a disclaimer read to high school science classes that said that evolutionism was only a theory and those who wished to learn about an additional theory, “I.D.,”

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<sup>117</sup> *See id.*

<sup>118</sup> *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 714-15 (M.D. Pa. 2005) (citing *McCreary County v. ACLU*, 545 U.S. 844, 861 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

<sup>119</sup> *Id.* (quoting *Modrovich v. Allegheny County*, 385 F.3d 397, 407 (3d Cir. 2004)); accord *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-81 (1995).

<sup>120</sup> *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring)).

<sup>121</sup> *Id.* at 715.

<sup>122</sup> Though it may. *See infra* notes 186-188 and accompanying text.

a theory similar to creationism, could read an additional book.<sup>123</sup> Students who did not wish to be exposed to the disclaimer could “opt out” to avoid the unwanted religious message.<sup>124</sup> The court applied both the *Lemon* test and the endorsement test, finding that an objective student would see the disclaimer’s content as a mere relabeling of creationism and, thus, as an endorsement of religion.<sup>125</sup> The court found the “opt out” feature equally problematic because it presented a message to students that they were outsiders and not full members of the community.<sup>126</sup>

Interestingly, the court’s disapproval of the “opt out” feature may also provide grounds for a finding that the voting alternatives, such as changing one’s polling place or voting by absentee ballot, are not necessarily in compliance with the Establishment Clause. After all, just because one may “opt out” of voting in a church, one might still feel like an outsider. Even worse, the unconsciously affected voter will not have the chance to “opt out” of the exposure and engage in the available alternatives, constitutional or not.

The endorsement test has held support from a majority of the Court or been articulated on several occasions since it was first applied by the majority in *Allegheny*.<sup>127</sup> Based on both its recent application and the Court’s lack of clear direction regarding which test it will employ, it is clear that the endorsement test will remain an influential means of analysis.

### 3. The Coercion Test

The PPP Effect is perhaps most clearly problematic for First Amendment jurisprudence under a third test, known as the coercion test, which holds that treatment by the government needs to be equal. The government should accommodate religion by treating it the same as nonreligious beliefs and groups. Thus, the Establishment Clause is violated if the government establishes a church, coerces religious participation, or favors some religions over others.<sup>128</sup>

*Lee v. Weisman* articulated what constitutes coercion, when the Court ruled that sectarian prayer at a public school graduation violated the Establishment Clause.<sup>129</sup> In essence, because the school principal had given the rabbi, who was to give the prayer, a pamphlet on composing prayers for civic occasions,

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<sup>123</sup> *Kitzmiller*, 400 F. Supp. at 708-09.

<sup>124</sup> *Id.* at 727-28.

<sup>125</sup> *Id.* at 719.

<sup>126</sup> *Id.* at 728; *see also* *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000).

<sup>127</sup> *See* *McCreary County v. ACLU*, 545 U.S. 844, 859-61 (2005); *Van Orden v. Perry*, 545 U.S. 677, 712 (2005) (Stevens, J., dissenting); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 316-17; *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 772 (1995) (O’Connor, J., concurring).

<sup>128</sup> *See* *Lee v. Weisman*, 505 U.S. 577, 598 (1992).

<sup>129</sup> *Id.*

he had directed and controlled the content of the prayer.<sup>130</sup> In assessing the issue of school prayer, the Court reiterated that, at a minimum, the “Constitution guarantees that the government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in any way which ‘establishes a [state] religion or religious faith, or tends to do so.’”<sup>131</sup>

Interestingly, the Court noted that the age of the students was relevant to whether coercion had occurred.<sup>132</sup> Much like the young students, who may not have had the sufficient mental capability to make judgments for themselves, a voter who is unaware of the effects of the church as a voting forum will not have the proper state of mind to account for, or assess, the forum’s influences. More important, however, there is coercion in a literal sense, where a voter is forced<sup>133</sup> – though unconsciously – to select a ballot outcome consistent with a particular set of religious values.

### C. *Voting in Church Buildings*

Although the U.S. Supreme Court has yet to address the issue of voting in church buildings, several lower federal courts have heard cases where plaintiffs have alleged that using a church as a voting forum violates the Establishment Clause because their beliefs do not permit them to enter a church.<sup>134</sup> While these cases indicate how courts have resolved issues of challenges to the use of churches, much of the rationale is inapplicable when presented with the alternative problem of the effects on a voter’s unconscious. None of the cases have addressed or decided issues where a voter was unaware that voting in a church would alter the outcome of their vote.

In *Berman v. Board of Elections, City of New York*, a Jewish plaintiff claimed that he was unable to enter his designated polling place (a Catholic church), and, therefore, could not vote in the election.<sup>135</sup> However, New York Election Law allowed persons to vote by absentee ballot or, alternatively, in adjoining districts, if their religious beliefs prevented them from entering into the church designated as their voting location.<sup>136</sup> Consequently, the plaintiff’s claim was held moot.<sup>137</sup>

Additionally, the court noted that any “incidental burden” on the plaintiff’s free exercise of religion caused by voting with an absentee ballot or in an

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<sup>130</sup> *Id.* at 588.

<sup>131</sup> *Id.* at 587 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

<sup>132</sup> *Id.* at 590-91.

<sup>133</sup> “Forced” as used here in the broad sense of a magician “forcing” a volunteer to choose a particular card while conducting a trick. See, e.g., *How to Force a Card*, EASY MAGIC TRICKS FREE CARD MAGICIAN SECRETS, <http://www.howtodotricks.com/forcing-card.html> (last visited Jan. 17, 2011).

<sup>134</sup> *Berman v. Bd. of Elections, City of New York*, 420 F.2d 684, 684 (2d Cir. 1969).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 685.

<sup>137</sup> *Id.* at 686.

adjoining district was slight.<sup>138</sup> This “slight” burden did not outweigh the state’s interest in having available to it additional polling places such as the churches.<sup>139</sup>

Much of the court’s decision hinged on the availability of voting alternatives.<sup>140</sup> It appears that the court was able to stop short of a need to further explore the constitutionality of the use of churches when the plaintiff was not entirely deprived of the right to vote.<sup>141</sup> However, voters who are unaware that voting in a church is, in fact, altering the way in which they vote – and thus, in fact, depriving them of the exercise of a free, autonomous vote – will not know to take advantage of these alternatives. Because the court did not address persons who may otherwise be affected and unable to exert a free exercise of religion, the “slight incidental burden” is irrelevant. Indeed, there can be no sort of balancing of burdens when a person is unaware that she may be subject to these “incidental burdens.”<sup>142</sup>

In *Otero v. State Election Board of Oklahoma*, the plaintiff, an atheist mayoral candidate, claimed that his beliefs did not allow him to enter a church.<sup>143</sup> As a result, he argued that he was denied the right to vote.<sup>144</sup> Furthermore, the plaintiff alleged that establishing polling places in churches disadvantaged candidates like himself “by increasing the influence of the religious affiliation of the candidates beyond that which would be the case if voting were held” elsewhere.<sup>145</sup>

Applying the *Lemon* test, the court found that although voting in a church may remind voters of religion, it did not amount to an “excessive government entanglement” with religion as required by the test.<sup>146</sup> In other words, the plaintiff failed to demonstrate entanglement such as the payment of excessive rent to the churches for its use “or that the defendants attempted to promote a particular religion or religion in general.”<sup>147</sup>

Additionally, the court placed great emphasis on the overall convenience of using churches as polling places, a suggestion borrowed from *Berman*.<sup>148</sup> Again, however, because the plaintiff was arguing that he was denied a right to

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *See id.*

<sup>142</sup> *Cf.* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 212 n.4 (2008) (Souter, J., dissenting) (arguing that absentee balloting was an inadequate accommodation for disabled and elderly voters because these voters were unaware such ballots might not be counted).

<sup>143</sup> *Otero v. State Election Bd. of Okla.*, 975 F.2d 738, 738 (10th Cir. 1992).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 740-41 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)).

<sup>147</sup> *Id.* at 741.

<sup>148</sup> *Id.* (citing *Berman v. Bd. of Elections, City of New York*, 420 F.2d. 684, 686 (2d Cir. 1969)).

vote, it is difficult to fully apply the court's reasoning to instances where the voter is unconsciously influenced and unaware of the effects.

Moreover, *Otero's* burden-balancing analysis is inapposite, for two reasons. First, as noted above, it may seem odd to balance burdens when someone is unaware of being burdened. Second, as discussed below, a predictable change in a citizen's vote as the result of state action or state-established procedures may be far more than an "incidental" burden.<sup>149</sup>

Recently, in *Rabinowitz v. Anderson*, the plaintiff argued a violation of the Establishment Clause after arriving at his designated polling place only to be greeted with an anti-abortion banner at the entrance of the parking lot and multiple religious banners and symbols inside the building.<sup>150</sup> Although the plaintiff pointed to studies showing that religious cues may influence the way a person votes and alleged a perception of government endorsement of religion, the court, nonetheless, granted the defendant's motion for summary judgment.<sup>151</sup>

In granting the motion, the court applied the *Lemon* test, finding that there was a secular purpose of providing a forum for voting and that, further, a reasonable person would not believe that the government was endorsing religion.<sup>152</sup> When addressing the test's "excessive entanglement" factor, the court found that the defendant's employees did not participate in religious activity, nor was there proof that they supported the church by placing religious icons near the voting booths.<sup>153</sup> Moreover, the court noted that an individual's subjective feelings were not dispositive, saying that while the plaintiff may feel discomfort when viewing the religious symbols at the church, that feeling does not equate to a constitutional violation in the absence of credible evidence.<sup>154</sup> The court seemed to place great emphasis on the fact that neither the plaintiff nor any other individuals had claimed to believe that the religious symbols were the government's speech and not the church's.<sup>155</sup>

In this case, again, the plaintiff had available alternatives. Alleging an influence of religious cues probably had little impact on the court's decision because of the plaintiff's awareness of the cues and the availability of alternatives. Additionally, when the court reasoned that negative "subjective feelings" were not enough, it is important to consider instances when there are no consequent feelings at all because the voter is unaware. This is an instance

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<sup>149</sup> See *infra* notes 167-170, 196-198 and accompanying text.

<sup>150</sup> *Rabinowitz v. Anderson*, No. 06-81117 Civ., at 2 (S.D. Fla. July 31, 2007) (order granting defendant's motion for summary judgment).

<sup>151</sup> Plaintiff's First Amended Complaint at ¶ 17, ¶ 33, *Rabinowitz v. Anderson*, No. 06-81117 Civ. (S.D. Fla. Mar. 18, 2007).

<sup>152</sup> *Rabinowitz v. Anderson*, No. 06-81117 Civ., at 7 (S.D. Fla. July 31, 2007) (order granting defendant's motion for summary judgment).

<sup>153</sup> *Id.* at 8.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 10.

where much of the court's support for its decision would have little applicability in a case where the plaintiff alleges that they were unaware of the church's effect on their voting choices.

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Although case law has addressed – and rejected – the particular question of whether voting in church buildings is unconstitutional, we suggest that, for a number of reasons, courts' analysis is inapplicable to a similar claim grounded on the PPP Effect. The case law holds that the presence of alternative voting opportunities (whether in alternative locales or via absentee voting) defeats a plaintiff's claim, or else that any imposition on a citizen to vote in a particular place such as a church building is a minimal or incidental burden, outweighed by the state's interest or convenience in using such a locale.<sup>156</sup> We suggest, however, that the unconscious nature of the bias makes it difficult, if not impossible, for a plaintiff to identify when it would be appropriate to seek an alternative voting opportunity. Further, having one's ostensibly free and autonomous vote influenced or even changed outright by subtle situational or environmental cues may constitute far more than an "incidental" burden. Finally, applying the coercion test demonstrates a straightforward way in which voting in a church building can compel a citizen to vote consistently with a particular set of religious values, even if he or she did not intend to do so, thus violating the separation of church and state.

#### IV. ANALOGIES

Again, much of the reasoning of the cases rejecting challenges to voting in churches has failed to consider the *unconscious* influence of the voter's surroundings. A smattering of other cases, however, have argued that similar influences may have affected voters' decision-making – for instance, the possibility that the order of candidates' names on a ballot might produce an unconscious bias that benefits a candidate who is in a particular position on that ballot. Such arguments have met with mixed results. We review some of that case law here. In the next section, we build on recent literature in the context of abortion rights, and suggest that an emphasis on the unconscious effect of situational cues on voter's decisions, potentially changing the very choice that voter would have made, may support a claim of improper influence or substantial burden on a citizen's fundamental right to vote.

Since at least the 1950s, academics, and a few courts, have subscribed to the "conventional wisdom" that the order in which names or choices are listed on a ballot can affect voters' decisions.<sup>157</sup> Much of the scholarship investigating

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<sup>156</sup> See, e.g., *Berman v. Bd. of Elections, City of New York*, 420 F.2d 684, 684 (2d Cir. 1969).

<sup>157</sup> R. Michael Alvarez et al., *How Much Is Enough? The "Ballot Order Effect" and the Use of Social Science Research in Election Law Disputes*, 5 ELECTION L.J. 40, 40-41 (2006) (using the term "conventional wisdom" and discussing academic and judicial approaches to the question); Laura Miller, Note, *Election by Lottery: Ballot Order, Equal Protection, and*



this question has examined whether being listed first on a ballot tends to result in preferential treatment by voters, a “primacy” effect. More recent studies have also examined a “recency” effect, i.e., whether someone being listed last receives more votes.<sup>158</sup> Empirical evidence tends to be mixed, often depending on the type of election (e.g., general or primary), but the bulk of the findings indicate that some order effect exists.<sup>159</sup>

Nevertheless, most (but not all) courts have rejected claims of ballot order effects as constituting constitutional infringement under the Equal Protection Clause.<sup>160</sup> Some critics acknowledge that the ballot order effect may exist, but that the state of the literature is such that caution is warranted before using the empirical findings to support legal rulings.<sup>161</sup> Others suggest that even if the

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*the Irrational Voter*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 373 (2010) (reviewing studies and court decisions). A number of empirical studies have found such effects. *E.g.*, Daniel E. Ho & Kosuke Imai, *Estimating Casual Effects of Ballot Order from a Randomized Natural Experiment: The California Alphabet Lottery, 1978-2002*, 72 PUB. OPINION Q. 216, 216 (2008) (documenting small effects); Jonathan GS Koppell & Jennifer A. Steen, *The Effects of Ballot Position on Election Outcomes*, 66 J. POL. 267, 279-80 (2004); Jon A. Krosnick et al., *An Unrecognized Need for Ballot Reform: The Effects of Candidate Name Order on Election Outcomes*, in RETHINKING THE VOTE: THE POLITICS AND PROSPECTS OF AMERICAN ELECTION REFORM 51, 52 (Ann N. Crigler et al. eds., 2004); Joanne M. Miller & Jon A. Krosnick, *The Impact of Candidate Name Order on Election Outcomes*, 62 PUB. OPINION Q. 291, 291 (1998). *But see* Alvarez et al., *supra*, at 51-52 (finding few effects and suggesting caution). For recent reviews of the literature, see Alvarez et al., *supra*, at 41-43 (discussing recent literature); Miller, *supra*, at 381-89; Marc Meredith & Yuval Salant, *On the Causes and Consequences of Ballot Order Effects* 3 (Kellogg Sch. of Mgmt., Working Paper 2007) (on file with authors) (discussing recent studies on how ballot placement influences elections); *First Among Equals?*, KELLOGG INSIGHT (Oct. 2010), [http://insight.kellogg.northwestern.edu/index.php/Kellogg/article/first\\_among\\_equals](http://insight.kellogg.northwestern.edu/index.php/Kellogg/article/first_among_equals). Even Hollywood has become involved. *See* MAN OF THE YEAR (Universal Studios 2007) (Robin Williams plays a comedian who runs for President and is elected due to a computer malfunction based in part on ballot order).

<sup>158</sup> *E.g.*, Alvarez et al., *supra* note 157, at 52; Meredith & Salant, *supra* note 157, at 10.

<sup>159</sup> *See* Miller, *supra* note 157.

<sup>160</sup> *See* Alvarez et al., *supra* note 157, at 40-41.

<sup>161</sup> *E.g.*, *id.* at 41. They suggest a general standard for evaluating such claims along the lines of other burden-shifting approaches: first, a plaintiff should show by “significant evidence” that the “effect is likely to change election outcomes.” *Id.* at 53. The State “should then have to produce real evidence of significant savings” that would outweigh a change such as ballot randomization or rotation. *Id.* Clearly, such costs would vary by state; one estimate for the 1994 elections in Alaska of \$137 per voting precinct (a total of about \$64,000) would lead to an outlay in California of something more than \$3 million. *See* Meredith & Salant, *supra* note 157, at 19 n.14. As Miller points out, financial cost is not necessarily a fatal objection to, for instance, rotation schemes of the sort that many states use. Miller, *supra* note 157, at 403. Of course, there are other, non-monetary costs to consider. *See* Alvarez et al., *supra* note 157, at 52-53.

effect is demonstrable, it cannot serve as the basis for a cause of action.<sup>162</sup> On this argument, either the effect should be acknowledged and steps should be taken to address such effects *ex ante* – i.e., address it as a policy matter rather than a legal one – or a jurisdiction should simply acknowledge that the effect may (or will) occur and concede that it is part of the vagaries of the democratic process.<sup>163</sup> This latter approach seems to be the line taken by one federal district court, which held that despite the ideal of the informed voter, knowledgeable about the issues and the candidates, and despite the fundamental, crucial, constitutional right to vote, there is in fact “no constitutional right to a wholly rational election, based solely on reasoned consideration of the issues and the candidates’ positions, and free from other ‘irrational’ considerations.”<sup>164</sup>

There are several difficulties with these approaches. First, Professor Huefner is certainly correct that procedures should be examined *ex ante*, especially when empirical evidence suggests a potential for voter bias under that procedural regime.<sup>165</sup> When it is clear, however, that a certain proportion of voters may have been affected by the order of choices on a ballot – or by the location where a vote was held – then a *prima facie* case might plausibly be made that some constitutional burden has been imposed on voters, and that burden should be evaluated relative to the state’s interests.<sup>166</sup> This evaluation should be similar to that required when black prospective jurors are disproportionately eliminated through peremptory strikes,<sup>167</sup> or when a pattern of discrimination in hiring is evident.<sup>168</sup> This approach is consistent with previous U.S. Supreme Court case law indicating the importance of balancing these relative interests, and with the approaches of even those skeptical of the ballot order effect.<sup>169</sup> Under current law, such balancing is appropriate in cases dealing with state provisions that address “the voting process itself,” as well as the “mechanics of the voting process,” to assess whether the right to vote is impermissibly burdened.<sup>170</sup>

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<sup>162</sup> Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 297 (2007).

<sup>163</sup> *Id.* at 298.

<sup>164</sup> *Clough v. Guzzi*, 416 F. Supp. 1057, 1067 (D. Mass. 1976); *see also* *New Alliance Party v. N.Y. State Bd. of Elections*, 861 F. Supp. 282, 295 (S.D.N.Y. 1994) (“The Constitution does not protect a plaintiff from . . . the irrationality of the voting public . . .”).

<sup>165</sup> *See* Huefner, *supra* note 162, at 307.

<sup>166</sup> *See, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345 (1995).

<sup>167</sup> *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

<sup>168</sup> *E.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>169</sup> *See Andersen v. Celebrezze*, 460 U.S. 780, 789 (1983); *supra* note 161 and accompanying text (discussing issues with measures to ameliorate the ballot order effect, including various costs).

<sup>170</sup> *McIntyre*, 514 U.S. at 344-45; *cf. Baker v. Carr*, 369 U.S. 186, 208 (1962) (“A citizen’s right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . .”).

But more important, the problem with the ballot order effect – and with the PPP Effect – is *not* that votes are cast randomly or irrationally, as the courts in *Clough* or *New Alliance Party* implied.<sup>171</sup> Rather, the concern is that state provisions for how a ballot is designed, how an election is conducted, or where voting is held “*systematically* steers some proportion of voters to certain candidates [or choices] over others.”<sup>172</sup> That is, unlike the situation in *Clough* and *New Alliance Party*, voters, policymakers, candidates, election officials, and courts now have a legitimate empirical basis to expect that a church polling place will lead, on average, to more votes for a conservative candidate or against a “liberal” issue; a school polling place will lead, on average, to more votes in favor of educational issues, etc. Moreover, as noted, this happens outside the voter’s awareness. We turn now to this important issue.

#### V. THE UNCONSCIOUS NATURE OF THE PPP EFFECT

The sort of challenges to balloting procedures reviewed above have generally not been successful, even when incorporating findings or expert testimony from the social sciences. Again, however, missing from much of this analysis has been consideration of the *unconscious* nature of the psychological effect on voting decisions.

Recent scholarship has drawn connections between abortion rights and voting rights, and the problems that can arise when state action interferes with the decision-making involved in each.<sup>173</sup> Indeed, *Planned Parenthood of Southeastern Pennsylvania v. Casey* itself analogized to voting procedures (e.g., ballot access) in analyzing the extent to which the state can restrict the availability of an abortion (or the ballot box).<sup>174</sup> A further connection, however, informs the discussion here, emphasizing the role of autonomous decision-making in each context, and the problems that can arise when the state’s interference leads to an effect on choices of which the decisionmaker is unaware. Developing this connection, one of the Authors recently suggested a new view of informed consent statutes in the abortion law context, grounded in empirical social science on emotion and persuasion.<sup>175</sup> Under *Casey*, a state may lawfully seek to dissuade a woman from pursuing an abortion by requiring that she receive particular, state-mandated information purporting to

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<sup>171</sup> See *New Alliance Party v. N.Y. State Bd. of Elections*, 861 F. Supp. 282, 295 (S.D.N.Y. 1994); *Clough v. Guzzi*, 416 F. Supp. 1057, 1067 (D. Mass. 1976).

<sup>172</sup> Miller, *supra* note 157, at 399.

<sup>173</sup> E.g., Kenneth Agran, *When Government Must Pay: Compensating Rights and the Constitution*, 22 CONST. COMMENT. 97, 132-34 (2005).

<sup>174</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992). As Professor Agran points out, however, this is a “curious” analogy because the sort of restriction addressed in *Casey* could easily be found “coercive and patently unconstitutional if applied to the right to vote.” Agran, *supra* note 173, at 132.

<sup>175</sup> Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 WASH. L. REV. 1, 6 (2008).

ensure that she make a fully “informed” decision.<sup>176</sup> This is so even if that information is clearly designed to persuade the woman to forego childbirth in favor of abortion, so long as the information is “truthful and not misleading.”<sup>177</sup> A new perspective, however, suggests a broader reading of *Casey* and of its “truthful and not misleading” language. Specifically, it builds on social science research demonstrating that even “truthful” information may nevertheless be misleading when it takes advantage of individuals’ likelihood to be inappropriately persuaded by emotional biases. That is, empirical research demonstrates that individuals tend to be more easily persuaded when in a fearful or anxious emotional state – an emotional state likely to be elicited by the information states’ informed consent statutes mandate.<sup>178</sup> Accordingly, “truthful and not misleading” information that evokes an emotion that renders a woman more susceptible to being persuaded to make a choice she otherwise would not, may constitute the “undue burden” on her decision-making process that *Casey* proscribes.<sup>179</sup> Again, the ostensible rationale for the informed consent statutes is to provide women with objective information on which to base an informed, deliberative, reasoned, autonomous decision. The reality may be, however, that the decision is made as a result of induced emotion that unconsciously biases her decision, making it anything but autonomous, and thus unduly burdened – and thus unconstitutional.

Peter Huang has made a related point in the context of securities regulation.<sup>180</sup> As with informed consent statutes, securities regulation law is designed to facilitate informed, rational, deliberative decision-making.<sup>181</sup> That decision-making, however, may be inappropriately biased by emotional cues, just as a woman’s decision about an abortion might be biased by the emotions induced by the state-mandated information. In particular, Professor Huang reviews the substantial empirical research showing that positive mood can lead to more “superficial,” less in-depth decision-making, which can in turn lead to increased persuadability and thus over-optimism about a stock’s likely performance.<sup>182</sup> He notes the potential for puffery and over-optimistic language in stock prospectuses to induce such positive mood and thus risky

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<sup>176</sup> *Casey*, 505 U.S. at 882.

<sup>177</sup> *See id.*

<sup>178</sup> Blumenthal, *supra* note 175, at 36.

<sup>179</sup> *Id.* at 38.

<sup>180</sup> *See* Peter H. Huang, *Moody Investing and the Supreme Court: Rethinking the Materiality of Information and the Reasonableness of Investors*, 13 SUP. CT. ECON. REV. 99, 103 (2005).

<sup>181</sup> *See, e.g.*, *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953) (stating that the purpose of the SEC’s mandatory disclosure requirement is “promoting full disclosure of information thought necessary to informed investment decisions”).

<sup>182</sup> Huang, *supra* note 180, at 103.

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investing, even given the ordinarily required disclaimers that traditional securities law mandates.<sup>183</sup>

Similarly, situational cues in a polling place prime attitudes and beliefs that can influence and even change a citizen's putatively autonomous decision. Just as an investor's decision about a stock, or a woman's decision regarding an abortion, should be as informed, reasoned, and deliberative as possible,<sup>184</sup> so too should a citizen's vote. Indeed, the basis for privileging a citizen's right to vote over, for instance, another citizen's or a candidate's free speech rights – i.e., the basis for subordinating a free speech right to the right to vote – is to ensure that that vote is cast free of intimidation or interference. An informed, reasoned, deliberative choice made as the result of informed political decision-making, of an autonomous decision process, is the benchmark for a citizen's ballot decision. When manipulative emotional cues interfere with a woman's abortion decision, that interference might constitute an unconstitutional, undue burden. When symbolic situational cues in a church, a school, or a fire station prime extraneous attitudes, mindsets, or norms that interfere with a voter's autonomous decision-making process, those cues have imposed an unconstitutional, "substantial burden" on that citizen's right to vote.<sup>185</sup>

We can take the analogy further. Earlier we suggested that even where the state may not be deliberately trying to influence voters by using a church as a polling place, that use may nevertheless fail the endorsement test.<sup>186</sup> However, we might also envision a less benign process, where, for instance, a particular polling place is selected (or not) based on a particular referendum issue or candidate choice.<sup>187</sup> More egregiously, a particular place might be selected (or not) for a certain issue or candidate choice based on the demographics of a particular locale. We might – not altogether fancifully – envision even more manipulative conduct, where particular symbolic cues are placed in an apparently neutral polling place in order to change the environment there and induce unconscious attitudes or mindsets. Just as states should not be allowed to deliberately mislead women seeking an abortion by inducing persuasive but biasing emotion even via truthful information, neither should voters be

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<sup>183</sup> *Id.* at 122-27.

<sup>184</sup> We of course do not mean that emotion does not or should not play a role in judgments as personal and significant as ones regarding abortion. We distinguish, however, such personal emotion from the potentially biasing emotion induced by politicized, albeit truthful, information presented by the State for that purpose. For examples see Blumenthal, *supra* note 175, at 27; Julie A. Mertus, *Challenging Fake Abortion Clinics: Protecting Women's Privacy Interests Without Violating the First Amendment*, 15 N.Y.U. REV. L. & SOC. CHANGE 547, 548 (1986-1987).

<sup>185</sup> See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189-90 (2008).

<sup>186</sup> See *supra* Part III.B.2.

<sup>187</sup> The benignity of such selection is, to be sure, in the eye of the beholder. For instance, supporters of funding for education, a laudable goal, might applaud the possibility of increasing favorable attitudes simply by holding education-related votes in schools.

subjected to manipulation of their decision and their vote via manipulation of subtle cues in the polling place.<sup>188</sup>

In evaluating whether the emotions induced by informed consent abortion statutes might inappropriately bias a woman's decision – and thus constitute an impermissible undue burden – previous scholarship noted that although a substantial body of social science findings supported the doctrinal argument, empirical research that directly addressed the question had not yet been conducted.<sup>189</sup> Similarly, Professor Huang's suggestions are supported by the background literature on emotion, persuasion, and links between affect-laden stock information and the type and volume of trading in a particular stock;<sup>190</sup> research testing the direct links between puffery, induced positive mood, and over-optimism or risky investing, however, is unavailable. Here, however, a growing body of research does clearly demonstrate the PPP Effect, showing that situational contextual cues in a polling place can influence, and potentially change, an individual's choice.

The unconscious nature of the PPP Effect has additional implications. First, it shows the fundamental difficulty of courts' suggestion that simply providing additional information to voters can help overcome such effects.<sup>191</sup> Substantial empirical evidence belies the suggestion that simply advising someone of a potential decision-making bias eliminates that bias.<sup>192</sup> That is, more information, whether it is more substantive information about the target of the voter's decision, or even information about the bias itself, does not necessarily ameliorate the presence of the bias. Thus, even fully informed voters who intend to vote a particular way may be unconsciously affected by the location in which they vote.<sup>193</sup> Indeed, informing individuals about a particular bias may often lead to a "rebound" or "overcorrection" effect, where the decisionmaker tries to correct for the bias he learned about, but does so to too great an extent and makes a decision that is biased in the opposite direction.<sup>194</sup>

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<sup>188</sup> At its most extreme, such deliberate manipulation might give rise to criminal liability under the Civil Obedience Act of 1967, 18 U.S.C. § 241 (2006), though this would be a difficult case to make. See Jordan T. Stringer, Comment, *Criminalizing Voter Suppression: The Necessity of Restoring Legitimacy in Federal Elections and Reversing Disillusionment in Minority Communities*, 57 EMORY L.J. 1011, 1025-26 (2008).

<sup>189</sup> Blumenthal, *supra* note 175, at 38 n.187.

<sup>190</sup> Huang, *supra* note 180, at 103-04.

<sup>191</sup> See Miller, *supra* note 157, at 400-01 & nn.148-150.

<sup>192</sup> See, e.g., Ehud Guttel, *Overcorrection*, 93 GEO. L.J. 241, 242 (2004).

<sup>193</sup> This may also call into question Professor Huefner's perhaps overly optimistic suggestion that voters will take advantage of opportunities to inform themselves about ballots before election day. See Huefner, *supra* note 162, at 323. Even if they did make the effort to do so, the additional information would likely not address the unconscious bias.

<sup>194</sup> See, e.g., Guttel, *supra* note 192, at 245 (stating that the legal system sometimes corrects for overcorrection); C. Neil Macrae et al., *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808, 815-16 (1994) (documenting overcorrection empirically); Daniel M. Wegner & John A. Bargh, *Control*

Second, despite criticisms by courts and commentators, the unconscious nature of the PPP Effect demonstrates the viability of at least a prima facie claim of constitutional infringement, especially given the emerging empirical evidence to support the PPP Effect. The right to vote – lauded as so fundamental in the cases reviewed above – implicates, if nothing else, “the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.”<sup>195</sup> The PPP Effect demonstrates that the location in which a citizen votes can actually influence the substantive vote he casts, helping to demonstrate the potential lack of integrity of that process. As such there is potential injury both to the voter and to the process, satisfying the first prong of the *Anderson* test.<sup>196</sup> Whether that injury is held to be severe, triggering strict scrutiny,<sup>197</sup> or less so, triggering a lower level of scrutiny, it does prompt the need for a showing by the State of the “precise interests” justifying the burden of potentially biasing a voter’s choice.<sup>198</sup> Indeed, this is directly so under *Crawford*.<sup>199</sup> Although there is no “litmus test” for determining the severity of a burden on voters, even if that burden seems “slight,” the State must demonstrate that its interests are “sufficiently weighty” to justify the imposition on voters.<sup>200</sup> Here, it is clear that a predictable unconscious effect on a citizen’s voting choice will impose a burden on some recognizable, and potentially significant fraction of voters. The balancing that *Anderson* and *Crawford* seem to entail<sup>201</sup> thus calls for states to justify the use of particular polling places – churches and schools in particular, and perhaps polling places at all<sup>202</sup> – when the PPP Effect can demonstrate this burden.

Indeed, third, the issues of proof that would be necessary to make a case based on the PPP Effect can also draw on literature concerning unconscious effects and constitutional harm. In the abortion literature, the Court has

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*and Automaticity in Social Life*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 446 (Daniel T. Gilbert et al. eds., 1998).

<sup>195</sup> *Burdick v. Takashi*, 504 U.S. 428, 441 (1992).

<sup>196</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983).

<sup>197</sup> As suggested by some commentators. See, e.g., Miller, *supra* note 157, at 396.

<sup>198</sup> *Anderson*, 460 U.S. at 788.

<sup>199</sup> *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008).

<sup>200</sup> *Id.*

<sup>201</sup> A number of commentators have noted the uncertainty in which *Crawford* and other recent voting rights cases have left the field. See, e.g., Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507, 523-24 (2008). There is certainly ambiguity about the standard to be applied in such cases – i.e., strict scrutiny or a lower level – but *Crawford* itself was at pains to emphasize that it was retaining *Anderson*’s “flexible standard.” *Crawford*, 553 U.S. at 190 (“[A] court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the ‘hard judgment’ that our adversary system demands.”).

<sup>202</sup> See *infra* Part VI.

recently indicated a preference for as-applied challenges, rather than facial challenges, where a court can focus on “discrete and well-defined instances” in which a “particular condition” would occur that might make a provision unduly burdensome.<sup>203</sup> Under that approach, the important question can turn on whether a “large fraction” of individuals would be subject to a particular bias resulting from state action<sup>204</sup> – such as the decision to hold polling in a church, a school, or a similar venue – and whether specific groups of voters might be particularly susceptible to that bias.<sup>205</sup> Scholarship examining such biases under the *Casey* framework suggested that empirical support for those two propositions was “absent from the literature;”<sup>206</sup> in the context of the PPP Effect, however, such empirical support exists and can be easily applied.<sup>207</sup>

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The PPP Effect gives an empirical basis for a polling place challenge under *Anderson* and *Crawford*. This may especially be so for particular locale-relevant issues or for referenda, issues, or candidates where, for instance, priming conservative or religious values might make a difference in a citizen’s vote. Moreover, we suggest that much of the case law that might otherwise reject polling place challenges may be inapposite, because it does not take into account the possibility of *unconscious* effects. Drawing on scholarship in other domains – abortion jurisprudence and securities regulation – we suggest that this unconscious PPP Effect is legally problematic. Courts, commentators, policy-makers, and voting-rights advocates should thus take a fresh look at these issues.

## VI. CONVENIENCE VOTING

We have suggested that there is an empirical basis for re-evaluating some challenges to voting in churches, especially for issues or candidates for which religious or conservative attitudes might be particularly relevant. That same empirical basis might ground a re-evaluation of voting in other contexts in which cues from the polling place might be especially salient; the clearest example is schools and education issues, although fire stations, armories, fraternal lodges, and other similar locales where voting is held might be just as

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<sup>203</sup> *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (stating that as-applied challenge was more appropriate in that case than facial attacks); *see also* Blumenthal, *supra* note 175, at 34 & n.170.

<sup>204</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992).

<sup>205</sup> Blumenthal, *supra* note 175, at 34 n.171.

<sup>206</sup> *Id.*

<sup>207</sup> *See supra* Part II. The analogy above to securities regulation is also relevant for issues of proof in the PPP context. In both areas, analysis of causation “can proceed in the [traditional] formal way,” that is, existing case law and approaches can be applied, simply considering as well the influence of emotion (in the securities regulation context) or the unconscious influence of the polling place environment. *See* Blumenthal, *supra* note 175, at 35-36.



relevant. Thus, broadly, these empirical findings might serve as a basis for challenging the choice of particular polling places that might have some inappropriate effect on voters' choices.

Even more broadly, however, the findings lend support to a growing move away from using any polling places at all.<sup>208</sup> That is, multiple scholars and advocates have suggested a move toward absentee or convenience voting, whether that is done entirely by mail, as at least one state has mandated,<sup>209</sup> or entirely over the internet,<sup>210</sup> or in some other fashion. Both in legal and political science academia, an increasing amount of research has been conducted on convenience voting, and our discussion complements insights gained from those findings.<sup>211</sup>

Most academic research has focused on whether convenience voting – because it is more convenient – increases voter turnout.<sup>212</sup> Overall, it seems not to do so, at least substantially – rather, the level of absentee voting increases despite overall participation staying about level.<sup>213</sup> In other words, even though voter turnout stays level, more citizens take advantage of the opportunity to vote away from a polling place.<sup>214</sup> Other studies examine whether the demographics of those taking advantage of convenience voting differs from those who vote at polling places – suggesting, for instance, that higher income or non-minority voters do so more than others.<sup>215</sup> Perhaps surprisingly, the research seems to suggest few such differences.<sup>216</sup> Perhaps unsurprisingly, most practical discussion in different jurisdictions has

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<sup>208</sup> We thus find ourselves in agreement with Justice Scalia in *Crawford*: “[O]ne can predict lawsuits demanding that a State adopt voting over the Internet or expand absentee balloting.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 208 (2008). However, we do not think we arrived at the same place in the same way.

<sup>209</sup> Since 1998, voting in Oregon has been done solely by mail. *E.g.*, Paul Gronke, *Early Voting Reforms and American Elections*, 17 WM. & MARY BILL RTS. J. 423, 424 (2008). In most counties in Washington, voting is conducted by mail. *Id.* at 429.

<sup>210</sup> *See* Gronke et al., *supra* note 89, at 441 tbl.1 (identifying jurisdictions that use internet voting).

<sup>211</sup> For useful reviews of convenience voting see *Id.*; Jeffrey A. Karp & Susan A. Banducci, *Going Postal: How All-Mail Elections Influence Voter Turnout*, 22 POL. BEHAV. 223 (2000) (reviewing literature on all-mail voting and assessing impact on voter turnout).

<sup>212</sup> *See* Gronke, *supra* note 209, at 434.

<sup>213</sup> *E.g.*, Jeffrey A. Dubin & Gretchen A. Kalsow, *Comparing Absentee and Precinct Voters: A View over Time*, 18 POL. BEHAV. 369, 388 (1996).

<sup>214</sup> *See also* Karp & Banducci, *supra* note 211, at 224.

<sup>215</sup> *Id.* at 234.

<sup>216</sup> *E.g.*, Matt A. Barreto et al., *Do Absentee Voters Differ from Polling Place Voters? New Evidence from California*, 70 PUB. OPINION Q. 224, 232 (2006) (stating that absentee voters do not differ generally from non-absentee voters); *see also* Gronke, *supra* note 209, at 450 (finding that absentee voters are more partisan and have a longer average commute, but income was not associated with likelihood of earlier voting).

concerned whether convenience voting reduces costs; most claims are that it does, despite little formal research.<sup>217</sup>

One recent suggestion is that eliminating polling places – and thus eliminating poll workers – would help reduce or eliminate implicit discrimination and bias by poll-workers.<sup>218</sup> We add two further points. First, being mailed a ballot or other information at home reminds a citizen of an upcoming vote, affords the opportunity to develop informed discussion with friends and family, and affords an increased opportunity to study the ballot and any associated information.<sup>219</sup> This leads – it is hoped – to more informed voting decisions, approaching the desideratum of the voting process and, not incidentally, addressing courts' criticisms, noted above, of some voting challenges.<sup>220</sup> Second, of course, our overall discussion of the PPP Effect adds another justification for eliminating polling places altogether; doing so will help alleviate the potential to inappropriately bias voters.<sup>221</sup>

## VII. FURTHER DIRECTIONS

Attention to the subtle influence of voting location has important constitutional implications. The same subtle influence of unconscious priming, however, is likely relevant to many other legal contexts; that is, the PPP Effect is likely a special instance of the broader contextual priming effect found so reliably in psychological research. Legal academia has largely neglected such a discussion, however, and empirical researchers have not tested the potential impact of such primes in those other legal contexts. We thus close by encouraging both empirical research into the effect of contextual priming on attitudes and behavior in two such areas,<sup>222</sup> and the application of such research to law and policy.

### A. *Abortion*

Critics of the Supreme Court's abortion jurisprudence have objected that many state restrictions ostensibly designed to protect women's decision-making about abortion, and the cases upholding those restrictions, are in fact

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<sup>217</sup> See Gronke et al., *supra* note 89, at 448-49 (finding no academic studies on costs but indicating election administrators' addressing of the issue).

<sup>218</sup> Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1, 49 (2009) (suggesting, in a discussion of potential racial discrimination by poll workers, the possibility of using exclusively mail or internet voting).

<sup>219</sup> See Gronke, *supra* note 209, at 438 (discussing research suggesting early voting leads to more informed voting in some groups of voters).

<sup>220</sup> See *supra* notes 191-194.

<sup>221</sup> At least one of the researchers identifying the effect has noted this as well. See Rutchick, *supra* note 45, at 23.

<sup>222</sup> Other examples might easily be adduced.

paternalistic.<sup>223</sup> Others add that *Casey*<sup>224</sup> infringes on women's dignity in allowing states to impose such restrictions.<sup>225</sup> Most recently, as noted above, commentators have used the social science literature, psychological research in particular, to suggest that states infringe on the decision process itself when mandating both that women be presented with specific informed consent material (designed to persuade her not to have an abortion)<sup>226</sup> or, more specifically, that women view ultrasounds of their babies before making the abortion decision.<sup>227</sup>

Building on those suggestions and extending the discussion presented here, research might investigate the effect on women's abortion decisions when subtle (or not so subtle) contextual cues are present in ostensibly "truthful and not misleading"<sup>228</sup> informed consent material presented to a woman about to make her decision. Even apart from the explicit cues designed to influence her decision – videos, color photographs, ultrasounds, etc.<sup>229</sup> – implicit cues may affect her decision as well. Indeed, extending the logic of the research presented here, a poster displayed in a clinic discussion room of a happy child nestled in her mother's arms might serve as well to influence a woman's decision as the most extreme photos of a "wastebasket full of dead fetuses"

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<sup>223</sup> Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 489 (1995) (framing *Casey* as a "paternalis[ti]c [decision that] undermines the independence of women as decisionmakers and furthers the stereotype that women are emotional and irrational decisionmakers, easily swayed by authority figures"); Paula E. Berg, *Lost in a Doctrinal Wasteland: The Exceptionalism of Doctor-Patient Speech Within the Rehnquist Court's First Amendment Jurisprudence*, 8 HEALTH MATRIX 153, 171-72 (1998); see also Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 HARV. J. L. & GENDER 425, 456 (2006) (suggesting that for some, "the 'informed consent' requirements in *Casey* [may] reflect a gender-based paternalism toward women"); Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 144 (1992) ("The Court's analysis of informed consent and women's health is patronizing, selective, and in part contrary to fact."); Heather A. Smith, Comment, *A New Prescription for Abortion*, 73 U. COLO. L. REV. 1069, 1079 (2002) ("*Casey* . . . legalizes society's historically paternalistic approach to women.>").

<sup>224</sup> Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

<sup>225</sup> E.g., Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1694 (2008).

<sup>226</sup> Blumenthal, *supra* note 175, at 5.

<sup>227</sup> *Id.* at 25; Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 351 (2008).

<sup>228</sup> *Casey*, 505 U.S. at 882 ("In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available is truthful and not misleading, the requirement may be permissible."). For a fuller discussion of the potential manipulative effects of such information, suggesting that even such truthful information may in fact be misleading, see Blumenthal, *supra* note 175, at 5.

<sup>229</sup> See Blumenthal, *supra* note 175, at 8.

reportedly shown to some women.<sup>230</sup> Alternatively, presenting the informed consent material in a setting other than the medical clinic – again, we could imagine a venue conducive to more maternal or baby-oriented thoughts – might also affect her decisions. At least one state requires women to be provided with a video depicting a fetus at various stages during the pregnancy, including brain and heart function and the presence of external members and internal organs, and presenting adoption as the preferred choice to abortion.<sup>231</sup> Physicians are required to encourage women to view the video at the clinic as opposed to letting them take it home with them.<sup>232</sup> However, we might speculate that viewing the video in the family context of the home, surrounded by familiar contextual cues that might prime family concepts, might in fact encourage women to think in terms of having the baby and raising it there. If so, states or clinics seeking to discourage abortion are in fact doing themselves a disservice by discouraging women from watching the videos at home.

This is all, of course, speculation, designed to encourage further empirical research more narrowly tailored (so to speak) to such constitutionally relevant topics. We do not advocate any of the measures about which we speculate – indeed, done deliberately, such manipulation by the state might easily violate *Casey*'s prohibition against burdening a woman's exercise of her decision-making autonomy.<sup>233</sup> Elsewhere one of us has called for similar research on the effect of informed consent information;<sup>234</sup> this is simply another example of pointing out the relevance of psychological research in general, priming research in particular, and suggesting specific research that might be conducted.

#### B. *Negotiation*

Recall Vohs and colleagues' findings of the powerful effect of priming with money.<sup>235</sup> Simple contextual cues that activated study participants' concepts of money – playing Monopoly, a computer screensaver showing money, unscrambling sentences such as “I cashed a check,” even sitting near posters displaying money – significantly influenced individuals' subsequent behavior.<sup>236</sup>

Similarly, in the legal environment, even subtle reminders about money may affect attorney-client discussions. If something as presumably innocuous as a briefcase located in the same room as a study participant can increase his competitive behavior,<sup>237</sup> then the attitudes, perceptions, and interpersonal

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<sup>230</sup> Mertus, *supra* note 184, at 554-55.

<sup>231</sup> See Blumenthal, *supra* note 175, at 8.

<sup>232</sup> See *id.*

<sup>233</sup> See *id.* at 32.

<sup>234</sup> *Id.* at 27.

<sup>235</sup> See *supra* note 15 and accompanying text.

<sup>236</sup> *Concept of Money*, *supra* note 15, at 209-10.

<sup>237</sup> Kay et al., *supra* note 14, at 12.

dynamics of attorney and client in, for instance, an initial interview may be significantly affected by similar cues in the office or by explicit discussion of the potential financial outcome of the case. Commentators often note that plaintiffs at least express non-financial motivations in bringing suits, in particular the desire to obtain apologies,<sup>238</sup> restore reputation<sup>239</sup> or personal dignity or integrity,<sup>240</sup> or simply have one's "day in court."<sup>241</sup> To the extent that these are valid and desirable preferences, unconsciously reorienting litigants toward a more financial, potentially competitive, mindset might have detrimental effects.<sup>242</sup> Similar influences might affect an attorney rendering advice to a particular business, firm, or corporate client.<sup>243</sup> An attorney who meets a client at the business office, for instance, might be subject to subliminal money or business primes, thus unconsciously focusing overmuch on competitive, financial, or zero-sum advice to the exclusion of alternative perspectives.<sup>244</sup> Most strikingly, subtle contextual cues in the venue in which depositions, settlement negotiations, or other meetings between opposing attorneys occur might have some effect on perceptions, attitudes, and competitive perspectives, yielding potentially too little focus on cooperation and mutual benefit.<sup>245</sup>

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<sup>238</sup> See Jennifer K. Robbennolt, *What We Know and Don't Know About the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. U. L. REV. 1009, 1016-19 (2005) (discussing survey and experimental research showing that litigants often bring lawsuits in part in search of apologies); cf. Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 510-11 (2003) (hypothesizing that litigants might accept smaller financial compensation if they receive apologies).

<sup>239</sup> E.g., Frank Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 19-22 (2000).

<sup>240</sup> E.g., Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 706-11 (2005); Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L.Q. 373, 422 (2009).

<sup>241</sup> E.g., Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 205 (2005); Cross, *supra* note 239, at 19; Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 99 (1989); Roy D. Simon, *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 63 (1985).

<sup>242</sup> On the other hand, taking a less emotional or (at least potentially) realistic approach to a lawsuit may be beneficial as well. E.g., Christopher K. Hsee & Yuval Rottenstreich, *Music, Pandas, and Muggers: On the Affective Psychology of Value*, 133 J. EXPERIMENTAL PSYCHOL.: GEN. 23, 23-24 (2004).

<sup>243</sup> See Jeremy A. Blumenthal, *Property Law: A Cognitive Turn*, 17 PSYCHONOMIC BULL. & REV. 186, 188 (2010).

<sup>244</sup> See *id.*

<sup>245</sup> See *id.* Of course, this unconscious priming is quite separate from deliberate bargaining or negotiation tactics related to venue, such as insisting on meeting "at 'my place' rather than yours, knowing that you tend to bargain less fiercely when you do not have 'home-court advantage.'" See Alan Strudler, *Incommensurable Goods, Rightful Lies, and the Wrongness of Fraud*, 146 U. PA. L. REV. 1529, 1551 (1998).

Research has not yet explored these applied questions, which may thus be fertile ground for negotiation scholars and empirical social scientists. For instance, studies might compare negotiations that take place in a law firm office versus elsewhere (a coffee shop or other venue with a less “competitive” atmosphere); or in a conference room with blank walls versus pictures of white shoe founders of a firm; or Wall Street images versus abstract art, naturescapes, or individuals together cooperating.

#### CONCLUSION

Empirical research demonstrates that subtle environmental cues in a polling place can significantly, but unconsciously, affect citizens’ real-world votes. This PPP Effect has important doctrinal and policy implications in a variety of voting rights contexts. Most obviously, it calls for a reconsideration of case law holding that voting in church buildings is not unconstitutional. Voting in church buildings has been shown to prime attitudes and beliefs that elicit more conservative votes, as demonstrated by support for more conservative candidates and for more conservative stances on issues fraught with conservative religious values. This effect, moreover, occurs unconsciously, and as such those susceptible to its potential biasing will be unaware of its strength. As such, existing case law, which has emphasized the availability of alternative voting places to rebuff challenges to voting in churches, is largely inapposite. We have shown that existing case law does not consider the unconscious nature of the PPP Effect, but more affirmatively, we have shown ways in which the PPP Effect could ground a challenge to voting in church buildings under First Amendment jurisprudence.

Although perhaps the most serious implications are for First Amendment case law, the PPP Effect also suggests that voting in *any* polling place can lead to potentially biased votes, raising Fourteenth Amendment Equal Protection concerns. As such, we noted the consistency of our approach with the gradual increase in absentee and convenience voting. Taking into account the possibility of the PPP Effect in any polling location, we suggest that one extreme way of countering it would be to eliminate polling places altogether, as some states have done. These states provide an opportunity for further research into how and whether the PPP Effect operates in more personal environments such as a voter’s home. In any event, our discussion adds to the debate over the advantages of instituting some form of convenience voting.

Finally, the PPP Effect is most likely a focused example of the much broader phenomenon of priming, one which is firmly established in empirical research in psychology. Although application of psychological research on the unconscious to legal issues is burgeoning – unconscious bias or discrimination in employment or in jury selection, for instance – there has been little recognition of the relevance of such subtle, environmental cues on decision-making. We thus take a broader view and place the PPP Effect in the context of other, similar instances where such cues might affect legal decisionmakers, suggesting specific empirical research that might test the boundaries of the

priming effect. Although we identified two such instances – abortion decision-making and negotiation – empirical legal research could easily identify more. Thus, we hope this Article not only grounds new thinking about existing First Amendment and Equal Protection doctrine in the voting rights context, but encourages further empirical research in these other areas as well.