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Motivation, Rationality, and Secular Purpose in Establishment Clause Review

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I. INTRODUCTION

In *Lemon v. Kurtzman*,[1] the Supreme Court synthesized twenty-five years of establishment clause analysis into the now well-known three-prong test. To escape constitutional invalidation, governmental action challenged under the establishment clause must have: 1) "a secular legislative purpose;"[2] 2) "a principal or primary effect which neither inhibits nor advances religion;"[3] and 3) it "must not foster 'an excessive entanglement with religion.' "[4] Many commentators have suggested that the first prong of the *Lemon* test—the requirement of secular purpose—dictates judicial inquiry into governmental motives.[5] Others, however, argue that the secular purpose prong only requires a cursory review of government purpose, not unlike deferential "rational basis" review under the due process and equal protection clauses.[6] In this view, establishment clause values are primarily (and adequately) protected by the requirements of primary secular effect and non-entanglement.[7]

Beyond the three-prong *Lemon* test, the Court has articulated little in the way of a reasoned and consistent theory of the establishment clause.[8] The Court's adherence to factual, case-by-case review under the clause has led to inconsistent holdings and numerous, confusing separate opinions that attempt to define precisely what governmental action the clause

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1. 403 U.S. 602 (1971).

2. *Id.* at 612.

3. *Id.* (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

4. *Id.* at 613 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

5. *E.g.*, Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 100; Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 162 (1977); Ely, *Legislative and Administrative Motive in Constitutional Law*, 79 YALE L.J. 1205, 1322-24 (1970); Gardner, *Illicit Legislative Motive as a Sufficient Condition for Unconstitutionality Under the Establishment Clause—A Case for Consideration: The Utah Firing Squad*, 1979 WASH. U.L.Q. 435, 463-65; Note, *The Establishment Clause and Religious Influences on Legislation*, 75 NW. U.L. REV. 944, 964-67 (1980); *see also* McDaniel v. Paty, 435 U.S. 618, 636 n.9 (1978) (Brennan, J., concurring).

6. *See, e.g.*, Hunt v. McNair, 413 U.S. 734, 741 (1973); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971); McGowan v. Maryland, 366 U.S. 420, 468-69 (1961) (Frankfurter, J., concurring); Zorach v. Clauson, 343 U.S. 306, 310 (1952); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 836 & n.7 (1978); *see also* Ely, *supra* note 5, at 1224-27 (motive inquiry only required when legislation cannot be justified in secular terms); Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1178-81 (1974) (purpose inquiry subsumed within effects prong of *Lemon* test).

7. L. TRIBE, *supra* note 6, at 836 & n.7; *see* Note, *A Workable Definition of the Establishment Clause:* Allen v. Morton *Raises New Questions*, 62 GEO. L.J. 1461, 1462 n.8 (1974); *cf.* Note, *supra* note 6, at 1178-81 (purpose inquiry subsumed within effects prong of *Lemon* test).

8. *But see* Marsh v. Chambers, 463 U.S. 783 (1983) (historical analysis); Larson v. Valente, 456 U.S. 228 (1982) (strict scrutiny).

prohibits.[9] Yet, the pervasive reach of government at all levels, the growing influence of religious lobbying groups, and the persistent debate over religion in public schools foreshadow continued Court involvement in fixing the boundary between church and state. This Article explores the use of a meaningful secular purpose test—through more careful scrutiny of governmental purposes and motivations—within the framework of the *Lemon* test as a means of clarifying existing case law and better protecting the underlying values of the establishment clause.

II. Establishment Clause Values

In the first modern establishment clause case, *Everson v. Board of Education*,[10] the Court interpreted the establishment clause to:

> mean [] at least this: Neither a state nor the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence anyone to go or to remain away from church against his will or force him to profess belief or disbelief in any religion. No person can be punished for entertaining or professing attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation" between Church and State.[11]

This language reflects the two values that are generally thought to be protected by the establishment clause: voluntarism and separatism.[12]

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9. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673 (1980); Dunsford, *Prayer in the Well: Some Heretical Reflections on the Establishment Syndrome*, 1984 Utah L. Rev. 1, 16; *e.g.*, Wolman v. Walter, 433 U.S. 229 (1971) (six separate opinions in addition to the opinion for the Court); Meek v. Pittenger, 421 U.S. 349 (1975) (four separate opinions); Board of Educ. v. Allen, 392 U.S. 236 (1968) (four separate opinions); *see* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3232 (1985) (Rehnquist, J., dissenting); Mueller v. Allen, 463 U.S. 388, 393 (1983); *id.* at 408-13 (Marshall, J., dissenting); Committee for Pub. Educ. v. Regan, 444 U.S. 646, 662 (1980).

10. 330 U.S. 1 (1947).

11. *Id.* at 15-16 (dicta) (citations omitted) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

12. *E.g.*, L. Tribe, *supra* note 6, at 818; Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1684-86 (1969); Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part II: The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 516-18 (1968) [hereinafter cited as Gianella II]; *see, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 11 (1947); *id.* at 51, 52 (Rutledge, J., dissenting).

A. Voluntarism

Voluntarism is the idea that private religious ordering should not be distorted by government support or influence[13]—in other words, the social acceptance and popularity of religious organizations and individuals should depend only on the intrinsic merits of the beliefs and practices that they advocate. Thus, the *Everson* Court stressed that government must be strictly neutral in dealing with religion.[14] The establishment clause vice of departure from governmental neutrality is that it results in religious beliefs and practices receiving a greater or lesser measure of acceptance and popularity than they would otherwise receive.[15] Accordingly, some commentators have characterized governmental neutrality as the policy that preserves voluntarism.[16]

The Court's opinions since *Everson* have reiterated that the social acceptance accorded religious beliefs and practices must flow from individual choice and not from governmental coercion or influence. The Court has invalidated the inclusion of sectarian instruction and materials, as well as prayer exercises, in public schools because these programs entail use of the government's influence and coercive power to promote religious belief.[17] Voluntarism also explains the sharp distinction that the Court has drawn between governmental aid to elementary and secondary parochial schools and aid to church-sponsored colleges and universities. Programs of the former variety are very carefully scrutinized for religious effects and entanglements, whereas those of the latter variety are accorded substantially greater deference.[18] The Court has determined that

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13. L. TRIBE, *supra* note 6, at 818-19; Freund, *supra* note 12, at 1684-85; Gianella II, *supra* note 12, at 516-18; *see, e.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 779-80, 783-85 (1973); Walz v. Tax Comm'n, 397 U.S. 664, 689 (1970) (Brennan, J., concurring); Zorach v. Clauson, 343 U.S. 306, 313 (1952).

14. 330 U.S. at 15; *accord* Larson v. Valente, 456 U.S. 228, 244 (1982).

15. *See Larson*, 456 U.S. at 245; Widmar v. Vincent, 454 U.S. 263, 271 & n.10 (1981).

16. *E.g.*, Note, *Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 HARV. L. REV. 696, 698 (1979); *see* Note, supra note 6, at 1175 & n.4.

17. Stone v. Graham, 449 U.S. 39, 42 (1980) (posting of Ten Commandments); Abington School Dist. v. Schempp, 374 U.S. 203, 224 (1963) (prayer and bible reading); Engel v. Vitale, 370 U.S. 421, 429-31 (1962) (prayer); McCollum v. Board of Educ., 333 U.S. 203, 209-10 (1948) (release-time religious instruction program on public school campus); *see also* Torcaso v. Watkins, 367 U.S. 488, 490 (1961) (invalidation of affirmation of belief in God as test for holding public office). *But see* Zorach v. Clauson, 343 U.S. 306, 313-14 (1952) (upholding release-time religious instruction program off public school campus).

18. *Compare* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) *and* Lemon v. Kurtzman, 403 U.S. 602 (1971) *with* Widmar v. Vincent, 454 U.S. 263 (1981); Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973) *and* Tilton v. Richardson, 403 U.S. 672 (1971).

parochial primary and secondary schools impart a religiously skewed education to their students. These students, in turn, are easily swayed by what is taught to them because of their relative lack of education, maturity, and experience.[19] In contrast, the education offered by most church-sponsored institutions of higher education is essentially secular. In any event, students at these institutions presumably possess sufficient intellectual and emotional maturity to make independent and critical judgments about what they are taught.[20]

Although the establishment clause neutrality envisioned by the framers may have embodied a strict prohibition of any aid to religion,[21] this principle could remain consistent with voluntarism only so long as the clause was applied to a central government whose role in shaping American life remained relatively minor.[22] The rise of the welfare state and the application of the establishment clause to the states[23] brought contradictions between governmental neutrality and a strict rule of no aid to religion. Under a no-aid rule, the benefits of governmental programs designed affirmatively to alleviate societal problems must be denied to religion, yet to deny such benefits to an individual or organization solely on the basis of religious affiliation is not religiously neutral and undercuts voluntarism.[24]

Accordingly, the modern establishment clause cases have rejected a strict no-aid rule,[25] and the Court has made clear that not all governmental action that aids religion is unconstitutional. For example, the Court

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19. Lemon v. Kurtzman, 403 U.S. 602, 616 (1971); Tilton v. Richardson, 403 U.S. 672, 686 (1971) (plurality opinion) (citing Gianella II, *supra* note 12, at 586).

20. Widmar v. Vincent, 454 U.S. 263, 274 & n.14 (1981); Tilton v. Richardson, 403 U.S. 672, 686-87 & n.3 (1971) (plurality opinion) (citing Gianella II, *supra* note 12, at 583); *see also* Marsh v. Chambers, 463 U.S. 783, 792 (1983).

21. *See* Everson v. Board of Educ., 330 U.S. 1, 11 (1947); *id.* at 37-43 (Rutledge, J., dissenting); Gianella II, *supra* note 12, at 513-14. However, others have argued persuasively that the clause was never meant to sweep so broadly. *E.g.*, Wallace v. Jaffree, 105 S. Ct. 2479, 2508-09 (1985) (Rehnquist, J., dissenting); Abington School Dist. v. Schempp, 374 U.S. 203, 314 (1963) (Stewart, J., dissenting); R. CORD, SEPARATION OF CHURCH AND STATE (1984); M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 13-17 (1978); Corwin, *The Supreme Court as a National School Board*, 14 LAW AND CONTEMP. PROBS. 3 (1949); *see* Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 817 & n.2 (1984).

22. *See* Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development—Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1382-83 (1967) [hereinafter cited as Gianella I]. *See generally* P. BOBBITT, CONSTITUTIONAL FATE 145-46 (1982).

23. *See, e.g.*, Everson v. Board of Educ. 330 U.S. 1, 15-16 (1947).

24. Gianella II, *supra* note 12, at 514 & n.5.

25. Contrary dicta exist. *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203 217 (1963) (establishment clause forbids "every form of public aid or support for religion") (quoting *Everson*, 330 U.S. at 31-32 (Rutledge, J., dissenting)); Everson v. Board of Educ., 330 U.S. 1, 11, 15 (1947) ("government [is] stripped of all power . . . to support or otherwise to assist any or all religions"; no State "can pass laws which aid one religion [or] all religions").

has upheld governmental reimbursement to the parents of both public and parochial school students for the cost of their children's travel to and from school on municipal buses.[26] It has also upheld the free provision of textbooks[27] and diagnostic and therapeutic services[28] to parochial as well as public school students, the reimbursement of parochial schools by the state for expenses incurred in administering and scoring state-mandated tests,[29] and a narrowly drawn tax deduction for certain public and private school expenses.[30] In each of these cases, the Court reasoned that extending the benefits of nonreligious social welfare programs to religious individuals and organizations did not violate the neutrality principle so long as the aid was given in a context that did not imply government endorsement or preference of religion.[31] In other words, as long as government aids religion incidentally as part of a larger secular program, establishment clause neutrality is preserved. Similarly, the Court has refused to strike down "release-time" programs pursuant to which off-campus sectarian religious instruction is made available to public school students during school hours, so long as the coercive power of the government is not used to compel attendance at the classes.[32] When governmental influence or coercive power is not exercised disproportionately to support religious functions,[33] governmental action allowing participation in religious functions does not violate the neutrality principle, even when the action is not mandated by the free exercise clause.[34]

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26. *See* Everson v. Board of Educ., 330 U.S. 1 (1947).

27. *See* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Board of Educ. v. Allen, 392 U.S. 236 (1968).

28. *See* Wolman v. Walter, 433 U.S. 229, 242-48 (1977).

29. *See* Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980); Wolman v. Walter, 433 U.S. 229 (1977).

30. *See* Meuller v. Allen, 463 U.S. 388, 395 (1983).

31. Meek v. Pittenger, 421 U.S. 349, 359-61 (opinion of Stewart, J.,); *id.* at 394-95 (opinion of Rehnquist, J.) (quoting Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 814-15 (1973) (White, J., dissenting)); Board of Educ. v. Allen, 392 U.S. 236, 243-44 (1968); Everson v. Board of Educ., 330 U.S. 1, 16-17 (1947); *see* Wolman v. Walter, 433 U.S. 229, 242 (1977) (quoting Lemon v. Kurtzman, 403 U.S. 602, 616-617 (1971)). *But see* Witters v. State Comm'n for the Blind, 102 Wash. 2d 624, 628-29, 689 P.2d 53, 56 (1984) (5-2 decision) (holding establishment clause prohibits aid under state vocational rehabilitation program to handicapped student studying for the ministry at sectarian college), *cert. granted*, 105 S. Ct. 1863 (1985).

32. *Compare* McCollum v. Board of Educ., 333 U.S. 203 (1948) *with* Zorach v. Clauson, 343 U.S. 306 (1952).

33. For example, a law mandating that employees or school children be excused from work or school on religious holidays when not unreasonably disruptive or otherwise impracticable, or that non-Sunday Sabbatarians be exempted from compliance with Sunday closing laws.

34. Zorach v. Clauson, 343 U.S. 306, 311, 313-14 (1952); *see also* Larkin v. Grendel's Den, 459 U.S. 116, 123, 126 (1982). The Court generally has held that exemptions for religious groups or individuals designed to ease the burden of generally applicable legislation do not violate the establishment clause. *E.g.*, Thomas v. Review Bd., 450 U.S. 707, 719-20 (1981); Wisconsin v. Yoder, 406

The common element in these cases is the government's ability to explain in credible, nonreligious terms the law that grants the religious aid. Thus, although the holdings ultimately aid religion in an absolute sense by reducing the economic and social cost to adherents and organizations of particular religious beliefs and practices, the aid is nevertheless constitutional because it merely puts the adherents and organizations on an equal footing with nonreligious persons and groups in qualifying for governmental largesse.[35]

The *Sunday Closing Law Cases*[36] effected two significant variations on the modern rejection of the strict no-aid principle. First, these cases established that the rationale underlying the rejection of the strict no-aid principle also applies to governmentally imposed burdens on religion that nevertheless do not amount to violations of the free exercise clause. In other words, the cases rejected a strict "no-burden" rule that is analogous to strict no-aid. Despite the burdens that Sunday closing laws impose on Sabbatarians and other non-Sunday worshippers, the Court has upheld the laws because it is persuaded that they are justifiable by reference to purely secular governmental goals and that these goals cannot be implemented in any less intrusive manner.[37] The opinions stand for the proposition that, so long as government is rationally pursuing a legitimate secular goal in the least intrusive manner, the establishment clause does not specially insulate religion from the burdensome effects of facially neutral governmental action.[38] Thus, even when governmental action dispropor-

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U.S. 205, 220-21 (1972); Sherbert v. Verner, 374 U.S. 398, 409 (1967). Estate of Thornton v. Calder, Inc., 105 S. Ct. 2914 (1985), holding unconstitutional a state statute granting to all individuals an absolute right not to work on their chosen Sabbath, is not to the contrary. *Thornton* holds only that religious individuals do not have an unconditional right to accommodation under the free exercise clause when such accommodation imposes substantial costs on other members of society. *See id.* at 2918.

35. Gianella II, *supra* note 12, at 517-22; Note, *supra* note 6, at 1176 n.7; *see e.g.*, Thomas v. Review Bd., 450 U.S. 707, 719-20 (1981) (quoting Sherbert v. Verner, 374 U.S. 398, 409 (1967)); Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

36. Gallagher v. Crown Kosher Mkt., 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v., Maryland, 366 U.S. 420 (1961).

37. *See* McGowan v. Maryland, 366 U.S. 420, 442-44 (1961). *McGowan* has been broadly criticized for its studied ignorance of the free exercise burdens implicit in Sunday closing laws. *See, e.g.*, Kushner, *Toward the Central Meaning of Religious Liberty: Non-Sunday Sabbatarians and the Sunday Closing Laws Revisted*, 35 Sw. L.J. 557 (1981); *infra* note 101.

38. *See, e.g.*, Gallagher v. Crown Kosher Mkt., 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); P. KURLAND, RELIGION AND THE LAW (1961) (arguing that Court's religion clause decisions generally support proposition that clauses prohibit government use of a religious standard or classification as the basis for action or inaction). However, facially neutral governmental action nevertheless may be unconstitutional under the free exercise clause as applied to particular individuals or groups. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 718 (1981); Wisconsin v. Yoder, 405 U.S.

tionately burdens religion, as compared to the burden the action imposes on non-religion, the action may still be constitutional if the government can justify the action by reference to believable secular goals—*i.e.*, when the government can show that the disproportionate effect was not intended.

Second, the *Sunday Closing Law Cases* teach that the government may take majoritarian religious preferences into account in formulating ways to implement legitimate governmental goals.[39] The Court found that the legislature might reasonably have determined that Sunday is the day that most citizens would choose for a weekly holiday and, therefore, that the legislative goals of the closing laws are most effectively implemented by a Sunday holiday.[40] Although the closing laws obviously favor Christian religions by designating Sunday as the weekly holiday, they do not for that reason violate the establishment clause.

The Court significantly broadened this principal when it upheld against establishment clause challenge a city's inclusion of a nativity scene as part of a larger secular Christmas holiday display.[41] The Court observed that Christmas is a holiday long celebrated both religiously and secularly by the majority of the Western world and that by depicting the religious origins of the holiday, the city is merely participating in celebration of the holiday in accordance with the traditional symbols and customs of the majority of its citizens.[42] Thus, although the nativity scene obviously coincides with the Christian celebration of Christmas, the city's acknowledgment of majoritarian religious preferences by inclusion of the display does not for that reason violate the establishment clause.[43]

The cases suggest a general establishment clause limitation on neutrality and voluntarism. Facially neutral governmental action that aids or burdens religion, even disproportionately, does not violate the neutrality principle when the government can articulate a credible non-religious justification for the action.

B. Separatism

Although voluntarism is thought to be the more fundamental establishment clause value, the Court also has read the establishment clause to

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205 (1972); Sherbert v. Verner, 374 U.S. 398 (1967).

39. Profesor Gianella called this the "secularly relevant religious factor." Gianella II, *supra* note 12, at 527-28.

40. McGowan v. Maryland, 366 U.S. 420, 444-45 (1961).

41. Lynch v. Donnelly, 104 S. Ct. 1355 (1984).

42. *Id.* at 1362-63.

43. *Id.* at 1364, 1366.

protect a separatism value. Separatism is the idea that social and individual benefits from both religion and government are maximized when the two are institutionally separated.[44]

Although strong separatism language appeared in some of the Court's early establishment clause opinions,[45] the Court did not clearly define the contours of the value until the emergence of the concept of church-state "entanglement" in *Walz v. Tax Commission.*[46] In *Walz*, the Court held that a state property tax exemption for church-owned property did not violate the establishment clause. Significantly, the Court refused to rest its holding on the fact that churches, like other charitable, nonprofit organizations, generally provide welfare, counselling and other socially desirable services:

> To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of government evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing, day-to-day relationship which the policy of neutrality seeks to minimize.[47]

In other words, continual governmental evaluation of the relative social merits of particular religious programs, even when undertaken only to ascertain eligibility for a tax exemption, suggests the very regulatory scrutiny of religion that the establishment clause prohibits. Instead, the Court upheld the tax exemption because it eliminates potential church-state conflicts without creating other entangling church-state relationships.[48]

Similar concerns are evident in the school aid cases that have dominated establishment clause jurisprudence. When the Court invalidates governmental aid to religious schools on entanglement grounds, it generally refers to one of two considerations: (1) whether the governmental controls necessary to ensure that the aid is used only for secular purposes would too closely involve government in the operation of religious schools,[49] and (2) whether the disbursement of aid would divide political or regulatory bodies along sectarian or religious-nonreligious lines.[50]

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44. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122-23 (1982); McCollum v. Board of Educ., 333 U.S. 203, 212 (1948); L. TRIBE, *supra* note 6, at 819.

45. *See supra* note 25.

46. 397 U.S. 664 (1970).

47. *Id.* at 674.

48. *See id.* at 674, 676.

49. *E.g.*, Aguilar v. Felton, 105 S. Ct. 3232, 3237 (1985); Wolman v. Walter, 433 U.S. 229, 254 (1977); Meek v. Pittenger, 421 U.S. 349, 370-72 (1975); Lemon v. Kurtzman, 403 U.S. 602, 619-21 (1971).

50. Meek v. Pittenger, 421 U.S. 349, 372 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 794-98 (1973); Lemon v. Kurtzman, 403 U.S. 602, 622-24 (1971). The element of religious-

Commentators fear that governmental regulation to ensure that aid to parochial schools is used only for secular purposes might cause religious schools to compromise their religious beliefs or practices in order to qualify or remain eligible for the aid.[51] Additionally, in any close regulatory relationship, those who are subject to regulation have historically engaged in intense efforts to influence and control the governmental regulators. When the regulatory relationship is one between church and state, successful lobbying efforts can be described as religious control of a governmental agency.[52] Moreover, political division along sectarian lines undermines the legislative process by injecting into it factors—such as religious affiliation and belief—that do not lend themselves to the essential legislative processes of fact-finding and compromise.[53] Sectarian strife also diverts scarce legislative and administrative resources from resolution of more compelling secular issues.[54]

Accordingly, the separation of government and religion (or "non-entanglement") eliminates two dangers inherent in close relationships between government and religion—that allowing government to oversee the affairs of religious organizations might permit it directly or indirectly to influence the religious beliefs and practices of such groups, and that the community might be polarized and the political system rendered ineffective by sectarianism in government.

A tension exists between voluntarism and separatism. To the extent that separatism guards against the danger of government control of religion, it is consistent with voluntarism. When separatism is viewed in terms of insulating government from religion, however, it often conflicts with voluntarism.[55] Stretched to its logical limits, separatism would prevent aid of any sort from flowing to religion from government—*i.e.*, the

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secular governmental conflict has been invoked only in dicta, and questions persist about its continued vitality. *See* Johnson, *supra* note 21, at 830; *infra* note 135. *Compare* Larson v. Valente, 456 U.S. 228, 253-54 (1982) *with* Lynch v. Donnelly, 104 S. Ct. 1355, 1364-65 (1984) *and* Harris v. McRae, 448 U.S. 297, 319-20 (1980). *See also* Lynch v. Donnelly, 104 S. Ct. 1355, 1367 (1984) (O'Connor, J., concurring).

The Court recently has read the establishment clause to prohibit the apparent state endorsement of religion inherent in aid to parochial schools. *See* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3226 (1985) (citing Widmar v. Vincent, 454 U.S. 263, 274 (1981); Zorach v. Clauson, 343 U.S. 306 (1952); McCollum v. Board of Educ., 333 U.S. 203 (1948)).

51. Lemon v. Kurtzman, 403 U.S. 602, 621-22 (1971); *id.* at 650-52 & nn.8-9 (opinion of Brennan, J.); Freund, *supra* note 12, at 1685; Note, *supra* note 6, at 1187-89.

52. *See* Freund, *supra* note 12, at 1685-86.

53. *See* Larson v. Valente, 456 U.S. 228, 253-54 (1982) (quoting Walz v. Tax Comm'n. 397 U.S. 664, 695 (1970) (opinion of Harlan, J.)); *see generally* Engel v. Vitale, 370 U.S. 421, 442-43 (1962) (Douglas, J., concurring).

54. Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971).

55. *See infra* note 163 and accompanying text.

strict no-aid rule[56] —as well as prevent religious people and organizations from participating in the political process in any way.[57] Religious neutrality would be violated in either event.[58]

III. Secular Purpose in Establishment Clause Review

Scrutiny of the purposes of challenged governmental action has long been a part of constitutional adjudication.[59] The Court has often applied this scrutiny by objectively examining the effectiveness with which the challenged action implements the goals offered by the government in justification of the action. More recently, the Court also has focused on evidence of the subjective motivations of governmental decision-makers in taking the challenged action. Both styles of analysis are useful in assessing the constitutionality of governmental action under the establishment clause.

A. Motivation and Rationality in Constitutional Law

In the wake of two cases in which the Supreme Court expressly declined to invalidate governmental action on grounds of improper motive,[60] several commentators addressed the question whether judicial scrutiny of the motives of governmental actors is a legitimate and helpful means of assessing the constitutionality of certain kinds of governmental action.[61] Although there is still broad disagreement on the constitutional role that motive analysis should play (if any), many commentators have concluded that in some instances, judicial scrutiny of motive is both legitimate and necessary.[62] Indeed, the Court itself has retreated somewhat from its initial position that analysis of governmental motives is inappropriate and has held that in certain circumstances proof of illicit constitutional motivations on the part of a governmental actor is essential to show a constitu-

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56. *See supra* text accompanying notes 21-24.

57. L. Tribe, *supra* note 6, at 819; Freund, *supra* note 12, at 1686; Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056, 1058 (1978).

58. *See supra* text accompanying note 24. *See generally* McDaniel v. Paty, 435 U.S. 629 (1978).

59. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 392 (1798); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

60. Palmer v. Thompson, 403 U.S. 217, 224-25 (1971); United States v. O'Brien, 391 U.S. 367, 383 (1968).

61. Brest, *supra* note 5; Eisenberg, *supra* note 5; Ely, *supra* note 5.

62. *See, e.g.*, Alexander, *Motivation and Constitutionality*, 15 San Diego L. Rev. 925, 933 (1978); Brest, *supra* note 5, at 116, 130; Eisenberg, *supra* note 5, at 136-37, 139-46, 149-51; Ely, *supra* note 5, at 1207-08, 1228-49, 1261-63, 1269, 1272-75, 1281-83; Simon, *Racially Prejudiced Governmental Actions: A Motivational Theory of the Constitutional Ban Against Racial Discrimination*, 15 San Diego L. Rev. 1041 (1978); Note, *Legislative Purpose, Rationality and Equal Protection*, 82 Yale L.J. 123, 141-42 (1972).

tional violation.[63] The result has been to focus significant attention on legislative purposes in constitutional litigation under the equal protection clause, the establishment clause, and other constitutional provisions.[64]

Commentators also have focused on the legitimacy and utility of a meaningful rationality standard to measure the constitutionality of all government action.[65] Analyzing whether a statute satisfies a minimum standard of rationality necessarily involves an inquiry into governmental goals for taking the action and, hence, inquiry into governmental purpose. In practice, however, the Court's examination of legislative rationality has rarely resulted in meaningful review of legislative purpose.

The normal formulation of the rationality standard is meaningless without importing into it one or more independent norms against which legislative conduct can be evaluated.[66] Presumably, governmental decisionmakers do not act randomly. It follows that any governmental action, by

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63. In Washington v. Davis, 426 U.S. 229 (1976), the Court held that evidence of the disproportionate impact of governmental action on racial minorities was by itself insufficient to make out a violation of the equal protection clause in the absence of evidence of intentional discrimination by the government. *Id.* at 239-42; *see also* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). Subsequent equal protection cases have elaborated the role of motive analysis in proving such discrimination, stating that evidence of illicit discriminatory motives may come from historical background, the sequence of events leading to the challenged action, legislative or administrative history, and the inability of the government to articulate credible, constitutionally permissible legislative goals for the action. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 275, 279 nn. 24-25 (1979); Village of Arlington Heights v. Metro Housing Dev. Corp., 429 U.S. 252, 266, 267 (1978). The Court has also held that evidence of illicit motive does not dispose of the constitutional question, but only shifts the burden to the government to prove that such motive did not play a significant role in the decisionmaking process. *See* Mount Healthy School Dist. v. Doyle, 429 U.S. 274 (1978); *see also Village of Arlington Heights*, 429 U.S. at 270 n.21 (dictum). For development of an evidentiary model of violations of the equal protection clause based on illicit racial motivations, see Simon, *supra* note 62.

64. Evidence of illicit motivation has played an important role in decisions under the commerce clause, Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 685-86 (1982) (Brennan, J., concurring in the judgment); the establishment clause, Wallace v. Jaffree, 105 S. Ct. 2479, 2490-91 & nn.43-44 (1985); Stone v. Graham, 449 U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968); the first amendment, Island Trees School Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (plurality opinion); the due process clause, Perry v. Sindermann, 408 U.S. 593 (1972) (by implication); and the fifteenth amendment, City of Mobile v. Boklen, 446 U.S. 550 (1980).

65. *E.g.*, Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980); Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049 (1979); Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Michelman, *Politics and Values or What's Really Wrong With Rationality Review?*, 13 CREIGHTON L. REV. 487 (1979); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). The Court itself commonly refers to a rationality test as the minimum standard of review by which the constitutionality of legislation must be measured under the equal protection clause, *e.g.*, Village of Belle Terre v. Borras, 416 U.S. 1 (1974), and the due process clause, *e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

66. L. TRIBE, *supra* note 6, at 991; Bennett, *supra* note 60, at 1065-67; Bice, *supra* note 65, at 9, 17, 31; *see* Michelman, *supra* note 65, at 501.

reason of its existence, will suggest the reasons of the decision-makers for having taken the action and, therefore, will be "rational."[67] The stigma of substantive due process inherited from the judiciary of the early twentieth century apparently has deterred modern courts from attempting to discern objective standards for governmental decision-making and thereby give meaning to the rationality standard.[68] Thus, unless the governmental action under review is characterized as discriminating against a protected group or burdening the exercise of a preferred right, the Court's use of the rational basis standard of review signals the constitutionality of the action under review.[69]

Numerous commentators have argued that judicial review of legislative rationality is meaningful only if the actions of governmental decision-makers are judged against a standard of social efficiency. This standard requires that decision-makers act to advance some notion of "the public interest."[70] Under this analysis, all governmental action generally should advance some interest of the entire citizenry. The presumption that the articulated public interest goals are the actual goals of the action is weakened to the extent that governmental action inefficiently implements the goals articulated by the government in justification of its action and concurrently imposes burdens on particular groups of citizens or on the exercise of particular constitutional rights.[71] At a certain point, the disparity between the articulated goals and the efficiency of the action in implementing these goals, together with burdens imposed by the inefficiency on particular groups of citizens or the exercise of certain constitutional rights, becomes so great that the articulated goals must be rejected as an explanation for the government's behavior. In other words, the challenged action is an irrational means of implementing the articulated goals and, therefore, is unconstitutional.[72]

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67. L. TRIBE, *supra* note 6, at 995; Bennett, *supra* note 65, at 1056-57, 1059, 1077-78; Bice, *supra* note 65, at 8, 30; Gunther, *supra* note 65, at 35-36; Note, *supra* note 62, at 128-32, 140-41; *e.g.*, Wallace v. Jaffree, 105 S. Ct. 2479, 2492 & n.48 (1985).

68. *See* P. BOBBITT, *supra* note 22, at 149-50; Gunther, *supra* note 65, at 21.

69. *See* Bennett, *supra* note 65, at 1054. *See generally* L. TRIBE, *supra* note 6, at 996.

70. *E.g.*, J. ELY, DEMOCRACY AND DISTRUST 31-32 (1980); L. TRIBE, *supra* note 6, at 995; Bennett, *supra* note 60, at 1066-67, 1095; Bice, *supra* note 65, at 17-19; Gunther, *supra* note 65, at 8, 21; Note, *supra* note 5, at 950; *see also* Trimble v. Gordon, 430 U.S. 762, 773-74 (1977); Reed v. Reed, 404 U.S. 71, 76 (1971). *But see, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW 409 (2d ed. 1977) (general legislative norm is redistribution of wealth to politically effective interest groups); *see also* J. ELY, *supra*, at 130 n.* ("What is hard to sell in America today is the claim that legislators ever vote in the public interest").

71. *See* Gunther, *supra* note 65, at 20.

72. Bennett, *supra* note 65, at 1062-63; Bice, *supra* note 65, at 33-39; *see* Gunther, *supra* note 65, at 21; Michelman, *supra* note 65, at 490-92, 500-01.

A more refined and specialized use of rationality analysis is relevant when the challenged action accomplishes the government's articulated goal to a significant degree while burdening a particular class of citizens or the exercise of certain constitutional rights, but another means would accomplish the goal with the same or a higher degree of efficiency while imposing less of a burden on the class or right—so-called "less-intrusive" or "less-restrictive alternatives."[73] When two or more methods are equally effective, failure to implement the goal by means of the less intrusive alternative is irrational.[74] When particularly important constitutional rights are implicated, the Court has sometimes held that a less intrusive means of accomplishing a governmental objective is constitutionally required even though the means may be somewhat less efficient in accomplishing the objective.[75]

Meaningful rationality analysis often can provide circumstantial evidence of illegitimate governmental motivation when direct evidence is lacking. The failure of the government to act in a manner that is more carefully circumscribed to implement its goals counts as evidence that the articulated goals were not the actual goals of the government—*i.e.*, that the government instead harbored constitutionally impermissible goals that, because of their unconstitutionality, the government could not use to justify passing the legislation.[76]

Both motive and rationality review reflect the idea that contemporary constitutional review is a process of justification.[77] Once a challenge to governmental action passes certain threshold tests, judicial review focuses on reasons why the government may have taken the challenged action.[78] Thus, an integral part of the adjudication of a challenged governmental action is judicial scrutiny of the purposes articulated by the government in justification of the action. This scrutiny ensures that the government does not pursue constitutionally impermissible goals.[79]

B. Motivation and Rationality in Establishment Clause Review

Under the establishment clause, the religiously disproportionate im-

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73. Bice, *supra* note 65, at 37-38; *e.g.*, J. ELY, *supra* note 70, at 106 (freedom of speech).

74. Bice, *supra* note 65, at 37-38; Simon, *supra* note 62, at 1129; *see also* Eisenberg, *supra* note 5, at 149.

75. Bice, *supra* note 65, at 38-39.

76. Alexander, *supra* note 62, at 941 & nn. 56-58; Bice, *supra* note 65, at 24-26; Simon, *supra* note 62, at 1121; *see* Gunther, *supra* note 65, at 45-47.

77. Bice, *supra* note 65, at 5; Simon, *supra* note 62, at 1042.

78. *See* Bice, *Standards of Judicial Review under the Equal Protection and Due Process Clauses*, 50 S. CALIF. L. REV. 689, 690 (1977); Simon, *supra* note 62, at 1042-43.

79. *See* Bice, *supra* note 65, at 24-26.

pact[80] of governmental action can, by itself, be a sufficient basis for declaring the action unconstitutional.[81] Accordingly, the Court has tended to focus primarily on the potential religious effects and entanglements of challenged governmental action while only superficially analyzing governmental purpose.[82] Nevertheless, elements of motive and rationality analysis are evident in a number of the Court's establishment clause opinions, and a justification model of establishment clause review that protects the establishment clause values of voluntarism and separatism can be fairly articulated. When governmental action appears religiously biased, the secular purpose prong of the *Lemon* test requires an initial explanation of the action in terms other than a desire disproportionately to help or to hinder the beliefs or practices of a particular religious sect or religion generally.[83] Evidence bearing on the plausibility (or lack thereof) of the explanation serves to shift the burden of proof between plaintiff and government.[84] Similarly, when the government acts in concert with religious people or organizations, the secular purpose prong requires an explanation in terms other than a desire to facilitate secular regulation of religion or sectarian control of government. In either case, a justification model of the secular purpose prong mandates judicial inquiry into the motives of

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80. *See infra* note 83.

81. *Compare* accompanying text *with supra* note 63.

82. *See, e.g.*, Mueller v. Allen, 103 S. Ct. 3062, 3069-70 (1983); Wolman v. Walter, 433 U.S. 229, 326 (1977); Meek v. Pittenger, 421 U.S. 349, 363 (1975); Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736, 754 (1976); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 773-74 (1973); Tilton v. Richardson, 403 U.S. 672, 678-79 (1971).

83. Ely, *supra* note 5, at 1313-14; *see* Lynch v. Donnelly, 104 S. Ct., 1355, 1368 (1984) (O'Connor, J., concurring) ("The proper inquiry [under the secular purpose prong] is whether government intends to convey a message of endorsement or disapproval of religion"); *infra* note 145.

The concepts of "religious neutrality" and "disproportionate religious impact" presuppose a baseline measure of constitutional rights to which religious organizations and individuals are clearly entitled. Government action that materially deviates from this baseline in either direction—by burdening the exercise of such rights or by granting additional privileges—is religiously non-neutral and thereby has an unconstitutional, disproportionate religious impact under the establishment clause. However, the factual and doctrinal inconsistency of the Court's establishment clause opinions, *see supra* text accompanying notes 8-9, and the diverse opinions of the commentators attest that no consensus on the content of a baseline religious rights entitlement is imminent. The issue is further complicated by the free exercise clause, which sometimes demands government action to alleviate burdens on the exercise of religious rights when the establishment clause apparently prohibits such action. The exposition of a general theory of the religious rights granted by the constitution is beyond the scope of this Article. Accordingly, the arguments developed in this Article generally assume that one can arrive at the set of baseline religious rights in some principled manner, but generally identify the substance of such rights only to the limited extent that one can derive their content from the current muddle of establishment clause decisions. *See generally supra* text accompanying notes 10-58. For a fuller and more detailed discussion of the foregoing issues, see Johnson, *supra* note 21; Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. REV. 1195 (1980).

84. Ely, *supra* note 5, at 1316-17.

governmental decision-makers.

1. *McGowan v. Maryland*—Illustrating a Justification Model of the Establishment Clause

McGowan v. Maryland,[85] one of the *Sunday Closing Law Cases*, provides an excellent example of how the Court could apply a justification model of the establishment clause. *McGowan* shows both the analytical potential of rigorously scrutinizing governmental purpose under the establishment clause and the negative analytical consequences of failing to do so.

In *McGowan*, the state's comprehensive system of Sunday closing laws was challenged in part on the ground that it constituted an establishment of religion. Opponents of the laws argued that they aided the religious efforts of Christian churches to hold Sunday worship services for their congregations. Conceding that Sunday closing laws clearly are of religious origin and that they provide at least coincidental support to churches seeking to increase attendance at Sunday services, the Court's close scrutiny of the Maryland statute nevertheless enabled it to conclude that "the statute's *present* purpose and effect is not to aid religion, but to set aside a day of rest and recreation."[86]

In upholding the statute, the Court relied heavily on a long and exhaustive review of the religion clauses, Sunday closing legislation generally, and the Maryland laws in particular.[87] The Court noted that the earliest closing laws in England and colonial America were undeniably religious in both origin and purpose. Beginning in the nineteenth century, however, closing laws increasingly were justified by a purely secular purpose—promotion of better physical and emotional health by provision of a weekly day of rest and relaxation. Maryland's closing laws and their antecedents were consistent with this pattern. The Court also observed that, during the enactment process, the disputed statute had drawn support from labor unions and trade associations as well as Christian churches.

Turning to the text of the statute, the Court found expressions such as "Sabbath-breaking" and "profaning the Lord's day." The statute also prohibited a number of activities generally considered antagonistic to religious worship, such as drinking and gambling, at hours when worship services were commonly held, and prohibited certain noisy activities from taking place within 100 yards of a church. Nevertheless, the statute also

85. 366 U.S. 420 (1961).
86. *Id.* at 449 (emphasis added).
87. *See id.* at 431-49 (majority opinion); *id.* at 459-543 (Frankfurter, J., concurring).

permitted a number of activities, such as bingo, and fishing and swimming in public parks, that are inconsistent with church-going and the belief that Sunday is "the Lord's day." Finally, the Court could think of no alternative that would as effectively implement the state's secular purpose. The Court characterized Sunday as a rational legislative choice for a common day of rest because the Court perceived it as the day that most people would choose of their own accord. To choose another day, therefore, or to allow people individually to choose their own day, would be administratively inefficient. The Court concluded that the originally religious influences and purposes arguably reflected in the language of the statute had attenuated to a point of insignificance, and that the legislative goals of the laws were implemented by the least religiously burdensome means. Accordingly, it upheld the statute against the establishment clause challenge.[88]

Because the state's articulated secular purpose was believable, and apparently was implemented by the least burdensome means,[89] one cannot clearly discern in the closing laws a governmental intent to aid religion.[90] Nevertheless, the statute's disproportionate favoring of Sunday worshippers and burdening of Sabbatarians, such as Jews and Seventh Day Adventists, as well as its utilization of religious language and deference to worship services, suggest that a desire to facilitate Christian worship might have played some role in the lawmaking process. This inference is partially controverted by the laws' narrow scope, their permission of activities inconsistent with Sunday worship, and the state courts' long and consistent pattern of upholding Sunday closing laws (including the disputed statute) on secular grounds. Still, the question remains to what extent (if any) impermissible religious considerations motivated the legislature to pass the Sunday closing laws.

In equal protection review, when illicit considerations are proved to have been taken into account in the governmental decision-making process, but all of the state's articulated innocent goals have not been circumstantially or otherwise disproved, a causation issue is deemed to have arisen: whether, in the absence of the illicit considerations, the challenged action would have been taken anyway.[91] The *McGowan* Court suggested its awareness of a causation issue in upholding the Maryland closing statute:

> [T]he "Establishment" Clause does not ban federal or state regulation

88. *Id.* at 452.
89. *But see infra* text accompanying notes 94-102.
90. *See supra* text accompanying notes 68-71.
91. *See* Eisenberg, *supra* note 5, at 149-50; Simon, *supra* note 62, at 1067, 1127-29.

> of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislature conclude that the general welfare of society, *wholly apart* from any religious considerations, demands such regulation. . . . Sunday Closing Laws, like those before us, have become part and parcel of th[e] great governmental concern [for the public health and welfare] *wholly apart* from their original purposes or connotations.[92]

The italicized language suggests that the Court may have implicitly employed a causation scheme similar to that expressly approved in later constitutional cases.[93] Consistent with those pronouncements, the Court did not treat evidence of impermissable religious motivations for enacting the closing laws as dispositive of the establishment clause issue. Rather, this evidence served only to shift the burden of proof to the state to show that the impermissible motivations did not play a material role in the legislature's decision to enact the law.

McGowan might have been notable as a case in which the state was successfully able to carry this burden of proof. To characterize the case in this manner, however, would be reaching too far. Although the Court recognized the legitimacy of the state's articulated secular purpose and, by carefully scrutinizing the text, legislative history, and political context of the Maryland closing laws, determined that this purpose was genuinely considered by the legislature in passing the laws, this analysis only carried the Court part way to its result: it provided credible justification for a system of state-enforced, one-holiday-in-seven closing laws, but did not explain the state's insistence that the holiday be the same for everyone, and that it be Sunday.[94]

With regard to universality, the state offered several justifications:

1. Family togetherness—families can enjoy the day of rest together only if the rest day is the same for each working family member.
2. Efficient enforcement—it is much more difficult to apprehend violators of the closing laws when the holiday is different for everyone; with one common rest day, violators are conspicuous, making enforcement easier.
3. Community cohesion—one of the values of the day of rest is to permit friends and relatives to socialize and to create a general air of rest and relaxation throughout the entire community. These

92. 366 U.S. at 442, 445 (emphasis added).

93. *E.g.*, Island Trees School Dist. No. 26 v. Pico, 457 U.S. 853, 871 n.22 (1982) (plurality opinion); Village of Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 274, 287 (1977)); *see* Simon, *supra* note 5, at 1325.

94. *See* Ely, *supra* note 5, at 1325.

values are not implemented by a one-day-in-seven plan.[95]

With regard to the legislative choice of Sunday as the common rest day, the state offered as sole justification that Sunday is the day most people would have chosen anyway.[96] None of the goals or justifications was challenged as beyond the regulatory power of the state.

In reviewing the state's articulated justifications for imposing Sunday as the universal day of rest, the Court changed its analytic style from inquiry into whether the articulated goals were actually recognized and considered by the legislature, and whether the challenged legislation addressed real problems. The Court instead applied classic deferential rational-basis scrutiny[97] and upheld the choices of universality and Sunday, speculating that a legislature might reasonably have considered such goals in enacting the challenged statute and that the statute implemented these imaginary goals at least to some degree.[98]

The *McGowan* Court, however, neither balanced the interests of the state against those of the individual nor employed any other sort of alternatives test, and its failure to do so resulted in ignorance of probative evidence of illicit legislative motivation. The goals of family togetherness would be just as effectively implemented by a voluntary one-day-in-seven plan. Family members would be free voluntarily to act in concert and rest on the same day, whatever it might be. The one-day-in-seven plan also is less intrusive, permitting those who worship on another day to rest on that day and avoid the choice between undergoing economic hardship or forsaking religious beliefs or practices. Thus, assuming a legislative standard of social efficiency,[99] family togetherness cannot count as a justification for state-compelled Sunday resting; the justification must come from the other articulated goals. That the majority of the population would choose Sunday merely begs the question whether patterns of religious choice have been unconstitutionally distorted under the establishment clause by state preference of majoritarian religious preferences. That leaves the goals of better enforcement and community cohesion to be balanced against the resulting intrusions on religious autonomy and fairness. A one-day-in-seven plan might not as effectively promote community cohesion, but it does not substantially hinder this promotion either—friends and neighbors may act together to choose the same day, just as family members who are about unity may be expected to do so. Moreover, the

95. 366 U.S. at 450-51.
96. *Id.* at 451-52.
97. *See supra* text accompanying notes 66-69.
98. 366 U.S. at 450-52 & n.21.
99. *See supra* text accompanying notes 70-72.

efficient enforcement goal may have been only illusorily achieved by the *McGowan* laws—there was no evidence that a violator of these laws would in fact have been any more conspicuous than the violator of a one-day-in-seven law.[100] Against this one must balance the substantial intrusions on religious choice and fairness. Maryland chose a religiously burdensome means to implement relatively unimportant (though admittedly nontrivial) goals when nearly-as-effective, significantly less burdensome means were available to implement those goals. This choice should have directed the Court to find that the state's universal prescription of Sunday as the day of rest was intended disproportionately to favor Christians in violation of the secular purpose prong of the *Lemon* test.[101]

McGowan illustrates how valuable motive and rationality analysis can be to an evaluation of the secular purposes of legislation challenged under the establishment clause. By using circumstantial evidence of legislative motivation to shift the burden of proof between state and plaintiff, one can make some sense of laws that at first blush appear to have been enacted to aid Christian churches in a quest for higher attendance at Sunday School. Indeed, the Court's review of the challenged laws' history is a convincing demonstration that secular concerns genuinely motivated the legislature to enact the laws. In a society in which governmental intervention and regulation is pervasive, it is important that governmental actions not be found constitutionally infirm merely because they are suggested by or coincident with the beliefs or practices of religious organizations or individuals. The Court's meaningful scrutiny of legislative purpose of the *McGowan* laws provided the government with the opportunity to rebut

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100. *See* Braunfeld v. Brown, 366 U.S. 599, 614-15 (1961) (Brennan, J., concurring and dissenting).

101. *See supra* text accompanying notes 73-76; Braunfeld v. Brown, 366 U.S. 599, 613-14 (1961) (Brennan, J., concurring and dissenting) (citation omitted):

> What, then, is the compelling state interest which impels the [state] to impede appellants' freedom of worship? What over-balancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants' freedom? It is not the desire to stamp out a practice deeply abhorred by society, such as polygamy, as in *Reynolds*, for the custom of resting one day a week is universally honored, as the Court has amply shown. Nor is it the State's traditional protection of children, as in *Prince v. Massachusetts*, for appellants are reasoning and fully autonomous adults . . . . It is the mere convenience of having everyone rest on the same day. It is to defend this interest that the Court holds that a State need not follow the alternative route of granting an exemption for those who in good faith observe a day of rest other than Sunday.

See also Braunfeld, 366 U.S. at 616 (Stewart, J., dissenting):

> [The state] has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness.

presumptions of religious motivation arising from the coincidence of the laws with Christian worship practices.

On the other hand, the Court's extreme deference to the legislature in reviewing the manner in which the state determined to implement its legitimate goals resulted in the imposition of substantial burdens on religious exercise by those persons whose beliefs require observance of a Sabbath other than Sunday. When a fundamental right such as the free exercise of religion is more than trivially burdened by the state's pursuit of a legitimate government goal, the Court should at least require the state to show that the goal is being pursued in the least intrusive manner and that the goal is relatively important.[102] The Court's failure to use rationality analysis to expose the relative inefficiency of the closing laws in obtaining the legislative objectives resulted in an improper resolution of the competing constitutional interests.

2. Applying a Justification Model of the Establishment Clause

Generally, one can classify the Court's establishment clause cases into two factual patterns. The cases involve either governmental action that accommodates or otherwise expressly takes into account religious practices or beliefs,[103] or governmental action that grants to or prohibits a religious person or organization access to governmental benefits which otherwise are generally available to all.[104] Analysis of governmental purpose adds little to the latter group of cases. Application of the secular purpose prong of *Lemon* is rarely dispositive in these contexts because the broad secular legislative classifications embodied in the laws usually can be credibly defended in terms of legitimate social welfare or similar regulatory goals.[105] Accordingly, constitutional review in these cases tends to

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102. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 51 (1973); Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

103. *E.g.*, Estate of Thornton v. Calder, Inc., 105 S. Ct. 2914 (1985); Wallace v. Jaffree, 105 S. Ct. 2479 (1985); Lynch v. Donnelly, 104 S.Ct. 1355 (1984); Marsh v. Chambers, 463 U.S. 783 (1983); Stone v. Graham, 449 U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); McGowan v. Maryland, 366 U.S. 420 (1961); Zorach v. Clauson, 343 U.S. 306 (1952); McCollum v. Board of Educ., 333 U.S. 203 (1948).

104. *E.g.*, Witters v. State Comm'n for the Blind, 54 U.S.L.W. 4135 (U.S. Jan. 27, 1986); Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985); Aguilar v. Felton, 105 S. Ct. 3232 (1985); Mueller v. Allen, 463 U.S. 388 (1983); Widmar v. Vincent, 454 U.S. 263 (1981); Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 572 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971); Everson v. Board of Educ., 330 U.S. 1 (1947). A few cases might be characterized as involving both kinds of action. *E.g.*, Larson v. Valente, 456 U.S. 228 (1982); Larkin v. Grendel's Dean, 459 U.S. 116 (1982).

105. *See supra* text accompanying notes 31-35.

focus on potential religious effects and entanglements.[106] Application of motive and rationality analysis to the former group of cases, however, demonstrates the utility of such analysis in clarifying and protecting establishment clause values in a broad range of governmental actions. Motive and rationality analysis have been particularly significant in the Court's establishment clause decisions relating to public school curriculum choices, the use of religious symbols by government, religious lobbies and religiously motivated legislators, and public school prayer. In each of these areas (most of which recently have been before the Court),[107] careful scrutiny of governmental purpose is necessary to illuminate the constitutionally proper resolution of the competing interests.

a. Public School Teaching and Curriculum Decisions

One commentator has argued that:

> resort to impact will not always assure the protection of establishment clause rights. For instance, the decision not to teach particular subjects in public schools and universities is normally within the scope of a state's police power. But if such an exclusionary decision is designed to promote a religion . . . the establishment clause requires the statute's invalidation. If impact alone is examined, the effects of the statute . . . are consistent with both constitutional and unconstitutional governmental action.[108]

In *Epperson v. Arkansas*,[109] the Court reviewed an action for a declaratory judgment that the state's statutory prohibition against teaching the Darwinian evolutionary model in the public schools was unconstitutional. The Court, convinced from the record that "fundamentalist sectarian conviction was and is the law's reason for existence," held the prohibition unconstitutional under the establishment clause.[110] In a more recent case,

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106. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 394-95 (1983).

107. *See, e.g.*, Wallace v. Jaffree, 105 S. Ct. 2479 (1985) (statute mandating moment of silence in public schools); Lynch v. Donnelly, 104 S. Ct. 1355 (1984) (inclusion of nativity scene in publicly funded Christmas display); Stone v. Graham, 449 U.S. 39 (1980) (display of Ten Commandments in public school classroom); Harris v. McRae, 448 U.S. 297, 318-20 (1980) (prohibition of Medicaid funds for most abortions); Stone v. McCreary, 739 F.2d 716 (2d Cir. 1984) (display of privately funded nativity scene on publicly owned town square), *aff'd by equally divided Court*, Village of Scarsdale v. McCreary, 105 S. Ct. 1859 (1985); *see also* Marsh v. Chambers, 463 U.S. 783 (1983) (legislative prayer); Island Trees School Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (prohibition of school library's use of certain books); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984) (high school prayer group), *cert. granted*, 105 S. Ct. 1167 (1985).

108. Eisenberg, *supra* note 5, at 166-67; *accord* J. ELY, *supra* note 70, at 137.

109. 393 U.S. 97 (1968).

110. *Id.* at 107-08. In *Epperson*, the state did not attempt to articulate any secular purpose for the teaching ban, and impliedly conceded that the law was the result of the anti-evolutionary religious

Stone v. Graham,[111] the Court declared unconstitutional Kentucky's practice of posting privately funded displays of the Ten Commandments in public school classrooms, concluding that the "pre-eminent" purpose for the displays was indisputably religious.[112]

The Court's decisions in *Epperson* and *Stone* are consistent with the Court's constitutional analysis of legislative purpose in other contexts. For example, the Court has indicated that evidence of intentional racial or other discrimination by the government can be inferred from the discriminatory impact of governmental action when the action cannot plausibly be explained in non-discriminatory terms.[113] Thus, in *Gomillion v. Lightfoot*,[114] the Court held unconstitutional a bizarre rearrangement of municipal boundaries which had the effect of excluding from the municipality virtually all blacks who had resided within the city under the old boundaries. As one commentator explained:

> [t]he mere fact that boundaries divide communities of different racial

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fervor that swept the Bible Belt in the 1920's at the time of the *Scopes* trial. *See* 393 U.S. at 103 n.11, 107-08 & nn. 15-18 (citing Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927)). Darwinian evolutionary theory is contrary to the fundamentalist Christian tenet of divine, instantaneous, and *ex nihilo* human creation, and the Court decided that the proper logical inference to be drawn from the record was what the plaintiffs had alleged—that the purpose of the teaching ban was to prohibit public school instruction of scientific knowledge that is offensive to believers in a particular sectarian doctrine relating to the origin of man:

> The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.

Id. at 103.

111. 449 U.S. 39 (1980).

112. *Id.* at 41-42. The displays in question were required by statute to exhibit an explanation that the secular nature of the Ten Commandments was clear from their "adoption" as the "fundamental legal code of Western civilization and the common law of the United States." 449 U.S. at 41. Though it labeled the statutory declaration "self-serving," the trial court nevertheless found the purpose of the statute to be secular. *Id.* The Court, however, determined that the legislative purpose for posting displays of the Ten Commandments in a public school classroom could only be religious in nature:

> The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no recitation of a supposedly secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters. . . . Rather, the first part of the Commandments concern the religious duties of believers. . . . If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce school children to read, to meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

Id. at 41-42.

113. *See, e.g.*, Personnel Admin'r v. Feeney, 442 U.S. 256, 275 (1979) (citing Village of Arlington Heights v. Metro Hous. Dev. Corp., 428 U.S. 252, 266 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976)).

114. 364 U.S. 339 (1960).

> mixtures is not itself unconstitutional, and because political boundaries often are drawn piecemeal over time and for a wide variety of non-rational but racially innocent reasons, a governmental defendant will usually be able to provide a credible non-racial explanation for why the boundary is where it is. However, none of these usual explanations were available to explain the Gomillion statute that altered "the shape of Tuskagee from a square to an uncouth 28-sided figure," and any attempt by the government to fabricate a non-racial explanation would have been so contextually peculiar as to be unbelievable.[115]

Justifications of governmental action that impose disproportionate and undesirable burdens on certain classes of citizenry should be viewed with judicial skepticism when these justifications do not correspond to general knowledge or widely held presumptions about the way governmental bodies normally act (or perhaps should act).[116] This standard more clearly illuminates the basis for the Court's decisions in *Epperson* and *Stone*. Public schools unquestionably have a large measure of discretionary control over teaching curriculum, course content, methods of instruction, and classroom materials.[117] A variety of credible, non-religious justifications usually are available for the withdrawal of any particular subject from, or its inclusion in, the curriculum—the availability of space, materials, or funds, the degree of student interest or teaching expertise, and the degree of relevance to perceived educational needs. Given certain facts in *Epperson*[118] and *Stone*,[119] however, none of these usual explanations is a believable justification for the singular banishment of Darwinian evolution from the curriculum or for the prominent display of a sacred religious text on classroom walls. The peculiarity of the states' actions, when viewed in the

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115. Simon, *supra* note 62, at 1116 (quoting 364 U.S. at 340).

116. *See* Simon, *supra* note 62, at 1115-16; *cf.* C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE 794 (E. Cleary 2d ed. 1972) ("[jurors'] experience may tell them . . . that although the plaintiff has introduced evidence and the defendant has offered nothing in opposition, it is still unlikely that events occurred as contended by the plaintiff").

117. *E.g.*, Island Trees School Dist. No. 26 v. Pico, 457 U.S. 853, 869-72 (1982) (plurality opinion). The *Epperson* statute was affirmed by the state court on precisely this ground. Epperson v. Arkansas, 242 Ark. 922, 922, 416 S.W.2d 322, 322 (1967), *rev'd*, 393 U.S. 97 (1968); *see also* 393 U.S. at 101 & n.7; *id.* at 111-14 (Black, J., concurring).

118. (1) The Arkansas statute admittedly was modelled after the Tennessee statute pursuant to which the *Scopes* trial took place, 393 U.S. at 98; (2) the state failed even to attempt a secular explanation of the statute, *id.* at 107; (3) the statute coincided with fundamentalist Christian doctrine, and fundamentalist Christianity is a majoritarian religion in Arkansas, *id.* at 107-08; and (4) there were no convictions under the statute in its 45 years of existence, *id.* at 109 (Black, J., concurring).

119. (1) The Ten Commandments form part of a sacred text for both Christianity and Judaism, 449 U.S. at 41; (2) the content of the Commandments is not confined to secular matters, but covers elements of religious worship and piety as well, *id.* at 41-42; and (3) the Commandments were not integrated into the school curriculum so as to serve an educational function, *id.* at 42.

context of normal public school curriculum and instruction decisions, strongly suggests that the coincidence of the actions with predominant religious beliefs was intended, and the coincidence in each case, thereby, constitutes circumstantial proof of covert religious preference in violation of the secular purpose prong of the *Lemon* test.[120]

Nevertheless, it may be constitutionally possible for the state to mandate special instruction in areas that are religiously sensitive. Consider, for example, a school district that has as part of its required high school curriculum a biology course that includes study of experimental tests of Darwin's theory of natural selection and related scientific theories explaining the origin of the different plant and animal species. The district requires that a particular textbook be used in teaching the class. This text critically examines and discusses all empirical findings without restriction. Theoretical conclusions drawn from such findings are likewise discussed in the book without restriction, insofar as they do not purport to explain the creation and origin of the human species. Theoretical conclusions respecting human origin are treated in a separate chapter. This chapter also descriptively surveys and comparatively discusses the varying influence that the evolutionary explanation of human origin has had on different social, political, philosophical, and theological beliefs respecting human creation, including how adherents of such views have attempted to reconcile their distinctive views on the nature and origin of man with scientific data generated by the evolutionary model.[121] No special restrictions are placed on the teacher,[122] except that he or she must use this particular textbook and must teach its survey chapter on human creation. A student and his parents sue the district, arguing that requiring use of this text and requiring that theological beliefs respecting human origin be taught together constitute an establishment of religion.

In assessing the constitutionality of the directive, it is doubtful that a court could construe the directive as requiring political or administrative surveillance that would run afoul of the non-entanglement prong of the *Lemon* test.[123] The directive probably would satisfy the effects prong as

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120. *See* Ely, *supra* note 5, at 1318; *see also* Eisenberg, *supra* note 5, at 53.

121. Such a chapter could include, for example, discussions of the importance of the evolutionary model to the intellectual development of such theories as dialectic materialism and social darwinism, as well as treatment of the challenges that the model presented and continues to present to Christian theology. It also might include a discussion of creationism. *See generally* Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 550-65 (1978).

122. *See* Note, *The Constitutional Issues Surrounding the Science-Religion Conflict in the Public Schools: The Anti-Evolution Controversy*, 10 PEPPERDINE L. REV. 461, 479-81 (1983) (noting existence of independent speech rights of teacher); *see also* Epperson v. Arkansas, 393 U.S. 97, 111, 113-14 (1968) (Black, J., concurring).

123. For example, there is no competition for funds, government surveillance of religious person-

well. There can be no argument about the secular educational character of science, sociology, political science, or philosophy, and the objective study of theology, when integrated into the curriculum to serve an educational purpose, has been endorsed by the Court.[124] The teaching of theology concededly has some favorable effect on religion. In the context of a survey including contradictory non-religious beliefs, however, one can fairly characterize that effect as being as "remote, indirect, and incidental" as the favorable effect that Sunday closing laws or public nativity scenes have on Christian churches. These effects have been held insufficient to amount to establishment clause violations.[125] If the directive is unconstitutional under the establishment clause, it must be for lack of a secular purpose.

Case A. Assume that the school board offers no evidence at trial beyond a showing of its traditional control over curriculum and course content, and the plaintiffs offer evidence showing the following:

> (1) A majority of the school board had frequently expressed in other forums its view that the unbridled teaching of evolution was destroying students' faith in God and promoting "materialistic and immoral" behavior.[126]
>
> (2) The particular textbook was chosen by the board because its even-handed discussion of social, political, scientific, and philosophic views of the nature and origin of man, as well as theological beliefs, gave educational credibility to the board's directive.
>
> (3) The curriculum change was neither considered nor recommended by the board's curriculum committee, which was a deviation from standard procedure, and was discussed and adopted by the board at an improperly noticed meeting.

Case B. Assume that the plaintiffs offer no evidence but their interpretation of the religious purposes, effects, and potential entanglements suggested by the text of the directive, and the board offers evidence showing the following:

> (1) The directive was adopted in response to broad-based student, parental, and community complaint that evolutionary theory was being used in classes to discredit and ridicule belief in the existence of a

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nel or institutions, or government resolution of internal religious disputes. *See generally* L. Tribe, *supra* note 6, at 865-80.

124. *See* Stone v. Graham, 449 U.S. 39, 40-41 (1980) (by implication); Abington School Dist. v. Schempp, 374 U.S. 203, 224, 225 (1963).

125. *See* McGowan v. Maryland, 366 U.S. 420 (1961) (sunday closing laws); Lynch v. Donnelly, 104 S. Ct. 1355 (1984) (nativity scene). *See generally*, L. TRIBE, *supra* note 6, at 840.

126. *Cf.* Wallace v. Jaffree, 105 S. Ct. 2479, 2490 & n.43 (1985) (post-enactment testimony of legislative sponsor relied on to hold statute unconstitutional).

Supreme Being. The school board's inquiry showed this to be the case in fact.[127]

(2) The school board members felt that current biology texts were not neutral between religion and non-religion in that they tended to persuade students of an empirically undemonstrable view of reality—that a Supreme Being does not exist—without recognizing the existence of competing views of reality incorporating the existence of a Supreme Being. The board concluded that even-handed, non-critical discussion of the impact of the evolutionary model on a wide variety of views of reality was the best accommodation of the various competing views and that the required textbook best incorporated this approach.[128]

(3) Numerous alternatives were considered and rejected for legitimate reasons.[129]

The Case A evidence is sufficient to prove that a constitutionally impermissible motive—a desire to aid religion by teaching theistic principles in a public school—played some part in the decision-making process. Assuming that the board could not show that this part was inconsequential,[130] the finder of fact should declare the directive unconstitutional under the establishment clause for lack of a secular purpose.[131]

Case B, however, may well lead to a different result. The articulated desire to remain neutral with respect to a controversial issue having both secular and religious overtones, the specific inquiry into the facts, and the measured consideration of alternatives, as well as the existence of a genuine secular educational purpose (to inform students about the response of the adherents of a number of socially common but ultimately unverifiable theories of human nature and origin to the evolutionary model, without

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127. *See generally* Note, *supra* note 121, at 532-36.

128. *See generally* Note, *supra* note 122, at 485-86 & n.152; Note, *supra* note 121, at 527 nn.56 & 57, 542-43, 550-55, 558-59 & n.213.

129. Regulation of the teacher's presentation of the material was rejected as too entangling and a possible infringement of the teacher's speech rights; offering a separate course on theories of the nature and origin of man was rejected as fiscally impracticable; teaching the unit in another class, such as social studies, was rejected because student questions about the origin of man most often arise in science classes, making such classes the most appropriate forum for discussion of the issue; and allowing students to be excused from discussions of evolution and theology or prohibiting such discussions altogether were rejected because they subverted the educational goal of preparing students to make informed and mature value choices. *See generally* Note, *supra* note 121, at 523.

130. *Cf.* Mount Healthy School Dist. v. Doyle, 429 U.S. 274 (1978) (showing of constitutionally impermissible purpose for governmental action may be rebutted by preponderance of evidence that such purpose played no role in decision to take such action).

131. *See, e.g.*, Daniels v. Walters, 515 F.2d 485 (6th Cir. 1975); McLean v. Arkansas, 529 F. Supp. 1255 (E.D. Ark. 1982); Wright v. Houston Indep. School Dist., 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd*, 486 F.2d 137 (5th Cir. 1973); Smith v. State, 242 So.2d 692 (Miss. 1970).

appearing to endorse or approve any particular one)[132] evidence the lack of any intent to promote religious belief in the manner prohibited by the establishment clause. In the absence of proof of primary religious effects or potential entanglements, a court should uphold the directive against an establishment clause challenge.[133]

b. The Symbolic Identification of Government and Religion

In *Lynch v. Donnelly*,[134] the Court considered an establishment clause challenge to a municipality's inclusion of a traditional nativity scene as part of a larger secular display depicting various observances of the Christmas holiday. The trial court found that by including the nativity scene in the display, the municipality had endorsed and promoted religious beliefs and, by affiliating the municipality with Christian beliefs and giving the appearance of official sponsorship, had conferred a substantial benefit on Christianity. The Supreme Court, however, determined that "the primary purpose of including the nativity scene in the larger display was not to promote religion, but to celebrate the public holiday through its traditional symbols," which the Court validated as a legitimate and secular purpose.[135]

Government action that harmonizes with majoritarian religious beliefs or practices, whether by design or otherwise, often imposes substantial burdens on the exercise of religion by non-conforming religious minorities.[136] These burdens have often been held unconstitutional under the free exercise clause.[137] When the religious effects or potential entanglements of the action are substantial, the actions may be struck down as unconstitutional under the establishment clause as well. Cases such as *Lynch* in which government associates itself with religion by use of a reli-

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132. *See* Note, *supra* note 121, at 561; Note, *supra* note 122, at 485; *see also* Epperson v. Arkansas, 393 U.S. 97, 112-13 (1968) (Black, J., concurring).

133. *See generally* Note, *Teaching the Theories of Evolution and Scientific Creationism in the Public Schools: The First Amendment Religion Clauses and Permissible Relief*, 15 U. MICH. J.L. REF. 421, 459-60 (1982).

134. 104 S. Ct. 1355 (1984).

135. *Id.* at 1364. The Court characterized the religious effects of the nativity scene as merely incidentally harmonizing with Christian religious beliefs, and analogized the effect of the scene to the effect of the numerous religious works of art which passively hang in government museums. *Id.* at 1365. The Court further found that the only evidence of "political divisiveness" under the entanglement prong was the litigation before the Court, and held that the political divisiveness that would render governmental action unconstitutional could not be created merely by filing a lawsuit. *Id.*

136. Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1476 (1981) [hereinafter cited as Note, *Rebuilding the Wall*]; *see also* Note, *Abortion Laws, Religious Beliefs and the First Amendment*, 14 VAL. U.L. REV. 487, 504-06 (1980) [hereinafter cited as Note, *Abortion Laws*].

137. *See, e.g., supra* note 33.

gious symbol, however, are difficult because, despite the coincidence of government action and religious belief, they generally entail no legal obstacle or other burden on the exercise of minority rights and have little other demonstrably religious impact.

Nevertheless, the coincidence of government action with majoritarian religious beliefs or practices should be suspect under the establishment clause because it appears to align the coercive power of the government with predominant religious beliefs or practices, and against minority religious and non-religious beliefs or practices. The resultant appearance of government approval or endorsement of the coincident beliefs or practices thereby impedes or "chills"[138] adherence to and exercise of inconsistent beliefs and practices, both religious and non-religious.[139] Adherents of other religions or of no religion who do not accept the coincident religious belief or practice are implicitly, though unmistakably, disapproved by the government. This distorts normal patterns of religious voluntarism by imposing an external benefit—implicit government approval—to acceptance of the belief or practice and a corresponding external cost—implicit government disapproval—to non-acceptance.[140]

Lower courts[141] have not always recognized that any constitutionally significant religious impact results from government use of or association with religious symbols.[142] The Court itself has held that governmental action that incidentally advances religion does not, for that reason alone, violate the establishment clause.[143] The Court also has held, however, that governmental action intended to promote or to burden a particular religious belief or practice is unconstitutional.[144] Thus, careful scrutiny of

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138. *Cf.* Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (vague statutory language compels those wishing to avoid violation of law to restrict "their conduct to that which is unquestionably safe").

139. Engel v. Vitale, 370 U.S. 421, 431 (1962); Note, *Rebuilding the Wall*, *supra* note 136, at 1476; *see also* Eisenberg, *supra* note 5, at 164; Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1385 & n.105 (1981); Note, *supra* note 5, at 959, 960-61.

140. *See* Wallace v. Jaffree, 105 S. Ct. 2479, 2497 (1985) (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 104 S. Ct. 1355, 1366 (1984) (O'Connor, J., concurring)); Lynch v. Donnelly, 104 S. Ct. 1355, 1373 (Brennan, J., dissenting).

141. Before *Lynch*, the Supreme Court had never addressed this issue. *See* Lynch v. Donnelly, 104 S. Ct. 1355 (1984).

142. *Compare* Stone v. McCreary, 739 F.2d 716 (2d Cir. 1984), *aff'd by equally divided Court*, Village of Scarsdale v. McCreary, 105 S. Ct. 1859 (1985); Eugene Sand & Gravel, Inc. v. City of Eugene, 276 Or. 1007, 558 P.2d 338 (1976), *cert. denied*, 434 U.S. 876 (1977); Opinion of the Justices, 108 N.H. 97, 228 A.2d 161 (1967); *and* Paul v. Dade County, 202 So. 2d 833 (Fla. App. 1967), *cert. denied*, 390 U.S. 1041 (1968) *with* ACLU of Georgia v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983); *and* Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978). *See also* Laycock, *supra* note 130, at 1383-84.

143. *See supra* text accompanying notes 25-34.

144. *E.g.*, Wallace v. Jaffree, 105 S. Ct. 2479 (1985); Stone v. Graham, 449 U.S. 39 (1980);

secular purpose is critical to determine whether the harmonization of government and religion is intentional or not.[145] When the scrutiny enables a court to conclude that the government's goals are both believable and legitimate, the harmonization of governmental action and religious belief or practice should be constitutionally acceptable.[146]

The Court has long rejected a strict rule of no-aid to religion, as it has rejected a strict rule of no-burden.[147] Accordingly, neutrality is not violated when religion is aided or burdened as part of a larger, secular group or classification similarly aided or burdened, as long as it is clear that the governmental action was taken in spite of, rather than because of, the religious aid or burden.[148] As with other forms of discrimination or preference, the invidious nature of religious discrimination or preference is not present when the disproportionate aid to or burden on the religious person or group can credibly be shown to be the result, not of the absence or presence of religious belief or practice, but of classification of the person or group with other religious and non-religious persons or groups on the

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Epperson v. Arkansas, 393 U.S. 97 (1968); *see* Larson v. Valente, 456 U.S. 228 (1982).

145. When even slight religious effects are deemed constitutionally fatal under the primary effect prong of the *Lemon* test, scrutiny of legislative purpose is less important because most governmental action falling under the establishment clause at least trivially promotes or burdens religion. When, however, more substantial religious impact is tolerated under the establishment clause, scrutiny of motive is critical to ensure that the government is not pursuing constitutionally prohibited goals. *See* Eisenberg, *supra* note 5, at 103. Failure to scrutinize sufficiently governmental motivation may result in governmental action being permitted under the establishment clause despite the government's motive to discriminate disproportionately against or in favor of a particular religion or religion generally. If the establishment clause is to guard against the distortion of patterns of religious voluntarism that occur when the government aligns itself for or against the beliefs of practices of a religion or religion generally, then it follows that governmental intent to aid or hinder religion is as much as establishment clause violation as actual aid or hindrance. Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193, 212 & n.77 (establishment clause concerned with psychic and moral affront caused by religious discrimination or favoritism by government); *see* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); Gardner, *supra* note 5, at 157 ("to disadvantage a group essentially out of dislike is surely to deny its members equal concern and respect, specifically by valuing their welfare negatively"); Bennett, *supra* note 65, at 1075; Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 964-67 (1978) (laws enacted because of illicit motivation stigmatize victims and breach the public trust); *cf.* Simon, *supra* note 62, at 1047, 1051 (racially prejudiced governmental actions insult, stigmatize, and demean the dignity of the group members towards whom the prejudice is held).

146. *See* J. ELY, *supra* note 70, at 153; Bennett, *supra* note 65, at 1076; *cf.* Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (state veterans preference hiring statute having overwhelming discriminatory effect on women held constitutional in absence of evidence that discriminatory effect was intended).

147. *See supra* text accompanying notes 21-37.

148. Conflicting evidence of government motivation still will raise a causation issue notwithstanding an initial determination that the government's articulated goals are constitutionally legitimate. *See supra* text accompanying notes 91-93.

basis of commonly shared secular characteristics.[149] Because any costs of nonconformance are not (and thus should not generally be perceived as) the result of a government desire to disproportionately burden religion, those who bear the costs are not stigmatized by governmental disapproval and cannot be characterized as bearing the costs unfairly. Similarly, because the government is not (and should not generally be perceived as) animated by a desire to promote majoritarian religious practices or beliefs, conforming believers are not for that reason reinforced in their beliefs.[150] Thus, scrutiny of motive may preserve religious voluntarism when

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149. *See* Mueller v. Allen, 103 S. Ct. 3062, 3069 (1983); Walz v. Tax Comm'n, 397 U.S. 664, 696-97 (1970) (opinion of Harlan, J.); Everson v. Board of Educ., 330 U.S. 1 (1947); Laycock, *supra* note 139, at 1384; *see also* J. ELY, *supra* note 70, at 153; Bennett, *supra* note 60 at 1076; Bice, *Motivational Analysis as a Complete Explanation of the Justification Process*, 15 SAN DIEGO L. REV. 1131, 1139 (1978); Eisenberg, *supra* note 5, at 157.

The Court recently decided the case of a handicapped student who qualified for post-secondary financial educational assistance under a state vocational rehabilitation program, but was denied such assistance solely because he was studying to be a minister at a sectarian college. Witters v. State Comm'n for the Blind, 54 U.S.L.W. 4135 (U.S. Jan. 27, 1986). Under the foregoing analysis (which differs from that of the Court), a denial of the aid in this case is not required by the establishment clause because the student qualified for the aid solely on the basis of his status as a handicapped student, a clearly secular criterion. Because the influence of government is not being used *disproportionately* to encourage or discourage the choice of entering the ministry, to grant aid in such a situation sends no message of government approval. *See infra* note 150 and accompanying text; *cf.* Mueller v. Allen, 103 S. Ct. 3062, 3069 (1983) ("[w]here . . . aid to parochial schools is available only as a result of decisions of individual parents, no 'imprimatur of state approval' can be deemed to have been conferred on any religion generally") (citation omitted). Indeed, to deny assistance in such a situation solely because of the religious avocation of the student actually would subvert establishment clause neutrality by favoring non-religious recipients of rehabilitation aid over religious recipients. *See supra* text accompanying notes 25-34.

150. *See* Wallace v. Jaffree, 105 S. Ct. 2479, 2497 (1985) (O'Connor, J., concurring) ("direct government action endorsing religion or a particular religious practice is invalid because it 'sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community' ") (quoting Lynch v. Donnelly, 104 S. Ct. 1355, 1366 (1984) (O'Connor, J., concurring)); *see* Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 881-83 (1984).

In concurring opinions in *Jaffree* and *Lynch*, Justice O'Connor has proposed a refinement of the *Lemon* test that would narrow the purpose inquiry to whether the government subjectively intended to endorse religion, and the effects inquiry to whether the governmental action under review actually sends a message of religious endorsement. *See* 105 S. Ct. at 2479; 104 S. Ct. at 1368-69. In *Jaffree*, Justice O'Connor elaborated the effects prong of *Lemon*, her version of the test when she argued that "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." 105 S. Ct. at 2497. Because its only prohibited religious effect is the appearance of government endorsement of religion, however, Justice O'Connor's version of the *Lemon* test apparently collapses the effects test into the purpose test; it would seem improbable that an "objective observer" could perceive a state endorsement of religion in any action with respect to which the state can show with relevant evidence that it was subjectively motivated by secular concerns. In other words, if a statute does not reference religion in its text, contains evidence of legitimate secular goals in its

government pursues goals in a manner that entails the appearance of government endorsement or disapproval of religion by revealing that the motives of the governmental decision-makers are secular and neutral with respect to religion.[151]

The *Lynch* decision is instructive. In that case, the Court engaged in careful scrutiny of the articulated legislative purposes of the challenged action. The Court found that the government did not undertake the challenged action to promote or to burden the beliefs or practices of any par-

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legislative history and is efficiently implemented in a manner consistent with such goals, it is unlikely that anyone familiar with such evidence nevertheless could discern in the statute a state endorsement of religion.

151. *See* Note, *supra* note 5, at 966. Of course, governmental acts that closely align the government with religion still may be found unconstitutional under the *Lemon* test if their primary effect (apart from any appearance of government endorsement or disapproval of religion) is to advance religion, or if they entangle government and religion in each other's affairs. *But see supra* note 150. The analysis in text would become more relevant to the Court's establishment clause decisions in the event that the Court abandons or relaxes the entanglement prong of the *Lemon* test, which has come under growing criticism. *See, e.g.*, Aguilar v. Felton, 105 S. Ct. 3232, 3243 (1985) (O'Connor, J., dissenting); Wallace v. Jaffree, 105 S. Ct. 2479, 2518 (1985) (Rehnquist, J., dissenting); Choper, *supra* note 9, at 681-85; Ripple, *supra* note 83, at 1204-30; *see also supra* note 50. A number of the Court's decisions finding parochial school aid programs unconstitutional under the establishment clause rest solely on the potential for excessive entanglement between church and state and the apparent government endorsement of religion inherent in such programs. *See, e.g.*, Aguilar v. Felton, 105 S. Ct. 3232 (1985); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Hunt v. McNair, 413 U.S. 734 (1973). The Court has long and consistently determined that public aid to private schools serves the clear and predominant secular purposes of providing educational opportunities to large groups of school-aged children and (not incidentally) of alleviating financial pressures and overcrowding in the public schools. *See supra* note 82. In the absence of entanglement as a test of constitutionality under the establishment clause, private school aid programs that are designed to provide private school students with educational programs and opportunities that are already available to public students through the general public school curriculum, and that are not otherwise available to private school students, *see, e.g.*, Aguilar v. Felton, 105 S. Ct. 3232, 3234-35 & n.6 (1985), could be characterized as merely providing aid to religious schools incidentally as part of a broader secular classification—*i.e.*, schools in general, both public and private. *See* Johnson, *supra* note 21, at 822; Note, *The Supreme Court, Effect Inquiry, and Aid to Parochial Education*, 37 STAN. L. REV. 219, 232 (1984). Because parents and guardians of private school students support two school systems—the private school system through the payment of tuition and the public school system through the payment of property and other taxes—such programs arguably can be characterized as merely providing the educational opportunities that already have been paid for by such individuals through their tax support of public education. *See id.* at 242-43 & n.100 (discussing Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 2675-66 (1968) (arguing government can reimburse parochial schools for full value of secular education provided)). Because the government should be able to show in such a situation that it was motivated to establish an aid program by a legitimate secular goal, and that parochial schools are being aided only as part of a broader scheme to aid all public and private schools in such a manner as to equalize the edcational opportunities for all school-age children within the jurisdiction of the local school authority, and not disproportionately to favor parochial schools, the appearance of government aid to religion should not have constitutional significance under the establishment clause. *See supra* text accompanying note 146.

ticular religion or religion generally, but only as part of a display to depict both secular and religious symbols utilized by the citizenry in celebrating a holiday with both secular and religious significance. The finding that this purpose was clearly predominant dissolved the apparent endorsement of Christianity by the city.[152] Indeed, exclusion of either the secular or the religious symbols from the display would be a departure from religious neutrality by the government, with a consequent advancement or burdening of Christianity. Thus, the Court could conclude that inclusion of the creche in the city's display was no threat to nonestablishment.[153]

c. *Religiously Motivated Legislators and Religious Lobbies*

The Court's most recent abortion funding case, *Harris v. McRae*,[154] illustrates further applications of motive analysis in the establishment clause context. In *Harris*, opponents of the Hyde Amendment,[155] which eliminated Medicaid funding for most abortions, argued that the premise of the funding termination is the belief that the fetus is a human being, and that this belief, being grounded in metaphysical assumptions about the nature of man and also being scientifically or otherwise empirically undemonstrable, is for that reason religious.[156] Opponents of the Hyde Amendment further argued that support of the Amendment by Catholic, fundamentalist Protestant, Mormon, and Orthodox Jewish organizations, and the coincidence of the anti-abortion beliefs of these organizations with the belief that the fetus is human render the Amendment unconstitu-

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152. The plaintiffs had argued that the city's display of the nativity scene constituted government endorsement and approval of Christianity and emphasized the minority status of those with nonconforming beliefs. 104 S. Ct. at 1373-74 (Brennan, J., dissenting).

153. *Id.* at 1366. Under this analysis, *publicly* sponsored religious displays violate the establishment clause unless they occur in a context that includes related secular displays so as to make clear government neutrality. *See generally* Allen v. Morton, 495 F.2d 65, 67 (D.C. Cir. 1973) (dictum). *Privately* sponsored religious displays on government property arguably are constitutional even in the absence of related secular displays, despite the appearance of government sponsorship, on the theory that religious groups and individuals, as all of the public, have a right of equal access to public forums. *Compare* Bender v. Williamsport Area School Dist., 741 F.2d 538 (3rd Cir. 1984) *cert. granted*, 105 S. Ct. 1167 (1985) *with* Stone v. McCreary, 739 F.2d 716 (2d Cir. 1984), *aff'd by equally divided Court*, 105 S. Ct. 1859 (1985); *cf. infra* note 218. Full discussion of the relationship between the establishment clause and more general First Amendment freedom of speech theories is beyond the scope of this Article.

154. 448 U.S. 297 (1980), *rev'g* McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y. 1979).

155. Pub. L. 96-123, § 109, 93 Stat. 926 (1979).

156. 448 U.S. at 318-19; McRae v. Califano, 491 F. Supp. 630, 740 (E.D.N.Y. 1979), *rev'd sub. nom.* Harris v. McRae, 448 U.S. 297 (1980); *see also* Tribe, *The Supreme Court 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 18-32 (1973); Note, *Abortion Laws*, *supra* note 136, at 494.

tional under the establishment clause as a preference by Congress of the religious beliefs of these organizations regarding abortion and the humanness of the fetus.[157]

The Court rejected these arguments. Noting that the Hyde Amendment "is as much a reflection of 'traditionalist' values toward abortion, as it is an embodiment of the views of any particular religion," the Court held that the coincidence of the funding restrictions with certain religious beliefs does not "without more" constitute a violation of the establishment clause.[158]

The argument advanced in *Harris* depends on the validity of the assertion that belief in the humanness of the fetus is necessarily and exclusively religious. Beliefs are not inevitably religious merely because they are based on metaphysical or otherwise empirically undemonstrable assumptions.[159] In particular, a belief in the humanness of the fetus can be justified by reference solely to secular philosophical and ethical authority.[160] The Court's rejection of the argument, therefore, may simply be the result of the opponents' failure to persuade the Court that a belief in the humanness of the fetus is necessarily and exclusively a *religious* belief.[161]

Nevertheless, *Harris* raises an important issue relating to the use of motive analysis in establishment clause cases: is the secular purpose prong

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157. 448 U.S. at 319; *see* McRae v. Califano, 491 F.Supp. at 690-728 (E.D.N.Y. 1979), *rev'd sub. nom.* Harris v. McRae, 448 U.S. 297 (1980). *See generally* Note, *supra* note 5, at 946 n.18; *Ecumenical War Over Abortion*, TIME, Jan. 29, 1979, at 62; *Abortion Funding: A Case of Religious War*, L.A. TIMES, Jan. 7, 1979, pt. IV (Opinion Section), at 5, col. 1. (editorial); *A Singular Issue*, N.Y. TIMES, Nov. 9, 1978, at col. 1. Opponents of the Hyde Amendment introduced evidence at trial showing that certain members of Congress, including the Amendment's principal congressional proponents, voted in favor of the Amendment because of their belief that the fetus is a human being entitled to protection against deprivation of life under the due process clauses of the Fifth and Fourteenth Amendments. 491 F.Supp. at 630, 690-727, *rev'd*, 448 U.S. 297 (1980).

158. *Harris*, 448 U.S. at 319-20.

159. *See, e.g.*, Note, *Abortion Laws*, *supra* note 136, at 497 n.64, 498 n.65. *But see, e.g.*, Mullins, *Creation Science and* McLean v. Arkansas Board of Education*: The Hazards of Judicial Inquiry into Motive*, 5 U. ARK. LITTLE ROCK L.J. 345, 385 (1982) (transcendental beliefs are religious); Note, *Rebuilding the Wall*, *supra* note 136, at 1479 & nn.101 & 103 (arguing that government should be barred under the establishment clause from advocating or advancing any metaphysical perspective).

160. *See, e.g.*, S. KRASON, ABORTION: POLITICS, MORALITY AND THE CONSTITUTION 441-63, 468-73 (1984) (anti-abortion argument derived from Aristotelian and Stoic philosophy); Gensler, *A Kantian Argument Against Abortion*, 48 PHIL. STUDIES 57 (1985); Noonan, *An Almost Absolute Value in History* in ETHICAL ISSUES IN MODERN MEDICINE (R. Hunt & J. Arras ed. 1977) (arguing that the least arbitrary point at which to recognize the humanness of the fetus is conception). *See generally* McCrae v. Califano, 491 F.Supp. 630, 741 (E.D.N.Y.), *rev'd sub. nom.* Harris v. McCrae, 448 U.S. 297, 319 (1980); Mullins, *supra* note 159, at 385.

161. *Cf.* Note, *supra* note 5, at 971 (unless the dominant legislative acts can be characterized as having advocated a clearly religious position, a law does not have a religious character).

of the *Lemon* test violated when legislation objectively shown to have a secular purpose also is shown to have been sponsored or otherwise supported by legislators subjectively motivated by their personal religious beliefs or preferences? Put in terms of the justification model, is direct evidence of religious motivation (consisting of the subjective views of participants in the governmental decision-making process) dispositive of the issue of secular purpose, or can this evidence be controverted by circumstantial evidence of permissible secular motivation (consisting of the demonstration of credible, constitutionally legitimate governmental goals achieved by the challenged action)?[162]

At the outset, one should recognize that any resolution of the issue which permits the subjective religious motivations of governmental decisionmakers to form the basis of a determination of unconstitutionality would raise serious and significant free speech and free exercise issues.[163] This by itself may be a compelling argument against this resolution of the issues. Even setting aside free exercise consideration, however, one en-

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162. *See* Note, *Abortion Laws, supra* note 136, at 499-500.

163. *E.g.*, McDaniel v. Paty, 435 U.S. 629, 640-41 (1978) (Brennan, J., concurring); *see* Laycock, *supra* note 139, at 1379; Mullins, *supra* note 159, at 389; Note, *Religion and Political Campaigns: A Proposal to Revise Section 501(c)(3) of the Internal Revenue Code*, 49 FORDHAM L. REV. 536, 554 (1981); Note, *supra* note 5, at 950; Note, *Abortion Laws, supra* note 136, at 523. Religious organizations and beliefs have always played an integral part in the development of Western thought and culture. *See generally* H. BERMAN, THE INTERACTION OF LAW AND RELIGION ch. II (1974); Fitch, *Can There Be Morality Without Religion?* in RELIGION, MORALITY AND LAW (A. Harding ed. 1956) (arguing religion is indispensable to development of systems of morality); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 712-13 (1968) (same). Presumably, this is one reason why religion is valued by a pluralistic community. *See* Schwarz, *supra*, at 713; L. TRIBE, *supra* note 6, at 881. Individual members of the Court have adverted to the social value of religion, *see, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970); *id.* at 693 (Brennan, J., concurring); *id.* at 696-97 (opinion of Harlan, J.), and, indeed, the very existence of both the free exercise and the establishment clause arguably evidences a societal judgment that religious persons and organizations are valued members of society and worthy of protection, independent of concern for considerations of individual conscience. *See generally* H. BERMAN, THE INTERACTION OF LAW AND RELIGION ch. I (1974); Gianella II, *supra* note 12, at 521. A judgment that personal religious belief should not be used, either by governmental decisionmakers or by those who seek to influence such decisions, as a predicate for their participation in the political process not only assumes that religion has no social value, it also presupposes that religion is socially harmful. Not surprisingly, the Court has recognized the legitimacy under the establishment clause of attempts by religious individuals and organizations to persuade others of the correctness of their views in the free marketplace of ideas. Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970); *e.g.*, McDaniel v. Paty, 435 U.S. 618 (1978); *see* Laycock, *supra* note 139, at 1379. On the other hand, the Court has never construed the free exercise clause as protecting an unqualified right to engage in all action motivated by religious belief, *e.g.*, Estate of Thornton v. Calder, 105 S. Ct. 2914 (1985); Reynolds v. United States, 98 U.S. 145, 164-66 (1878), and domination of any public forum or government body by religious individuals could lead the Court to a different result. *See* Mansfield, *supra* note 150, at 884-88; Note, *supra* note 151, at 224-25 & n.33. Consideration of the conflict between free exercise, anti-establishment, and freedom of speech values in this context is beyond the scope of this Article.

counters complex issues surrounding the legitimacy of such a rule under the establishment clause.

Resolution of the issue should not turn on whether direct evidence of illicit motives should be accorded more weight than circumstantial evidence of legitimate motives, as is sometimes argued,[164] because what appears to be direct evidence of institutional motivation is itself usually only circumstantial evidence. Legislatures and most other governmental decision makers are multi-member bodies. Although relevant statements by an individual member of such a body constitute evidence that is highly probative of the motivations of that member, they tell little about the motivations of other members, and, thus, little about the motivations of the decision-making body as a whole:

> Admissions by individual members . . . are relevant to institutional motivation only because the individual is part of the institution and his admission . . . therefore tells us something about his role in the institution's action. However, such statements . . . have little independent probative value concerning institutional motivation, for one member's motivation, standing alone, provides no information about others' motives.[165]

Evidence of individual member motivation is not irrelevant; indeed, evidence of the illicit motivation of a sufficiently large number of members[166] (or, perhaps, of certain key members)[167] may enable a court to conclude that the institutional motivation also was illicit. This evidence, however, though direct as to the motivations of the individuals, is only circumstantial as to the motivation of the institution—*i.e.*, of the governmental decisionmaker, which is the only motivation that counts in making the judgment of constitutionality.[168] Evidence of illicit motivation of individual members, though clearly relevant to the inquiry into institutional motivation, is entitled to no greater probative weight than other circumstantial evidence of institutional motivation.

It can be argued that successful religious lobbying does not result in an unconstitutionally religious legislative motivation because of the nature of

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164. *See, e.g.*, Note, *Abortion Laws*, *supra* note 136, at 499-500.

165. Simon, *supra* note 62, at 1107; *see also id.* at 1098, 1103-04, 1105-06.

166. *Id.* at 1108, 1109-10.

167. *E.g.*, Wallace v. Jaffree, 105 S. Ct. 2479 (1985) (holding law unconstitutional based in part on evidence of constitutionally illicit motives of legislative sponsor); Bennett, *supra* note 65, at 1073 ("Most legislation is shaped by only a few legislators. [I]mputed purpose allows legislative purpose to be defined by the purposes of those few"); *see* J. Ely, *supra* note 67, at 27 ("the statements of floor leaders are precisely where we should look to determine the purpose [of a law], since that is where those who were voting would have sought it"); *see also* Note, *Abortion Laws*, *supra* note 136, at 499.

168. Simon, *supra* note 62, at 1106-07.

the legislative process. In order to gain the support of non-believers for a particular public policy position, a religious person or organization generally must be able to appeal to broader-based, secular authority, for it must be able to persuade those who do not recognize the religion as a source of legitimate authority.[169] If the religious person or organization is unable to articulate supporting arguments in secular terms, the subsequent legislation will be viewed as parochial and religiously motivated. Even if the legislation is somehow enacted, it would probably be judicially overturned.[170] To the extent that a legislator is successful in universalizing in secular terms an originally religious belief as a justification for proposed legislation, he or she also succeeds in secularizing the legislative motivation for passing the legislation.[171] This type of law presents no government identification with religion and, consequently, no chilling effect on non-conformists because the secularization of the underlying religious motivation removes the religious label from the legislation.[172] Thus, the government is not identified with an overtly religious belief or practice, but with a secularly justifiable one that also is supported by religious people or organizations for their own reasons.[173] The articulation by the religious legislator or lobbyist of credible goals for desired governmental action in purely secular terms removes the taint that might otherwise attach to governmental action supported by religious legislators or a religious lobby.[174]

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169. *See* Mullins, *supra* note 159, at 385-86; Note, *supra* note 5, at 971; *see also* Johnson, *supra* note 21, at 827. Even those who are inclined to support such legislation for reasons unrelated to its secular merits, *see infra* text accompanying notes 175-76, must be supplied a usable rationalization for their support. *See* Bennett, *supra* note 65, at 1082.

170. Commentators agree that bald legislative favoritism for a very narrow interest group that cannot otherwise be justified is unconstitutional. *See, e.g.*, Bennett, *supra* note 65, at 1082; Ely, *supra* note 5, at 1237-38. This would appear to be premised on an application of the "public interest" normative standard to the legislative process. *See supra* text accompanying notes 70-71.

171. *Cf.* Bennett, *supra* note 65, at 1072 ("A legislator who compromises with other legislators while negotiating legislation he will eventually favor can be said to adopt as a part of his purpose the similarly qualified purposes of those with whom he reaches agreement"); J. ELY, *supra* note 67, at 144 ("[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates his colleagues to enact it").

172. *See* Note, *supra* note 5, at 971 (unless dominant legislative actors can be characterized as having advocated a clearly religious position, a law does not have a religious character).

173. Choper, *supra* note 9, at 684; *see* Drakeman, *Prayer in the Schools: Is New Jersey's Moment of Silence Law Constitutional?* 35 RUTGERS L. REV. 341, 355 (1983) ("the pious hopes of one or two misguided legislators" should not invalidate an otherwise proper statute intended by the vast majority of legislators to achieve purely secular goals); *see also* J. Ely, *supra* note 70, at 128 n.*; Anastaplo, *The Religion Clauses of the First Amendment*, 11 MEMPHIS ST. U.L. REV. 151, 173 (1981) ("it should not matter . . . for constitutional purposes, what a church believes or wants with respect to its 'religious mission.' *Its* perceptions, interests and expectations should be irrelevant to how the public should respond to the rather obvious *activities* of church members") (emphasis in original).

174. *Cf.* Mullins, *supra* note 159, at 364-65:

The legislative process, however, rarely is so principled. Often legislators will support legislation aiding or burdening religion simply because of the power, influence, and financial resources of the supporting religious or other lobby, irrespective of the credibility of any articulated secular goals.[175] Indeed, secular goals may not even be voiced at all, with support coming as the result of party or constituent pressure, vote-trading or other exchanges of legislative favors, or for no apparent reason at all.[176] Even on its merits, governmental action often may be justified by reference to both religious and non-religious authority and arguments.

When government acts in a context that indicates religious belief played a role in the passage of legislation, the decisive issue should not be the subjective reasons why lobbyists or decision-makers valued the legislative result, or whether the reasons are predicated on religious preferences. Instead, the appropriate inquiry is whether justifications for the legislation can credibly be articulated in such a way as to show that the government is acting, not in the narrow interests of religious (or anti-religious) interest groups, but for the broader, secular "public interest."[177] Evidence of religious states of mind of decision-makers or lobbyists is clearly relevant to this inquiry.[178] When the government fails to articulate believable secular legislative goals,[179] or when the articulated goals poorly fit the impact of the challenged action,[180] evidence that prominent decision-makers or influential lobbyists supported the action because of its coincidence with favored religious beliefs or practices of a particular religion will tend to reinforce the inference that the government intended to use its coercive power disproportionately to favor the beliefs or practices and to burden religious and nonreligious beliefs and practices that do not conform.[181] When, however, governmental action that disproportionately favors or disfavors religion can credibly be defended by reference to legitimate secular purposes, evidence of subjective religious motivations should not serve au-

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> if [objective inquiry] is insufficient to establish an unconstitutional purpose or motive, one of two possibilities exists: either the act is a bona fide exercise of legislative power, or the legislature has been so careful about disguising underlying motives that those motives are not manifested in any significant way in the objective world in which the statute was developed or is operating.

175. *See* Bice, *supra* note 65, at 22.

176. *Id.*; *cf.* J. Ely, *supra* note 70, at 127 ("[p]eople often vote for measures for reasons sufficient to themselves even though no one else has put those reasons on the record"); *see also id.* at 130 n.*.

177. *See* Gardner, *supra* note 5, at 484-85; Note, *Rebuilding the Wall, supra* note 136, at 1475.

178. *See* Choper, *supra* note 9, at 684.

179. *See, e.g.*, Wallace v. Jaffree, 105 S. Ct. 2479, 2490-91 & nn.43-45 (1985); Epperson v. Arkansas, 393 U.S. 97, 103 n.11 (1968).

180. *See supra* text accompanying note 76.

181. *See* Simon, *supra* note 62, at 1106, 1114-15.

tomatically to invalidate the action; the evidence should simply be weighted in the balance with other direct and circumstantial evidence of institutional motives.[182] In most cases, strong evidence of the predominance of subjective religious motivations will be required to overcome secularly defensible governmental action.[183]

Harris can be explained, therefore, by the burden shifting role that evidence of governmental motive plays in a justification model of the establishment clause. When governmental action results in disproportionate religious impacts, evidence of impermissible government motives does not dispose of the constitutional question; the evidence merely shifts the burden to the government to prove that the impermissible motive did not have a significant effect on the decision to take the challenged action. Similarly, the coincidence of the abortion funding restrictions in *Harris* with certain religious beliefs, coupled with evidence of religious motivations on the part of some legislators who were prominent in the passage of the restrictions, did not by itself permit a finding of unconstitutionality under the establishment clause; it merely shifted the burden to the government to prove that the illicit motives were not significant motivations for Congress as an institution.[184]

Although the Court, in *Harris*, did not explicitly employ this analysis, its language and holding are consistent with it. In *Roe v. Wade*,[185] the Court held that protection of the fetus as potential human life was a legitimate government goal.[186] The Court's analysis in *Harris* and in previous abortion funding decisions validated funding restrictions as a rational pursuit of this goal by characterizing the restrictions as subsidies by the government to encourage the choice of pregnancy without prohibiting the choice of abortion.[187] Significantly, the Court also found that the funding restriction did not burden the exercise of any fundamental rights.[188] The

182. *See supra* text accompanying notes 165-68.

183. *See* J. ELY, *supra* note 70, at 138 ("It will be next to impossible for a court responsibly to conclude that a decision was affected by an unconstitutional motivation whenever it is possible to articulate a plausible legitimate explanation for the action taken"); *cf.* Drakeman, *supra* note 173, at 354-55 (when governmental action coincides with religious beliefs or practices and such action is not mandated by the free exercise clause, a minimal evidentiary showing of religious purpose should lead to a judgment of unconstitutionality "unless the court is offered extremely strong countervailing evidence justifying the statute on secular grounds").

184. *See generally* Note, *supra* note 5, at 974-75.

185. 410 U.S. 113 (1973).

186. *Id.* at 150.

187. Harris v. McRae, 448 U.S. 297, 315 (1980); Maher v. Roe, 432 U.S. 464, 473-74 (1977).

188. Harris v. McRae, 448 U.S. 297, 316-17, 311-23. (1980); Maher v. Roe, 432 U.S. 464, 470-71 (1977). Thus, *Harris* is consistent with the Court's toleration of burdens on nonconforming religious beliefs under the establishment clause when free exercise values are not infringed. *See supra* text accompanying notes 36-38.

government's articulation of a credible and legitimate state goal efficiently implemented by the funding restrictions counted as circumstantial evidence that controverted other circumstantial evidence of illicit institutional motivation and enabled the Court to uphold the restriction.[189]

d. Public School Prayer

Twenty-three years ago, in *Abington School District v. Schempp*,[190] the Court considered two challenges to public school use of the Bible and the Lord's Prayer in an exercise which opened each school day. Although the state articulated several permissible secular purposes for this use of the Bible and the Lord's Prayer, the Court found that the district's failure to utilize equally-as-effective, less-religious alternatives revealed a religious purpose for the challenged uses, and held the exercises unconstitutional under the establishment clause.[191]

The *Schempp* majority did not clearly signal whether the case was decided under a purpose or an effects analysis. However, *Schempp* cannot be explained by reference to the primary secular effect prong of the *Lemon* test. Although the disputed exercise might have been characterized as so laced with religious effects as to be an establishment clause violation on that ground alone,[192] the inconsistency of the state's administration of the exercise with its articulated secular goals[193] would then have been irrelevant, for even a practice which perfectly implements legislative goals will be unconstitutional under the establishment clause if it

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189. *See* Note, *supra* note 5, at 974-75.

190. 374 U.S. 203 (1963).

191. The majority focused its inquiry on whether the disputed exercise was "religious" in character, reasoning that if it were, the exercise would constitute state aid of religion in violation of establishment clause neutrality. The state articulated four secular justifications for using the Bible and the Lord's Prayer in the exercise: to promote moral values, to combat materialism, to perpetuate traditional social institutions, and to teach literature. The Court observed, however, that the Bible is unquestionably an instrument of religion and concluded that the exercise must have had significant religious overtones because the state specifically provided for optional reading from the Catholic as well as the King James Version of the Bible, and also permitted children to be excused from class during the exercise if they so desired. Noting that these two provisions are inconsistent with secular use of the Bible for teaching social values or literature, the Court concluded that, despite the state's articulated secular goals, the challenged action nevertheless violated the establishment clause. 374 U.S. at 223-24.

192. *See id.* at 280 (Brennan, J., concurring):

> [M]uch has been written about the moral and spiritual values of infusing some religious influence or instruction into the public school classroom. To the extent that only religious materials will serve this purpose, it seems to me that the purpose as well as the means is so plainly religious that the exercise is necessarily forbidden by the Establishment Clause.

193. *Id.* at 224; *see supra* text accompanying note 78.

fails the effects prong. That the Court considered this inconsistency important in rationalizing its decision indicates that it struck down the exercise because of its failure to satisfy the secular purpose prong.

In his concurring opinion in *Schempp*, Justice Brennan states that the Court's establishment clause cases "forbid the use of religious means to achieve secular ends where non-religious means would suffice."[194] When a governmental decision with respect to a legitimate goal imposes disproportionate costs on a religious or non-religious minority without consideration of equally-as-effective alternatives that are less costly or that more equitably spread the cost, one reasonably may infer that the government intended to discriminate against the minority by passage of the legislation.[195] Thus, the state's choice of a pervasive religious means to implement its legitimate secular goals, as opposed to an equally-as-effective, less-religious alternative,[196] evidenced purposeful state preference of religion in violation of the establishment clause.

Although the *School Prayer Cases*[197] remain controversial, the Court has never reconsidered them and it appears to be well settled that incorporation of oral prayer into the public school day is an establishment clause violation. However, many states have passed so called "moment of silence" laws. These statutes generally provide for a short period of silence (usually one minute) at the beginning of each school day. Students may do what they please during this period so long as they remain quiet and seated. The laws also generally provide either that students who do not wish to be present during the period of silence may be excused from attending or, alternatively, that students who are present during the period obtain special parental consent to be present.[198]

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194. *Id.* at 280 (Brennan, J., concurring); *accord* McGowan v. Maryland, 366 U.S. at 462, 466-67 (opinion of Frankfurter, J.).

195. *See* Brest, *supra* note 5, at 122-23; Simon, *supra* note 62, at 1120-21. *See generally supra* text accompanying note 102. Alternatively, the requirement that the state choose the least intrusive religious alternative may serve to highlight the constitutionally proper balance of competing state and individual interests when preferred rights such as religious freedom are implicated by state action. *See supra* text accompanying note 75.

196. Justice Brennan suggested as secular alternatives reading excerpts from the speeches and writings of famous Americans or from "the documents of our heritage of liberty," reciting the Pledge of Allegiance or observing a moment of silence at the start of each school day. 374 U.S. at 281 (concurring opinion). Twenty-two years later, however, Justice Brennan voted with a majority of the Court to overturn a law providing for a moment of silence at the beginning of the public school day. *See* Wallace v. Jaffree, 105 S. Ct. 2479 (1985).

197. Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

198. For a comprehensive listing and description of such statutues, see Wallace v. Jaffree, 105 S. Ct. 2479, 2498 n.1 (1985) (O'Connor, J., concurring); Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 HARV. L. REV. 1874, 1874 n.1 (1983)

In *Wallace v. Jaffree*,[199] the Court considered for the first time the constitutionality of a moment of silence statute. The law challenged in that case authorized one minute of silence "[a]t the commencement of the first class of each day in all grades in all public schools for meditation or voluntary prayer . . . ," during which no other activities could be undertaken by any student.[200] Relying on abundant evidence in the record that the purpose of the statute was to encourage praying in the public schools,[201] the Court had little difficulty finding the statute unconstitutional for lack of a secular purpose.[202]

Because of the clear and unrebutted evidence of unconstitutional religious purpose that motivated passage of the *Jaffree* statute, that statute was not a good test of the constitutionality of moment of silence laws in general. Indeed, two members of the majority that held the *Jaffree* statute unconstitutional allowed that moment of silence statutes whose text and legislative history do not evidence an intent to favor prayer over other activities are probably constitutional.[203] When added to the three *Jaffree* dissenters who would have upheld that statute notwithstanding the evidence of a constitutionally impermissible goal,[204] these two make a majority of the Court that apparently stands ready to uphold a properly drafted and enacted moment of silence statute. Accordingly, the constitutionality of these statutes is likely to remain a live issue before the Court in the immediate future.

The dissenters in *Jaffree* criticized the majority's emphasis on evidence of the unconstitutional religious motivations of the legislature, arguing that the decision only encourages governmental decision-makers affirmatively to disguise (or at least be silent about) their true reasons for enact-

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[hereinafter cited as Note, *Moments of Silence in the Schools*]; Note, *Daily Moments of Silence in Public Schools; A Constitutional Analysis*, 58 N.Y.U. L. REV. 364, 407-08 (1983) (Appendix) [hereinafter cited as Note, *Daily Moments of Silence*].

199. 105 S. Ct. 2479 (1985).

200. *Id.* at 2482 n.2.

201. The statutory language expressly named prayer as an approved activity during the silence period, 105 S. Ct. 2481 at n.2; another state statute authorizing a moment of silence "for meditation," but lacking any mention of voluntary prayer, had already been passed and was in force at the time of enactment of the challenged statute, *id.*, at 2481 n.1, 2491 n.45; the prime sponsor of the statute in the legislature testified that the statute was an "effort to return voluntary prayer to [the] public schools. . .," *id.* at 2490 & n.43; the state's pleadings at trial evidenced the same view of the statutory purpose, *id.* at 2490 n.44; and the state failed to introduce any evidence at trial suggesting a secular purpose for the statute, *id.* at 2491.

202. *Id.* at 2492 ("the State intended to characterize prayer as a favored practice").

203. *Id.* at 2493 & n.2 (Powell, J., concurring); *id.* at 2505 (O'Connor, J., concurring).

204. *Id.* at 2505 (Burger, J., dissenting); *id.* at 2508 (White, J., dissenting); *id.* at 2508 (Rehnquist, J., dissenting).

ing a moment of silence statute.[205] Careful scrutiny of the various secular purposes advanced in support of moment of silence statutes suggests, however, that the statutes will usually be unconstitutional even when lacking the damaging evidence of illicit purpose that was present in *Jaffree*, because a constitutionally impermissible purpose for the statutes can be inferred from their impact.[206]

The most common (and plausible) of the secular purposes advanced for moment of silence laws is that the silence period signals the beginning of the school day and gives students the opportunity mentally to "shift gears" and orient themselves to the business of learning.[207] If this is the purpose of the laws, however, it is not clear why any students should be excused from participating or why special permission should be necessary to participate,[208] nor is it apparent why the moment of silence is prescribed only at the beginning of the school day and not after each recess or change of classrooms.[209] In fact, evidence of a disciplinary or educational purpose rarely is evident in the legislative history of moment of silence laws.[210]

Opponents of the moment of silence laws contend that the true governmental purpose behind the silence period is to create an "opportunity for prayer" for public school students and subtly to endorse the practice of praying during the opportunity.[211] The legislative history[212] and the ineffi-

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205. *Id.* at 2508 (White, J., dissenting); *id.* at 2517 (Rehnquist, J., dissenting).

206. Thus, the argument implied by the dissent and often raised in criticism of motivation analysis — that invalidation of laws on motive grounds is futile because the legislature can immediately enact the same law with a more carefully written legislative history which will withstand constitutional challenge — is inapplicable because the evidence of unconstitutional motive is not obtained from legislative history but instead is inferred from the impact of the law. *See* Bice, *supra* note 76, at 692; *supra* text accompanying note 76.

207. *See, e.g.*, May v. Cooperman, 572 F. Supp. 1565, 1569 (D.N.J. 1983); Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1013, 1016 (D.N.M. 1983); Gaines v. Anderson, 421 F. Supp. 337, 342 (D.Mass. 1976) (three-judge court) (quoting Abington School Dist. v. Schempp, 374 U.S. at 281 n.57 (Brennan, J., concurring)).

208. These exemptions suggest that the moment of silence, even if it does not have a clearly religious purpose, may entail effects thought by the state to be beyond the boundaries of what legitimately may be imposed on a child in the name of public education. *Cf. supra* note 191.

209. *See* Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 103, 1017 (D.N.M. 1983); *see also* May v. Cooperman, 572 F. Supp. 1561, 1570 (D.N.J. 1983).

210. *See, e.g.*, May v. Cooperman, 572 F. Supp. 1561, 1564, 1565 (D.N.J. 1983); Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1013, 1015-16 (D.N.M. 1983). Indeed, the evidence generally is to the contrary. *See infra* note 212 and accompanying text.

211. *E.g.*, Beck v. McElrath, 548 F. Supp. 1161, 1163 (M.D.Tenn. 1982); Drakeman, *supra* note 173, at 357.

212. For example, many legislative sponsors unabashedly stated that their reason for introducing or supporting the law was to allow public school students to pray in public schools, *e.g.*, May v. Cooperman, 572 F. Supp. 1561, 1564 (D.N.J. 1983); Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1013, 1015, 1020 (D.N.M. 1983); Beck v. McElrath, 548 F. Supp. 1161, 1464 (M.D. Tenn. 1982);

cient way in which the moment of silence statutes as generally written and administered implement the alleged educational goal, provide persuasive evidence of such a legislative motivation in most cases. Accordingly, a frequent alternative justification for moment of silence laws is that the silence period merely accommodates the free exercise rights of those students who wish to pray at the beginning of each school day.[213]

In accommodating any religious practice, the government explicitly and inescapably takes into account that practice in formulating the nature and extent of its accommodating action. The result is that the action results in a high level of government identification with the accommodated practice. This identification is not constitutionally fatal under the secular purpose prong, however, so long as the government credibly can show that it is acting to accommodate the practices within the meaning of the free exercise clause, and not to promote or endorse the practices.[214]

The institution of a government-sanctioned opportunity for prayer closely identifies the government with public school prayer.[215] Thus, the extent to which opportunities for prayer can be provided to students through less religious means—means that less visibly or directly involve

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there generally was little or no discussion of the laws' supposed secular educational purposes during the enactment process, *e.g.*, *May*, 572 F. Supp. at 1564, 1565, *Duffy*, 557 F. Supp. at 1015-16; the laws often were passed only after repeated attempts and in the face of serious questions regarding their constitutionality, *e.g.*, *May*, 572 F. Supp. at 1563; and the text of the laws was often explicitly religious, *e.g.*, *Duffy*, 557 F. Supp. at 1015; Gaines v. Anderson, 421 F. Supp. 337, 341-42 (D.Mass. 1976) (three-judge court). *See generally* Note, *supra* note 198, at 1879-81; Drakeman, *supra* note 173, at 358, nn. 103 & 104. *See also supra* note 201.

213. *E.g.*, Gaines v. Anderson, 521 F. Supp. 337, 342, 343 (D.Mass. 1976) (three-judge court); *see generally* Dunsford, *supra* note 9, at 32-33, 43; Note, *supra* note 121, at 552-53 & nn. 183 & 184; *Gaines*, 421 F. Supp. at 344. Though it offered no evidence of secular purpose in the trial court, the state in *Jaffree* used an accommodation argument on appeal to attempt to show a secular purpose. *See* 105 S. Ct. at 2491 n.45. Some commentators have erroneously characterized religious accommodation as a constitutionally impermissible purpose under the establishment clause. *E.g.*, Note, *Moments of Silence in the Schools*, *supra* note 198, at 1885. However, that a purpose can be labeled "religious" is not dispositive of the narrower secular purpose question — *i.e.*, whether the state by the moment of silence laws means disproportionately to aid or burden a religion or religion generally. *See supra* text accompanying note 83. For example, laws that allow for excusal of employees from work on religious holidays when practicable or that exempt Sabbatarians and other non-Sunday worshippers from compliance with Sunday closing laws have never been held to violate the establishment clause. *E.g.*, TEX. REV. CIV. STAT. ANN. art. 9001 (Vernon 1985) (businesses may elect to close on either Sunday or Saturday). The Court also has held that the release of public school students to attend off-campus religious instruction classes during school hours is not a violation of the establishment clause. Zorach v. Clauson, 343 U.S. 306 (1952). *But see* McCollum v. Board. of Educ., 333 U.S. 203, 209-10 (1948). That such accommodation is not mandated by the free exercise clause does not make it prohibited under the establishment clause. *See supra* notes 37 & 38 and accompanying text.

214. *See also supra* text accompanying notes 75-78.

215. *E.g.*, Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1013, 1016, 1020 (D.N.M. 1983); *see* Drakeman, *supra* note 173, at 358.

the public school with student prayer—are relevant to whether the school is accommodating prayer or promoting it.[216] For example, if a student wants to pray before school each day, he or she can surely do so at home before leaving to come to school. If the student's religious devotion is such that he or she feels the necessity to pray on school grounds immediately prior to the commencement of the school day, it is not unreasonable to expect that such a student can create the opportunity to pray on his or her own. Even in the random morning confusion of the schoolyard, there are likely to be time and place for a student to pause and invoke the blessings of his or her particular deity. A student might pray silently immediately prior to leaving his or her car or school bus, at the edge of the schoolgrounds, in some relatively isolated or less trafficked part of the campus, or at his or her desk immediately prior to the commencement of class.[217] Most moment of silence statutes, therefore, evidence an intention that an opportunity for prayer be created (1) on the public school campus, (2) in a school-sanctioned, teacher-monitored classroom setting, and (3) despite the absence of any meaningful impediment to voluntary prayer on an individual basis.[218] The state's insistence on "accommodat-

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216. *E.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123-24 & n.8 (1982); *see* Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1013, 1016 (D.N.M. 1983); Gardner, *supra* note 5, at 484-85; Garvey, *supra* note 145, at 220-21; Lowey, *School Prayer Neutrality and the Open Forum: Why We Don't Need a Constitutional Amendment*, 61 N.C. L. REV. 141, 156 (1982) ("it is difficult to justify state-sanctioned prayer on free exercise principles when the same free exercise concerns can be accommodated by a truly neutral method"). *But see* Lynch v. Donnelly, 104 S. Ct. 1355, 1363 n.7 (1984) (existence of less religious alternatives to challenged government action irrelevant under establishment clause). A heightened level of scrutiny also may be appropriate because prayer can be characterized as a majoritarian religious practice that the government is accommodating. *See* Larson v. Valente, 456 U.S. 228, 246 (1982) (such actions are suspect); *supra* text accompanying notes 138-39; *cf.* Comment, *A Non-Conflict Approach to the First Amendment Religion Clauses*, 131 U. PA. L. REV. 1175, 1178-79 (1983) (government efforts to remedy a burden it has placed on a minority religion not viewed as having the purpose or effect of establishing religion).

217. Of course, to the extent that the student's beliefs require that certain worship forms be observed such as vocalization, kneeling, use of rosary beads, or gesticulations, such locations may lack the privacy necessary for personally meaningful prayer. However, such privacy is not likely to exist during a moment of silence in the classroom either. *See* Note, *Moments of Silence in the Schools*, *supra* note 198, at 1886 n.76.

218. *See* Wallace v. Jaffree, 105 S. Ct. 2479, 2491 n.45 (1985) ("[t]here was no [state] practice impeding students from silently praying for one minute at the beginning of each school day"); *id.* at 2505 (O'Connor, J., concurring) ("No law prevents a student who is so inclined from praying silently in public schools"); *cf.* Beck v. McElrath, 548 F. Supp. 1161, 1163 (M.D.Tenn. 1982) ("Certainly a statutory enactment is unnecessary to provide for a moment of silence").

The state might constitutionally accommodate student desire for a structured prayer opportunity by allowing the organization of a student prayer group which would be permitted to use school facilities on the same basis and at the same time periods as other school-affiliated clubs or organizations. *See* Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965); *supra* note 153. *Compare* Widmar v. Vincent, 454 U.S. 263 (1980) (religious student groups permitted access to state university facilities on same basis as nonreligious groups) *and* Lowey, *supra* note 192, at 143-49 (suggesting use of desig-

ing" student desire to pray in school notwithstanding the absence of government impediments evidences a governmental purpose not merely to accommodate those who desire to pray but to promote prayer by the use of government influence.[219] In the absence of controverting evidence, the laws should be found unconstitutional. Close scrutiny of the purported secular purposes of moment of silence statutes, therefore, usually will lead to their invalidation under the secular purpose prong of the *Lemon* test.

IV. SOME CLOSING OBSERVATIONS ON SECULAR PURPOSE

Although only two of the Court's establishment clause opinions expressly use motivation analysis in examining secular purpose under the *Lemon* test,[220] numerous decisions have implicitly relied on both motivation and rationality analysis while engaging in meaningful scrutiny of the purposes of governmental action that impacts establishment clause values.[221] Most of these cases use the inquiry into governmental motivation in a predictable manner. Evidence of governmental intent to promote or to burden a particular religious belief or practice or religion generally triggers close judicial scrutiny of articulated governmental goals and shifts to the government the burden of proving that its purposes are secular. Evidence of secular governmental intentions may be either direct or circumstantial. When the Court is convinced by evidence that the articulated secular goals are not credible or that religious motivations played a decisive role in the enacting process, the challenged action is struck down under the establishment clause as lacking a constitutionally legitimate purpose.

Several recent cases, however, suggest that the Court is dissatisfied

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nated student classrooms for prayer is constitutionally permissible under First Amendment theories of equal access to public forums and free marketplace of ideas) *with* Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984) (voluntary student prayer group meeting during high school activity period constitutes violation of establishment clause), *cert. granted*, 105 S. Ct. 1167 (1985) *and* Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) (public school prayer meetings violate establishment clause). The relationship between the establishment clause and more general First Amendment freedom of speech theories is beyond the scope of this Article.

219. *E.g.*, May v. Cooperman, 572 F. Supp. 1561, 1564 (D.N.J. 1983); *see* Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1013, 1021 (D.N.M. 1983); Note, *Daily Moments of Silence*, *supra* note 198, at 405 (advocates of silent prayer confuse individual free exercise right to pray with establishment clause prohibition of state sponsorship of prayer); Note, *Moments of Silence in the Schools*, *supra* note 198, at 1881-82.

220. Wallace v. Jaffree, 105 S. Ct. 2479 (1985); Epperson v. Arkansas, 393 U.S. 97 (1968).

221. *See, e.g.*, Lynch v. Donnelly, 104 S. Ct. 1355, 1361 (1984); Marsh v. Chambers, 463 U.S. 783, 791-92 (1983); Larson v. Valente, 456 U.S. 228 (1982); Stone v. Graham, 449 U.S. 39, 41-43 (1980); Abington School Dist. v. Schempp, 374 U.S. 203, 222-24 (1963); McGowan v. Maryland, 366 U.S. 420, 445-48 (1961).

with the current state of secular purpose doctrine. Two of the Court's recent establishment clause decisions do not rely on the *Lemon* test at all. In *Larson v. Valente*,[222] the Court held that government action that discriminates among religious sects is inherently suspect and, therefore, calls for classic strict scrutiny review.[223] Application of the *Lemon* test was confined in dicta to government action that discriminates between religion and non-religion.[224] In *Marsh v. Chambers*,[225] the Court, without so much as a citation to *Lemon*, used historical evidence of the past intentions of the framers and the current intentions of the state to uphold the practice of legislative prayer.[226]

Strict scrutiny has been described as a proxy for exposing constitutionally illegitimate government goals.[227] Accordingly, the application of strict scrutiny in *Larson* can be interpreted as simply a variant of the more familiar inquiry into secular purpose under *Lemon*.[228] Because strict scrutiny analysis is highly inflexible, however, it will not prove to be a useful tool for deciding establishment clause cases. Application of strict scrutiny to a government action is tantamount to finding that the action is unconstitutional;[229] thus, the crucial constitutional decision is the Court's determination of the appropriate standard of review, rather than the application of that standard.[230] Yet *Larson* provides no principled basis by which one can distinguish those factual situations that require strict scrutiny from those that may properly be analyzed under *Lemon*. By manipulating the level of generality used to describe a religious belief or practice, one can cast most government actions that implicate religion as either discriminatory among religious sects or discriminatory between religion and non-religion.[231] Indeed, the city's display of the Christmas nativity scene in *Lynch v. Donnelly*[232] was characterized by the plaintiffs as a government preference of Christianity over Judaism and other religions that do not accept the divinity of Jesus.[233] In contrast, the city argued that the display merely constituted government recognition of the religious origins

222. 456 U.S. 228 (1982).
223. *Id.* at 244-46.
224. *Id.*
225. 463 U.S. 783 (1983).
226. *Id.* at 791-92.
227. *E.g.*, J. ELY, *supra* note 70, at 125; Bennett, *supra* note 60, at 1077; Simon, *supra* note 62, at 1069-70; *see also* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).
228. *See, e.g.*, Mansfield, *supra* note 150, at 892-93 (reading *Larson* as a motive case).
229. *See* Gunther, *supra* note 65, at 8 (strict scrutiny is "strict in theory and fatal in fact").
230. *See* Bice, *supra* note 78, at 698.
231. *See generally* P. BOBBITT, *supra* note 22, at 208-09.
232. 104 S. Ct. 1355 (1984).
233. Brief of Respondents at 38-39, Lynch v. Donnelly, 104 S. Ct. 1355 (1984).

of a widely observed secular holiday, thus redefining the action as one that discriminates between religion and non-religion.[234] Because a majority of the Court was of the view that the display was constitutionally permissible, it is not surprising that it declined to strictly scrutinize the city's action. Nevertheless, the majority opinion in *Lynch* does not explain why the action is not suspect as a government discrimination among sectarian beliefs.

The historical analysis of *Marsh* is likewise of limited utility. Evidence of the framers' intent with respect to the various provisions of the Constitution is often ambiguous. Even when an original understanding can be derived, its relevance to a contemporary constitutional controversy 200 years and several social revolutions later is not self-evident.[235] This is particularly true of the establishment clause. Though virtually all modern establishment clause doctrine (not the least of which is the application of the clause to the states) must be conceded to be far beyond the imagination of anyone who drafted the Constitution, it would seem to be a little late in the day to overturn the body of establishment clause doctrine on that basis alone.[236]

Because *Marsh* was not decided under the *Lemon* test, the Court did not pass on the legitimacy of the state's articulated secular purposes and, indeed, it is not clear that any believable ones can even be imagined.[237] *Marsh* can be fairly read, however, as substituting in place of the secular purpose prong, a finding that the legislature genuinely did not intend to establish or otherwise to promote a religion or religion generally, as evidenced by the historical record.[238] The remainder of the opinion makes clear that the Court did not view as significant the alleged religious effects

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234. Reply Brief of Petitioners at 3, Lynch v. Donnelly, 104 S. Ct. 1355 (1984).

235. *See* J. ELY, *supra* note 70, at 11-42; Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 476-500 (1981).

236. *See* Choper, *supra* note 9, at 676-77 (arguing framers could not have had any intent with respect to religion in the public schools because public education was nonexistent at the time the First Amendment was enacted); Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 86-87 (arguing language and history of religion clauses irrelevant to modern religious controversies); Gangi, Book Review, 7 HARV. J.L. PUB. POL. 581, 594-96 (1984) (criticizing R. Cord., *supra* note 21, for failing to explain relevance to current law of framers' intentions regarding establishment clause); Tushnet, Book Review, 45 LA. L. REV. 175 (1984) (same). *See generally supra* note 21. Indeed, with the singular exception of *Marsh*, the Court has never upheld a governmental action which implicates establishment clause values solely on the basis of historical evidence that the framers did not view the challenged action as being unconstitutional.

237. *See* 463 U.S. at 797-98 (Brennan, J., dissenting).

238. *See* Bennett, *supra* note 65, at 1074; *see also* Dunsford, *supra* note 9, at 11 ("Seized by the conviction that legislative prayer is a violation of the establishment clause, the dissenters are blind to the significance of the fact that those who wrote the clause and those who ratified it did not think so").

or potential entanglements posed by legislative prayer.[239] Read this way, *Marsh* is consistent with the view that government may legitimately take certain actions in acknowledgment of widely-held religious beliefs so long as it is not motivated by a desire disproportionately to aid or to burden religion, and the action does not have that primary effect.

Marsh together with *Lynch* suggests that the Court may be willing to tolerate a substantial coincidence of religious belief with government action when inquiry into government purpose reveals no intent disproportionately to promote or to burden religion, even if the government is unable to articulate a clear secular purpose. Thus, the first prong of the *Lemon* test may be transformed in some cases from a government showing of "legitimate secular purpose" into a showing of "no religious purpose."[240]

Under a justification model of the establishment clause, this is not a significant doctrinal change. In most establishment clause challenges, the government is at least able to articulate some marginally believable secular justification for the action under review. Introduction of evidence of illicit religious motivation (if any) then shifts the burden back to the government to show that any such motivations were not significant causative factors in the enactment process—a showing equivalent, if not identical, to a showing that the desire disproportionately to aid or to burden religion was not present in the decision to take the challenged action. When the government cannot articulate any credible secular purposes, *Marsh* and *Lynch* merely allow it to satisfy the first prong of the *Lemon* test by disproving the existence of any illicit religious motive as a causative factor in the enactment process.

The Court, however, may be moving away from the consistent and meaningful scrutiny of governmental purpose that is implicit in a justifi-

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239. 463 U.S. at 792-95.

240. *Compare* accompanying text *with* Lynch v. Donnelly, 104 S. Ct. 1355, 1368-69 (1984) (O'Connor, J., concurring) (appropriate inquiry under secular purpose prong is whether government subjectively intended to endorse or disapprove religion) *and* Choper, *supra* note 9, at 675. ("The Establishment Clause should forbid only governmental action whose purpose is solely religious and that is likely to impair religious freedom by coercing, compromising or influencing religious beliefs"). To that extent, *Lynch* is consistent with *McGowan*, in which the Court's determination of the legitimacy of the state's articulated legislative goals enabled it to conclude that the legislation there in question had a primary secular effect despite the substantial burdens imposed by the legislation on non-Sunday worshippers. *Marsh* and *Lynch* suggest that a majority of the Court now is of the view that when a governmental body can credibly articulate legitimate secular goals for challenged action under the establishment clause (or can disprove any apparent impermissible goals), and the Court is convinced that the accomplishment of such goals is in fact the primary motivation of the governmental body taking such action (or that apparent impermissible goals are in fact non-existent), the Court will tolerate substantial advancements or inhibitions of religious belief or practice.

cation model of the establishment clause. For example, in *Mueller v. Allen*,[241] the Court appeared to read the secular purpose prong of the *Lemon* test as requiring only a showing of facial neutrality in the text of a challenged statute.[242] Moreover, it denied the significance of statistical evidence which overwhelmingly showed that the prime beneficiaries of the statute were private religious schools,[243] while finding evidence of secular purpose in various policy justifications imagined by the Court itself.[244] Similarly, Justice O'Connor, despite the importance of purpose analysis to her proposed refinement of the *Lemon* test,[245] apparently would require only deferential judicial review of secular purpose.[246]

If the Court consistently terminates scrutiny of government purpose in establishment clause cases after a minimal showing of secular goals and in the face of relevant evidence of illicit goals, it will run the serious risk of validating governmental actions that have been motivated by a desire disproportionately to aid or to burden a particular religion or religion generally. By cursory scrutiny of government purpose, the Court also deprives itself of an opportunity to clarify the basis of decisions in factual situations in which the government takes constitutionally permissible action that aids religion in some manner or otherwise closely identifies government with religion.[247] Indeed, in failing to closely scrutinize government motives in establishment clause cases, the Court ignores a powerful analytical tool whose consistent application would clarify the constitutionally legitimate bounds of religious participation in government and government regulation of religion.

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241. 103 S. Ct. 3062 (1983).
242. *Id.* at 3069-70.
243. *See id.* at 3072-74 (Marshall, J., dissenting).
244. *Id.* at 3066-67.
245. *See supra* note 150.
246. *See* Wallace v. Jaffree, 105 S. Ct. 2479 (1985) (concurring opinion).
247. *See supra* text accompanying notes 151 & 182.