

THE USE AND SCOPE OF EXTRINSIC EVIDENCE IN
EVALUATING ESTABLISHMENT CLAUSE CASES IN
LIGHT OF THE *LEMON* TEST’S SECULAR PURPOSE
REQUIREMENT

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“The Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.”

–Justice William Brennan¹

“Freedom sees in religion the companion of its struggles and its triumphs, the cradle of its infancy, and the divine source of its rights. It considers religion as the safeguard of mores, and mores as the guarantee of laws and the pledge of its own duration.”

–Alexis de Tocqueville²

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¹ *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

² ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 43–44 (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chicago 2000) (1835).

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I. INTRODUCTION: THE INTERSECTION OF POLITICS, RELIGION, AND LAW	

“We are a religious people whose institutions presuppose a Supreme Being.”³ These words, written by Justice William O. Douglas in *Zorach v.*

³ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952); *see also* *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (“Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens.”); *Holy Trinity Church v. United States*, 143 U.S. 457, 465 (1892). *But see* *Treaty of Peace and Friendship, Between the United States of America, and the Bey and Subjects of Tripoli, of Barbary, U.S.-Tripoli*, art. XI, Nov. 4, 1796, 8 Stat. 154, 155 (1846) (“[T]he government of the United States of America is not in any sense founded on the Christian religion . . .”). Many, if not most, state constitutions recognize in their preambles the foundational role of religious faith in American civic institutions. *See, e.g.*, ALASKA CONST. pmbl. (“We the people of Alaska, grateful to God and to those who founded our nation and pioneered this great land, in order to secure and transmit to succeeding generations our heritage of political, civil, and religious liberty within the Union of States, do ordain and establish this constitution for the State of Alaska.”); ARK. CONST. pmbl. (“We, the People of the State of Arkansas, grateful to Almighty God for the privilege of choosing our own form of government; for our civil and religious liberty; and desiring to perpetuate its blessings, and secure the same to our selves and posterity; do ordain and establish this Constitution.”); CAL. CONST. pmbl. (“We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution.”); FLA. CONST. pmbl. (“We, the people of the State of Florida, being grateful to Almighty God for our constitutional liberty, in order to secure its benefits, perfect our government, insure domestic tranquility, maintain public order, and guarantee equal civil and political rights to all, do ordain and establish this constitution.”); IDAHO CONST. pmbl. (“We, the people of the state of Idaho, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this Constitution.”); ME. CONST. pmbl. (“We the people of Maine, in order to establish justice, insure tranquility, provide for our mutual defence, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity, so favorable to the design; and, imploring His aid and direction in its accomplishment, do agree to form ourselves into a free and independent State, by the style and title of the State of Maine and do ordain and establish the following Constitution for the government of the same.”) (emphasis omitted); MONT. CONST. pmbl. (“We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.”); NEV. CONST. pmbl. (“We the people of the State of Nevada Grateful to Almighty God for our freedom in order to secure its blessings, insure domestic tranquility, and form a more perfect Government,

Clauston,⁴ express what may have seemed like a truism when written, but which in much of modern American discourse is a disputed proposition.⁵ On one side of the dispute are a host of voices that seek to exclude or vigorously curtail the effect of faith and religious ideas from American public life and law.⁶ Other voices seek a robust role, within the

do establish this CONSTITUTION.”); N.J. CONST. pmbl. (“We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution.”); N.Y. CONST. pmbl. (“WE, THE PEOPLE of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH THIS CONSTITUTION.”); N.C. CONST. pmbl. (“*We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign Ruler of Nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do, for the more certain security thereof and for the better government of this State, ordain and establish this Constitution.*”); N.D. CONST. pmbl. (“We, the people of North Dakota, grateful to Almighty God for the blessings of civil and religious liberty, do ordain and establish this constitution.”); WASH. CONST. pmbl. (“We the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.”); W.V. CONST. pmbl. (“Since through Divine Providence we enjoy the blessings of civil, political and religious liberty, we, the people of West Virginia, in and through the provisions of this Constitution, reaffirm our faith in and constant reliance upon God and seek diligently to promote, preserve and perpetuate good government in the State of West Virginia for the common welfare, freedom and security of ourselves and our posterity.”); WIS. CONST. pmbl. (“We, the people of Wisconsin, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquility and promote the general welfare, do establish this constitution.”). For an example of a state constitution that does not reference God or religious conviction as part of the basis of constitutional government, see OR. CONST. pmbl. (“We the people of the State of Oregon to the end that Justice be established, order maintained, and liberty perpetuated, do ordain this Constitution.”).

⁴ *Zorach*, 343 U.S. at 308.

⁵ See generally MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 814–15 (2002); Scott W. Breedlove & Victoria S. Salzman, *The Devil Made Me Do It: The Irrelevance of Legislative Motivation Under the Establishment Clause*, 53 BAYLOR L. REV. 419, 447–49 (2001). For a detailed overview from a progressive perspective on the need for the inclusion of religious perspectives in political debate, see Jason Carter, *Toward a Genuine Debate About Morals, Religion, Politics, and Law: Why America Needs a Christian Response to the “Christian” Right*, 41 GA. L. REV. 69, 79–86 (2006). For a critique of the view that religion should be limited in the public square because of concerns over its divisiveness, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006). The general contours of the debate regarding the role of religion in American public life is set out by Professor Stephen Monsma. See STEPHEN V. MONSMA, POSITIVE NEUTRALITY 62–68 (1993). On a pessimistic note, Monsma states, “U.S. culture simply has no theoretical framework or paradigm with which to deal with socially and politically relevant religious faith.” *Id.* at 68.

⁶ See generally EDGAR BODENHEIMER, TREATISE ON JUSTICE 63 (1967) (“[R]eligious convictions (which are usually not shared by everybody) should not be used as the basis of a law of the state unless they are supported by rational considerations pertaining to the general welfare of society.”); PHILIP B. KURLAND, RELIGION AND THE LAW 18 (1962) (“[T]he proper construction of the religion clauses of the first amendment is that the freedom and

permissible boundaries of the Constitution, for religiously grounded ethical and moral principles to be expressed in positive law.⁷ Regardless of the accuracy of Justice Douglas's observation, it remains beyond question that the American public has a strong religious component today, both in terms of overall belief and in terms of religious practice.⁸ In such a society, the role of religious believers in its public square is both inevitable and important. It is inevitable because citizens who profess religious faith possess the same political rights as those citizens who are not religious—the same rights to vote, to seek political and judicial office, to comment on public affairs. The activity of religious believers in the civic decision-making process is important because people of faith make up a majority of the population in the United States, and in our constitutional republic, the majority elect those who craft the positive law through the political branches of our government. And, despite a recent outpouring of books advocating a hostile approach to religion both in the public square and in the broader culture, the relative proportion of religionists in American society is unlikely to radically diminish in the foreseeable future.⁹ Further, as constitutional

separation clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden.”); MONSMA, *supra* note 5, at 199–202; Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197–201 (1992); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1320–35 (2007); Paul Jefferson, Note, *Strengthening Motivational Analysis Under the Establishment Clause: Proposing a Burden-Shifting Standard*, 35 IND. L. REV. 621 (2002).

⁷ See, e.g., STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 105–23 (1993); Jean Bethke Elshtain, *The Bright Line: Liberalism and Religion*, in *THE BETRAYAL OF LIBERALISM: HOW THE DISCIPLES OF FREEDOM AND EQUALITY HELPED FOSTER THE ILLIBERAL POLITICS OF COERCION AND CONTROL* 139, 139–55 (Hilton Kramer & Roger Kimball eds. 1999); Robert J. Araujo, *Contemporary Interpretation of the Religious Clauses: The Church and Caesar Engaged in Conversation*, 10 J.L. & RELIGION 493, 505–07 (1994); L. Scott Smith, *From Promised Land to Tower of Babel: Religious Pluralism and the Future of the Liberal Experiment in America*, 45 BRANDEIS L.J. 527, 548–53 (2007).

⁸ According to a 1993 Gallup poll, more than “nine out of ten Americans believe in God and some four out of five pray regularly.” CARTER, *supra* note 6, at 4 & n.2 (citing Ari L. Goldman, *Religion Notes*, N.Y. TIMES, Feb. 27, 1993, at 9). Additionally, of the ninety-six percent of people who identified themselves as believers in the poll, the overwhelming majority, eighty-two percent, described themselves as Christians. *Id.* More recent data also supports these figures, with only minor divergence; according to a 2007 *Newsweek* poll conducted by Princeton Survey, ninety-one percent of respondents believed in God, and eighty-two percent of the respondents claimed to be Christians. See Jon Meacham, *Is God Real?*, NEWSWEEK, Apr. 9, 2007, at 54, 55; Michael Novak, *Remembering the Secular Age*, FIRST THINGS, June/July 2007, at 35, 35.

⁹ For an analysis of the reasons why secularism and the recent flurry of atheistic advocacy is unlikely to result in a radical shift in the role of religion in American life, see Novak, *supra* note 7, at 35–40. For an overview of the increasing appeals to faith by

law professor Robert C. Post has observed, “Public discourse lies at the heart of democratic self-governance, and its protection constitutes an important theme of First Amendment jurisprudence.”¹⁰ Given Post’s observation, it is logical to conclude that the proper role of religious motivation in public life has an obvious and significant impact on the nature of American public discourse.

Since many religious believers are politically active, the question that faces citizens, politicians, lawyers, and judges is the extent to which the Constitution warrants religious believers to be influenced by religious convictions when formulating public policy.¹¹ This question also raises a practical issue regarding judicial interpretation and review of legislative and executive enactments under the Establishment Clause: namely, to what extent is it appropriate for judges reviewing legislative and executive action to look at the possible religious motivations of legislators and executive branch decision makers in crafting public policy? This Article addresses both of these concerns by examining the proper scope of the judiciary’s use of extrinsic evidence when evaluating legislative and executive action under the First Amendment’s Establishment Clause. This Article first discusses the pattern of use regarding extrinsic evidence in Establishment Clause cases in general, and argues that Establishment Clause jurisprudence of the Supreme Court of the United States, stretching back to the nineteenth century, supports the use of extrinsic evidence in determining whether government action violates the First Amendment’s protections against religious establishment. Second, this Article examines both scholarly

political candidates, see Lew Daly, *In Search of the Common Good: The Catholic Roots of American Liberalism*, BOSTON REV., May/June 2007, at 23; John J. DiIulio, Jr., *Spiritualpolitique*, WKLY. STANDARD, May 14, 2007, at 24; Mike Dorning, *Democrats Find Religion on Campaign Trail*, CHI. TRIB., May 6, 2007, § 1, at 1; Nancy Gibbs & Michael Duffy, *Leveling the Praying Field*, TIME, July 23, 2007, at 28; Beth Reinhard & Alexandra Alter, *The Religious Left Lifts Its Voice in Campaign 2008*, MIAMI HERALD, June 4, 2007, at A1.

¹⁰ ROBERT C. POST, CONSTITUTIONAL DOMAINS 177 (1995).

¹¹ Michael Perry raises this as the “fundamental question about religion in politics . . .” Michael J. Perry, *Religion in Politics*, 29 U.C. DAVIS L. REV. 729, 730 (1996). Of course, one should not presume that a robust role for religion in the American public square will necessarily lead to a uniformity of religiously-themed public discussion. Both the current political climate and the political arena of times past dispel the notion that religious influence in public life leads in practice to a uniform “religious position” on virtually any given issue. See generally JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY (1995) (noting that religious groups have not been hegemonic in their approach to social or moral concerns); George McKenna, *The Blue, the Gray, and the Bible*, FIRST THINGS, Aug./Sept. 2007, at 29. It should also be noted that not all religious groups or religious traditions encourage their adherents to bring their faith traditions to bear on public life. For those that do, however, it is simply not realistic to assume that adherents of those faiths will not bring their religious views to bear on matters of public life. Smith, *supra* note 7.

and case authority that supports the use of such extrinsic evidence in support of limiting or even excluding religious motivation from the public square. This Article then discusses three substantive objections to such an approach to using extrinsic evidence, arguing that attempts to exclude religious motivation from public policy overreach by conflating purpose and motivation, violating not only the deeper purposes and functions of the Establishment Clause, but also critically impacting the idea of equal citizenship of religious believers and secularists within the American constitutional framework. Throughout this Article, I also hope to uphold the idea of a strong institutional distinction between government and religion, upholding the secular nature of government action—a secular nature which has served both the government and religious believers and organizations quite well over the history of the United States.

II. AN OVERVIEW OF THE USE OF EXTRINSIC EVIDENCE IN ESTABLISHMENT CLAUSE CASES

A. General Principles Regarding the Use of Extrinsic Evidence in Religion Cases

It is a mild understatement to say that the use of extrinsic evidence in statutory and constitutional construction has been the subject of strenuous debate.¹² While legal scholars and jurists continue to argue over the normal circumstances in which extrinsic evidence such as

¹² See generally Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998) (providing an overview of the increasing use of legislative history in statutory construction, as well as the arguments for and against its use); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 29–41 (1997); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 U. KAN. L. REV. 815 (1990). For a detailed historical view of the use of extrinsic evidence in constitutional interpretation up until 1939, see the five-part series of articles by Jacobus tenBroek titled, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CAL. L. REV. 287, 437, 664 (1938), and *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CAL. L. REV. 157, 399 (1939). It should be noted that the debate over the use of legislative history in statutory construction has not been limited to the United States, but has also taken place in the English judicial system as well. See William S. Jordan, III, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F. L. REV. 1 (1994). On a related note, for a fairly negative assessment of the Supreme Court's use of historical analysis, see Leonard Levy's comment that the Court resorts to history for a quick fix, a substantiation, a confirmation, an illustration, or a grace note; it does not really look for the historical conditions and meanings of a time long gone in order to determine the evidence that will persuade it to decide a case in one way rather than another.

LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 322–23 (1988)

legislative history may be used for purposes of statutory and constitutional construction, there is a long-standing judicial practice of consulting legislative history and other extrinsic sources when examining laws that intersect with religion and the Establishment Clause. In most cases that involve application of enacted law that does not impact church-state relations—including statutory interpretation carried out under the ambit of judicial review—that application begins with the text of the enacted law being discussed, applied, or evaluated by the reviewing court.¹³ As a practical matter, most judicial action regarding enacted law begins with the text and any case precedent that has interpreted or applied that text. The use of extrinsic evidence to resolve questions of textual meaning is usually undertaken only to address problems that result from textual ambiguity,¹⁴ such as might be the consequence of poor legislative or regulatory word usage, or a difficulty in reconciling a particular enacted law with other laws presently on the books.

But, within the context of enacted laws that deal with religion, the Supreme Court has long relied upon extrinsic evidence more broadly, looking to legislative history and the general history of the nation to provide context to government action and to guide the Court as it undertakes its responsibility of judicial review.¹⁵ And this use of extrinsic evidence emerged relatively early in the Court's religion jurisprudence, most notably in the nineteenth-century case of *Church of the Holy Trinity v. United States*.¹⁶ While not dealing directly with the

¹³ See, e.g., Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594 (1995) (“[N]o one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which in our democracy has lodged in its elected legislature.” (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947))). Schacter describes the traditional approach to statutory interpretation:

If the words of the statute unambiguously reflect legislative intent, the court should go no further. On the orthodox originalist view, if the words used by the legislature are open to more than one interpretation—as is often the case in disputes about meaning that reach the courts—the court must look harder and longer and consider the legislative purpose behind the statute, the legislative history, and perhaps the canons of construction. Whether “intent” or “purpose” or some other similar measure serves as the benchmark, the traditional approach assumes a discoverable legislative design, and the court's cardinal obligation remains to identify and execute that design.

Id. at 594–95 (footnotes omitted).

¹⁴ *Id.*

¹⁵ See generally Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OR. L. REV. 563 (2006) (discussing the Supreme Court's use of historical analysis when evaluating the religion clauses).

¹⁶ 143 U.S. 457 (1892).

application of the Establishment Clause, the Supreme Court's decision is critical for understanding both the roots and the utility of the use of extrinsic evidence in evaluating claims impacting government actions that impact religion.

In *Holy Trinity*, the Court undertook to describe the parameters of religion's place in the public square by using evidence outside of the strict text of either the Constitution or the statute that was at the heart of the legal claim in the case. The relevant facts are brief. In 1887, Holy Trinity parish in New York state brought the Reverend E. Walpole Warren from the United Kingdom to the United States to pastor the church.¹⁷ Warren entered into an employment agreement with the church while residing in England.¹⁸ The United States government claimed that Warren's immigration to take up the pastorate violated a federal statute that prohibited importing foreign workers into the United States.¹⁹ The language in the applicable federal statute read as follows:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia."*²⁰

The lower court held in favor of the government, and the case was appealed to the Supreme Court, which held, miraculously enough, that the good reverend's employment agreement did not fall within the parameters of the statute.²¹

The Court had to discern whether Congress had meant to include professional workers like clergy under the statute prohibiting the importation of workers who would engage in "labor or service of any kind . . ."²² What did those words mean? The statute itself did not define them, although by using such sweeping terms it could well be argued that the meaning of the statute was reasonably clear: workers engaging in "any kind" of "labor or service" came under the statute's prohibition. The term "any kind" would, presumably, include the work of a

¹⁷ *Id.* at 457–58.

¹⁸ *Id.*

¹⁹ *Id.* at 458.

²⁰ *Id.* (quoting Law of Feb. 26, 1885, ch. 164 § 2, 23 Stat. 332 (repealed 1952)).

²¹ *Id.* at 458, 472.

²² *Id.* at 458–59.

professional, such as an ordained minister. Indeed, the Court “conceded” that the congregation’s action in seeking a pastor from outside the country fit within the statute’s prohibitory language;²³ however, the Court declined to end its analysis there, reasoning that “a thing may be within the letter of the statute and yet not within the statute, because [the thing is] not within its spirit, nor within the intention of its makers.”²⁴ While formally refusing to substitute its judgment for that of the legislature, the Court’s language indicated that it declined to be too tightly bound by the overt meaning of the statute.²⁵ Instead, the Court chose to rely on extrinsic evidence from the legislature—such as general legislative history, committee reports, and the title of the act itself—as well as the Court’s own examination of the “contemporaneous events,” which led Congress to prohibit the importation of foreign workers.²⁶ The Court’s examination of extrinsic evidence found that the purpose of the statute was to prevent the importation of “cheap unskilled labor” rather than professional workers such as clergy.²⁷ The employment agreement between Reverend Warren and Holy Trinity parish, therefore, lay outside the scope of the statute.

With that conclusion, one might think that the Court’s use of extrinsic evidence in the case would have come to an end—but not so. In addition to the extrinsic evidence relating to the statute itself, the Court also sought support for its decision in this country’s general history regarding the intersection of religion and public life.²⁸ Going as far back as the Spanish royal commission to Christopher Columbus, the Court used examples of colonial and early American history to support its contention that “no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people.”²⁹ The Court explained how the colonial charters, the Declaration of Independence, the preambles of several state constitutions, the Establishment Clause itself, and the exclusion of Sundays as a day of business in Article 1 Section 7 of the Constitution all supported that principle.³⁰ Further, the Court looked beyond history to the role of religion in the public functioning of government.³¹ Including the popular “form of oath universally prevailing . . . with an appeal to the Almighty,” the Court looked to a host of popular practices that indicated the

²³ *Id.*

²⁴ *Id.* at 459.

²⁵ *Id.*

²⁶ *Id.* at 462–65.

²⁷ *Id.* at 465.

²⁸ *Id.* at 465–71.

²⁹ *Id.* at 465–66 (referring to the people of the United States).

³⁰ *Id.* at 466–70.

³¹ *Id.* at 471.

pronounced status of religion in American life: the practice of “opening sessions of all deliberative bodies . . . with prayer;” the use of religious language in wills; Sunday closing laws affecting both private business and governmental operations on the Sabbath; and the almost universal presence of religious congregations, missionary societies, and charitable organizations throughout the country, as well as other unspecified “unofficial declarations” regarding the role in public life.³² Closing its examination of this extrinsic evidence, the Court concluded that it was simply unbelievable that Congress intended to criminalize a domestic church’s hiring of a foreign pastor.³³

The Court’s use of extrinsic evidence in *Holy Trinity* raises legitimate concerns regarding the free-wheeling use of historical sources in judicial decision-making. With few exceptions, judges and attorneys rarely receive professional historical training, and the reliance of judges and lawyers on what is sometimes unflatteringly called “law-office history” is concerning.³⁴ Looking at the historical analysis used in *Holy*

³² *Id.*

³³ *Id.*

³⁴ For a critical view of “law-office history,” see *Velasquez v. Frapwell*, 160 F.3d 389, 393–94 (7th Cir. 1998), *vacated in part*, 165 F.3d 593 (7th Cir. 1999). Justice Scalia has noted the daunting difficulties involved in historical analysis in constitutional law:

[W]hat is true is that it is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.

Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989); see also Steven K. Green, “Bad History”: *The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717 (2006); Robert J. Hume, *The Use of Rhetorical Sources by the U.S. Supreme Court*, 40 LAW & SOC’Y REV. 817, 839 (2006). Levy summarizes some of the primary arguments against judicial use of historical analysis, including a lack of professional historical training on the part of judges. See LEVY, *supra* note 12, at 322–23. Perhaps the most troubling concern regarding judicial use of historical analysis is that judges may engage in such analysis only to impose their own views of policy instead of the law. See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 922 (1992).

For an overview of the complexities of the place of religion in American history, see generally PHILLIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002). See also Frank J. Conklin & James M. Vaché, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411 (1985); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 110 MICH. L. REV. 279 (2001); Robert F. Utter & Edward J. Larson, *Church and*

Trinity, the Court's recitation of the role of religion in American public life was cursory and lacked sophistication and nuance in regard to its treatment of minority religions in the nineteenth-century American experience.³⁵ Additionally, it is possible to look at the Court's examination of extrinsic evidence and suspect that it engaged in an outcome determinative process, reaching for whatever evidence it could plausibly find to support its decision to evade statutory language that appears to be unambiguous. Yet, despite such criticism, the Court's use of history and the general practice of American government at the time is an informative part of the *Holy Trinity* decision because it was part and parcel of the broader methodology of statutory interpretation developed by the Court in that case. Much of the Court's recitation in support of its decision may no longer be relevant to analyzing church-state relations, but the Court's deployment of legislative history, general history, and the custom and popular usage of the country set a powerful tone for future judicial evaluation of government acts that impact church-state affairs. The Court summarized its approach in the case this way:

It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.³⁶

By this statement and by the reasoning used in its decision, the Court indicated that when dealing with matters of religious faith and public law, extrinsic evidence, even extrinsic evidence beyond the immediate legislative background of the statute, was fair game for judicial examination. And the relevance of the Court's approach in *Holy*

State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution, 15 HASTINGS CONST. L.Q. 451, 462 (1988).

³⁵ For example, nineteenth-century America could be a very hostile place for minority religious traditions. RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE 1800–1860* (1938); Philip Hamburger, *Illiberal Liberalism: Liberal Theology, Anti-Catholicism, & Church Property*, 12 J. CONTEMP. LEGAL ISSUES 693, 708–09 (2002); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 282 (2001); see also Frank J. Conklin & James M. Vaché, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411, 430–36 (1985); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 557–73 (2003).

³⁶ *Holy Trinity*, 143 U.S. at 472.

Trinity has not lessened over time. As the Court's jurisprudence regarding religion and the Establishment Clause became more developed and sophisticated, the role of extrinsic evidence has become even more crucial to the process of judicial review. This Article now turns to that topic.

B. The Establishment Clause and the Secular Purpose Requirement

The exact content of what constitutes an establishment of religion, so far as the Supreme Court is concerned, has been the subject of a great deal of litigation and scholarly comment, and the Court has shown precious little consistency in developing a uniform standard in this area. In most cases, the Supreme Court and the lower federal courts apply a test first fully enunciated in the case of *Lemon v. Kurtzman*.³⁷ The "*Lemon* test" incorporates earlier formulas used by the Court to determine breaches of the Establishment Clause.³⁸ In order to meet the *Lemon* test a government action must meet three criteria: 1) it must have a secular legislative purpose; 2) its principal or primary effect must neither advance nor inhibit religion; and 3) it must not foster excessive government entanglement with religion.³⁹ When formulating the outlines of the *Lemon* test, the Supreme Court expressly noted that it was designed to prohibit the "three main evils" that the Establishment Clause was meant to prevent: "sponsorship, financial support, and active involvement of the sovereign in religious activity."⁴⁰ With this statement, the Court gave critical guidance to prevent the institutional alliance of church and state.

The *Lemon* test has proven to be notoriously unpopular, and the Supreme Court has not always applied the test when evaluating Establishment Clause challenges.⁴¹ In spite of its unpopularity and its

³⁷ 403 U.S. 602, 612–13 (1971). For an overview of the development of the *Lemon* test, see Amy Louise Weinhaus, *The Fate of Graduation Prayers in Public Schools After Lee v. Weisman*, 71 WASH. U. L.Q. 957, 960–967 (1993). Cases in which the Court has not applied the test when evaluating possible Establishment Clause violations include *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 531 U.S. 793 (2000); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995); and *Marsh v. Chambers*, 463 U.S. 783 (1983).

³⁸ *Lemon*, 403 U.S. at 612–13. For an example of a pre-*Lemon* use of the first two prongs of the *Lemon* test, see *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 222 (1963). For an example of the pre-*Lemon* use of the third prong of the *Lemon* test, see *Walz v. Tax Comm'n*, 397 U.S. 664, 674–76 (1970).

³⁹ *Lemon*, 403 U.S. at 612–13.

⁴⁰ *Id.* at 612 (quoting *Walz*, 397 U.S. at 668).

⁴¹ See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (criticizing the test and citing two cases—*Marsh v. Chambers*, 463 U.S. 783 (1983) and *Larson v. Valente*, 456 U.S. 228 (1982)—in which the Court declined to apply *Lemon*).

inconsistency in application, the *Lemon* test remains the dominant test used by the federal courts when evaluating church-state issues.

An examination of the Establishment Clause problems that have reached the Court both before and after *Lemon* reveal a consistent approach to defending religious liberty by curtailing institutional connections between religion and the government. For example, the Court has held that direct tax support by the government for religion is prohibited.⁴² The Court has also held that government sponsored prayer and Bible reading in the public schools are prohibited.⁴³ The Court has found that official displays that give the appearance of government sponsorship of religion violate the Establishment Clause.⁴⁴ Finally, religious groups cannot be brought in during public school hours to teach religion classes in the public school.⁴⁵ Among the government actions that the Court has found do not violate the Establishment Clause include released time programs where students are dismissed from public school to attend religion classes off campus;⁴⁶ public provision of transportation to parochial school students if such transportation is made available to all children in both public and private schools;⁴⁷ and the teaching of the Bible as literature in the public schools, so long as such teaching is done in an objective and non-devotional manner.⁴⁸

When the Court has employed the Establishment Clause to strike down government actions that intersect with religious activity, the Court's overwhelming concern has been to guard against the institutional co-mingling of church and state.⁴⁹ In particular, the Court's use of the Establishment Clause has focused on government efforts to direct financial support to religion and on activities that may cause governmental coercion in regard to religious beliefs or practices.⁵⁰ For

⁴² *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

⁴³ *Engel v. Vitale*, 370 U.S. 421, 425 (1962); *Schempp*, 374 U.S. at 223–25.

⁴⁴ *County of Allegheny v. ACLU*, 492 U.S. 573, 621 (1989).

⁴⁵ *McCullum v. Bd. of Educ.*, 333 U.S. 203, 211–12 (1948); *see also* *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 397 (1985) (holding that a school district's use of shared time and community education programs violated the Establishment Clause).

⁴⁶ *Zorach v. Clauson*, 343 U.S. 306, 314–15 (1952).

⁴⁷ *Everson*, 330 U.S. at 17–18.

⁴⁸ *Stone v. Graham*, 449 U.S. 39, 42 (1980); *Schempp*, 374 U.S. at 225.

⁴⁹ *E.g.*, *Everson*, 330 U.S. at 15–16.

⁵⁰ *Id.*; *see also* *Lee v. Weisman*, 505 U.S. 577, 588 (1992). Justice Kennedy, writing for the Court in *Weisman*, observed that the Establishment Clause was not meant to eradicate religion from American society, but to protect American society from corruption at the hands of the government:

[R]eligious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that

this reason, direct tax payments to churches that would create an institutional link between particular religious bodies and the government are prohibited.⁵¹ This particular concern by the Court makes a good deal of sense in light of *Lemon's* overarching concern to prevent institutional connections between religious institutions and government entities; for the state or federal government to provide money to religious groups to enable those groups to carry on their religious work makes that work directly dependent upon government financing, and hence, government control. Teaching activities by religious instructors on public schools are prohibited because they create an institutional tie where religion is interjected into the functioning of the education apparatus of the state.⁵² Such religious education places the public education system at the service of religion, and integrates religious education with the secular education provided by the state.⁵³ Government orchestrated prayer and Bible reading are prohibited for the same reason, because it creates a tie between the government and religion by using the government's employees and facilities to carry out religious devotion and worship.⁵⁴

While preventing institutional overlap between church and state, the Supreme Court's approach has not created a vacuum-tight seal between the two. Governmental activities which do not result in official financial support of religion or in governmental coercion in regards to

while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference.

Id. at 589–90.

⁵¹ *Everson*, 330 U.S. at 16.

⁵² *McCullum v. Bd. of Educ.*, 333 U.S. 203, 209 (1948).

⁵³ *Id.* at 209–10.

⁵⁴ See *Weisman*, 505 U.S. at 589 (“The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice *committed to the private sphere* . . .” (emphasis added)); *Stone v. Graham*, 449 U.S. 39, 42 (1980) (“[T]he mere posting of the [Ten Commandments] under the auspices of the legislature provides the ‘official support of the State . . . Government’ that the Establishment Clause prohibits.” (quoting *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 222 (1963))); *Schempp*, 374 U.S. at 222 (There is a danger of a “fusion of governmental and religious functions or a concert or dependency of one upon the other . . .”). For the proposition that the purpose prong of the *Lemon* test is aimed at preventing the government from having the purpose of endorsing or disapproving of religion, see *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (citing *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring)). Justice O’Connor has commented:

The purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Lynch, 465 U.S. at 690 (O’Connor, J., concurring).

faith generally have not been held unconstitutional by the Court. Thus, release time programs, which accommodate religious practice without requiring the government to pay for or supervise religious activities, are permitted because there is no direct link between the government and religion.⁵⁵ Government programs that provide benefits to individuals rather than to groups also may benefit religious institutions because the benefit in those cases flows not directly to the religious body but to a third party who then uses the benefit to support a religious activity.⁵⁶ Such actions do not create the impression or the reality of direct government support of religion. Rather, since the government is conferring a general benefit on the population as a whole, religious institutions receive the same benefit as any other institution in society.⁵⁷ Finally, the reading of the Bible in public schools as a literary work, or as an historical text, or as a foundational document of Western civilization is permissible so long as it is done in an objective manner “as part of a secular program of education”⁵⁸ and does not create the impression that the government supports the teachings of the Bible anymore than the reading of the play *King Lear* in a literature class conveys the message that the government endorses Shakespeare. The golden thread, of course, that unites all of these examples in light of the Court’s actions is the simple fact that none of these outcomes results in a strong institutional link between religious institutions and the government.

In light of the Court’s overarching concern, both prior to and after the *Lemon* test was formally announced, it makes a good deal of sense that the courts would resort to the use of extrinsic evidence when evaluating the institutional links between religious institutions, churches, synagogues, mosques, and other places of worship and the government in either its state or federal forms. This is particularly true given the *Lemon* test’s incorporation of the Court’s already then-extant requirement that laws have a “secular purpose”—a purpose which often requires the use of extrinsic evidence to accurately identify. Thus, in *McGowan v. Maryland*, a pre-*Lemon* case, the Court looked at both the general history and legislative history underlying a state Sunday closing law in order to ascertain whether the purpose of the law was suitably

⁵⁵ *Zorach v. Clauson*, 343 U.S. 306, 308–09, 315 (1952).

⁵⁶ *Everson*, 330 U.S. at 17–18; see also *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Wolman v. Walter*, 433 U.S. 229 (1977); *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

⁵⁷ *Everson*, 330 U.S. at 17–19.

⁵⁸ *Schempp*, 374 U.S. at 225.

secular to avoid running afoul of the First Amendment.⁵⁹ In holding that the Maryland law in question was constitutionally permitted, the Court stated that such a statute would be held unconstitutional “if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State’s coercive power to aid religion.”⁶⁰ The Court’s basic approach regarding the use of extrinsic evidence to determine the purpose of government action in evaluating its constitutionality under the Establishment Clause was followed in the pre-*Lemon* cases of *Board of Education v. Allen*,⁶¹ and *Epperson v. Arkansas*,⁶² and in the post-*Lemon* cases of *Stone v. Graham*,⁶³ *Wallace v. Jaffree*,⁶⁴ *Edwards v. Aguillard*,⁶⁵ and *Santa Fe Independent School District v. Doe*.⁶⁶ In each of these cases the Court used extrinsic evidence to aid in its determination of the constitutionality of a government action that impacted on church-state relations.

C. *The Use of Extrinsic Evidence in the Recent Ten Commandments Cases*

While the Court’s use of extrinsic evidence in Establishment Clause cases is most pronounced when it applies the secular purpose requirement of the *Lemon* test, the Court has also relied on extrinsic evidence in Establishment Clause cases when it has not used the *Lemon* test. For instance, the two most recent cases in which the Court has robustly employed extrinsic evidence in evaluating government action under the Establishment Clause are both cases involving public displays of the Ten Commandments. In *McCreary County v. ACLU of Kentucky*, the Court applied the *Lemon* test to strike down a government display of the Ten Commandments.⁶⁷ In *Van Orden v. Perry*, though, the Court declined to apply the *Lemon* test and instead opted for a more historically-oriented approach to evaluate and uphold a differing

⁵⁹ 366 U.S. 420, 431–45 (1961). The Court in *School District of Abington Township v. Schempp* also looked at general historical context to determine the scope of the Establishment Clause. 374 U.S. at 212–15.

⁶⁰ *McGowan*, 366 U.S. at 453.

⁶¹ 392 U.S. 236, 247–48 (1968).

⁶² 393 U.S. 97, 108–09 (1968).

⁶³ 449 U.S. 39, 41–42 (1980).

⁶⁴ 472 U.S. 38, 56–60 (1985).

⁶⁵ 482 U.S. 578, 586–87, 589–93 (1987). “A court’s finding of improper purpose behind a statute is appropriately determined by the statute on its face, its legislative history, or its interpretation by a responsible administrative agency.” *Id.* at 594; *cf. id.* at 599–602 (Powell, J., concurring) (examining legislative history but only after finding that the statute on its face was ambiguous as to its purpose).

⁶⁶ 530 U.S. 290, 307–08 (2000).

⁶⁷ 545 U.S. 844 (2005).

government display of the Ten Commandments.⁶⁸ In each case, despite the opposite outcomes, the Court relied on extrinsic evidence for at least part of the support undergirding its decision.

Looking first at *McCreary*, that case involved two local county governments that had posted copies of the Decalogue in their county courthouses.⁶⁹ After the commandments were posted, the ACLU brought suit, contending that the counties' actions in posting the Ten Commandments violated the Establishment Clause.⁷⁰ In light of the ACLU's suit, the counties altered the display to include a statement explaining that the Decalogue was part of the laws of the state of Kentucky. The counties also included in the displays, though less prominently, other historical documents that highlighted religion in some way.⁷¹ Despite the changes, a federal district judge applied the *Lemon* test and issued an injunction requiring the counties to take down the displays.⁷² After some additional legal maneuvering, the counties again set up a display featuring the Ten Commandments, along with the Magna Carta, the Declaration of Independence, the Bill of Rights, the National Anthem, the national motto of "In God We Trust," along with a host of other historical documents, some of a religious nature and some not.⁷³ The ACLU sued again and the federal judge supplemented the first injunction, finding that the new displays violated the Establishment Clause because of the decision to post the Decalogue; the counties appealed and the United States Court of Appeals for the Sixth Circuit affirmed the district court's injunction.⁷⁴ The Supreme Court then granted certiorari.⁷⁵

The Supreme Court found that the counties' actions violated the Establishment Clause under the *Lemon* test because their decision to post the commandments lacked a sufficient secular purpose.⁷⁶ Justice Souter, writing for the Court, reaffirmed the continuing validity of the *Lemon* test and the test's secular purpose prong.⁷⁷ In addition, the Court made plain that the judicial branch rightly shows deference to a legislative body's stated secular purpose when interpreting government action, but "the secular purpose required has to be genuine, not a sham,

⁶⁸ 545 U.S. 677 (2005).

⁶⁹ *McCreary*, 545 U.S. at 851.

⁷⁰ *Id.* at 852.

⁷¹ *Id.* at 852–54.

⁷² *Id.* at 854–55.

⁷³ *Id.* at 855–56.

⁷⁴ *Id.* at 856–57.

⁷⁵ *Id.* at 858.

⁷⁶ *Id.* at 871.

⁷⁷ *Id.* at 848, 871.

and not merely secondary to a religious objective.”⁷⁸ Legislative branches must act in a manner such that the purposes of government action truly are in accord with the Establishment Clause’s requirements.⁷⁹ “[T]he Court required more than a sham purpose and would not abandon its role in analyzing whether a truly secular purpose existed for a government’s actions.”⁸⁰ As part of its evaluation as to whether a sham purpose exists, the Court stated that it would rely on numerous sources, including the language of the government enactment establishing the display, the display’s history, the documents contained within it, and the general circumstances surrounding the display.⁸¹ All of this material is necessary in order to provide context for the Court to evaluate whether an “objective” or reasonable observer would find that the creation of the display offended the underlying values of the Establishment Clause; the reasonable observer is deemed to be familiar with the text of the enactment in question, as well as extrinsic evidence regarding the enactment, including legislative history and the “implementation of the statute.”⁸²

The Court’s use of historical evidence to decide *McCreary* was strongly vindicated not only in Justice Souter’s decision applying the *Lemon* test’s secular purpose prong but also in the Court’s second Ten Commandments case argued and decided the same day as *McCreary*, but which produced a different result. In *Van Orden v. Perry*,⁸³ the Court ruled on the constitutionality of a display of the Decalogue dating from the early 1960s at the Texas State Capital in Austin, Texas.⁸⁴ The specific display was carved into a large granite monument measuring “6-foot high and 3-foot wide.”⁸⁵ It was included as part of a larger complex of “monuments” and “historical markers” of various types covering twenty-two acres of the capital grounds, commemorating various aspects of the

⁷⁸ *Id.* at 864.

⁷⁹ *Id.*

⁸⁰ Susan Hanley Kosse, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases: McCreary County v. ACLU of Kentucky and Van Orden v. Perry*, 4 FIRST AMEND. L. REV. 139, 155 (2006). For an overview of the Court’s approach to “sham” secular purposes in relation to government displays of the Decalogue, see Susanna Dokupil, “*Thou Shalt Not Bear False Witness*”: “Sham” Secular Purposes in Ten Commandments Displays, 28 HARV. J.L. & PUB. POL’Y 609 (2005).

⁸¹ *McCreary*, 545 U.S. at 861–63.

⁸² *Id.* at 862 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring)).

⁸³ 545 U.S. 677 (2005). For a critical examination of the case arguing that *Van Orden* should not be relied upon as precedent, see W. Jesse Weins, Note, *A Problematic Plurality Precedent: Why the Supreme Court Should Leave Marks Over Van Orden v. Perry*, 85 NEB. L. REV. 830 (2007).

⁸⁴ *Van Orden*, 545 U.S. at 681.

⁸⁵ *Id.*

history of Texas.⁸⁶ In addition to its “primary content” of the text of the Decalogue, the specific display included other smaller symbols, some secular and some religious in nature: “[a]n eagle grasping the American flag, an eye inside of a pyramid, and two small tables with what appears to be an ancient script” were included above the Decalogue.⁸⁷ Underneath the Ten Commandments were included “two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ.”⁸⁸ At the monument’s base was an inscription noting that it had been donated by the Fraternal Organization of Eagles in 1961 “TO THE PEOPLE AND YOUTH OF TEXAS”⁸⁹

The federal district court upheld the constitutionality of the display against an Establishment Clause challenge.⁹⁰ The United States Court of Appeals for the Fifth Circuit affirmed.⁹¹ At the Supreme Court, Chief Justice Rehnquist, writing for a plurality of the Court, characterized the Texas display as “passive,” and declined to apply the *Lemon* test.⁹² The plurality based its decision on the recognition of religion found in various public contexts throughout American history since the Revolution.⁹³ While acknowledging limits to the constitutionality of posting the commandments in a public school setting,⁹⁴ on the basis of American history the plurality found that the Decalogue has “an undeniable historical meaning,” and that “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”⁹⁵

Justices Scalia, Kennedy, and Thomas joined Justice Rehnquist’s opinion. The most interesting concurring opinions, however, are by Justices Thomas and Breyer. Justice Thomas, while arguing that the Court should abandon the vast majority of its modern Establishment Clause jurisprudence, joined the plurality “in full” because of the plurality’s historical analysis, which “recognize[d] the role of religion in this Nation’s history and the permissibility of government displays acknowledging that history.”⁹⁶ Justice Breyer concurred in the judgment, based ultimately on the historical context of the Texas Decalogue display. Eschewing the use of any pre-existing test to resolve the

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 681–82.

⁹⁰ *Id.* at 682.

⁹¹ *Id.* at 682–83.

⁹² *Id.* at 686.

⁹³ *Id.* at 686–89.

⁹⁴ *Id.* at 690.

⁹⁵ *Id.*

⁹⁶ *Id.* at 692–93 (Thomas, J., concurring).

constitutional question,⁹⁷ Justice Breyer looked instead at extrinsic evidence involving the circumstances surrounding the Texas display: the physical setting of the display amid the other monuments reflecting Texas' history; the "primarily secular" nature of the donating group—the Fraternal Order of Eagles—and the fact that the tablets "prominently acknowledge that the Eagles donated the display"; and most "determinative," the fact that the display had stood for forty years before being challenged.⁹⁸ All of this evidence supported Justice Breyer's view that the state's intention was to focus on the "nonreligious aspects" of the Ten Commandments, allowing their secular meaning to "predominate."⁹⁹ In light of this historical and, for lack of a better phrase, positional evidence, Justice Breyer found that the display was constitutionally permissible.¹⁰⁰

Justice Breyer, like Justice Thomas and the other justices of the plurality, relied in large extent on the use of extrinsic evidence. Ironically, a majority of the Court in *McCreary* also relied on extrinsic evidence to support an opposite conclusion. As the foregoing discussion establishes, this use of extrinsic evidence is not unusual in the context of the Establishment Clause. It has been, from the late nineteenth century to the present, an integral part of the Court's methodology when examining the intersection of law, religion, and government action, whether the *Lemon* test is used or not. Acknowledging the reality of the use of extrinsic evidence in Establishment Clause cases, however, does not provide us with an answer regarding the proper scope of the use of such evidence.

III. SHOULD EXTRINSIC EVIDENCE OF RELIGIOUS MOTIVATION INVALIDATE GOVERNMENT ACTION ON ESTABLISHMENT CLAUSE GROUNDS?

Despite the almost endless amounts of ink spent criticizing its various approaches to the subject, the Supreme Court has on the whole done a reasonably good job preventing the kind of church-state institutional connections that the Establishment Clause has been aimed at thwarting. But the Court's Establishment Clause rulings have left murky the constitutionally permissible scope of religious activism in the public square. In some of its rulings, the Court has invalidated such activism by finding government action motivated either in whole or in part by religious sentiments to be problematic in varying degrees. This area is further made difficult by the fact that it is not always an easy task to discern religious purpose when dealing with public policy.

⁹⁷ *Id.* at 699–700 (Breyer, J., concurring).

⁹⁸ *Id.* at 701–02.

⁹⁹ *Id.* at 701.

¹⁰⁰ *Id.* at 703–04.

A distinction between religious and secular purpose is not always easy to apply, and is complicated by the conception of public purpose in Constitutional jurisprudence generally. The United States is a modified “liberal state.” Its constitutional jurisprudence, reflecting a conception of “ordered liberty,” of liberty subject to due process of law, inevitably has raised issues about the proper purposes of government. In the nineteenth century, United States jurisprudence accepted that government may legislate to serve “public” but not “private” purposes, and public purposes were defined as including “safety, health, morals and the general welfare.” But what is a public purpose and the concept of “general welfare” in particular, have proved to be neither simple nor clear.¹⁰¹ In light of these problems, some have proposed solutions to simplify and resolve the issue of how much a given government enactment may reflect or be motivated by religious values or ethical principles.

A. A Moderate Exclusionist View

One school of thought regarding the role of religion and politics postulates that religious ideas and motivations should have a restricted but permissible place in the public square. Legal scholar Kent Greenawalt proposes that religious believers can legitimately base their public policy views on their faith, but only within certain defined limits.¹⁰² Greenawalt seeks to create a cautious middle path between what he describes as the “inclusive position”¹⁰³ in regards to religion and politics and the “exclusive position.”¹⁰⁴ The inclusive position, in his view, seeks to justify religious involvement in politics on the ground that religious believers cannot separate their religious convictions from their secular views.¹⁰⁵ Religion thus cannot be outside of the permissible boundaries for political participation, because for most believers their religious and secular views are “interwoven together.”¹⁰⁶

Greenawalt characterizes the exclusive position as one that seeks to base politics on “shared methods of understanding.”¹⁰⁷ Under this paradigm, religion, religious values, and religious ethical principles are allowed to impact personal and cultural affairs, but cannot be used as

¹⁰¹ Louis Henkin, *The Wall of Separation and Legislative Purpose*, in RELIGION, MORALITY, AND THE LAW 143, 147 (J. Roland Pennock & John W. Chapman eds., 1988).

¹⁰² Kent Greenawalt, *Religious Expression in the Public Square—The Building Blocks for an Intermediate Position*, 29 LOY. L.A. L. REV. 1411 (1996).

¹⁰³ *Id.* at 1411.

¹⁰⁴ *Id.* at 1412.

¹⁰⁵ *Id.* at 1411–12.

¹⁰⁶ *Id.* at 1411.

¹⁰⁷ *Id.* at 1412.

the basis for public policy.¹⁰⁸ The government should only use coercive force through law when the laws “rest on grounds that the people coerced should reasonably accept as valid.”¹⁰⁹ Under the general approaches as to which grounds of belief are excluded under this approach, religious grounds are excluded every time.¹¹⁰ Greenawalt recognizes an intermediate path between the inclusive and exclusive positions that results in the formulation of his primary principle, that religion can be used as a basis for government decision, so long as it is done in such a way that the law “protects interests . . . that are comprehensible in nonreligious terms, and the law does not impose on other people’s religions.”¹¹¹ Such laws are constitutional in Greenawalt’s view, and should be judicially enforced.¹¹²

A second legal scholar who has taken a moderate approach supporting some carefully crafted limitations on the role of religious belief and motivation in politics is Michael J. Perry.¹¹³ Perry has argued that the fundamental question involved in the issue of religion and politics is the role of religious arguments in the debate over government policy.¹¹⁴ Perry has contended that the Establishment Clause prevents the government from grounding any policy, particularly policies concerning morality, “on the view that a religious belief is closer to the truth or otherwise better than one or more competing religious or nonreligious beliefs.”¹¹⁵ The Establishment Clause, in this view, precludes governmental action that is based solely on religious ideology.¹¹⁶ Only government actions that can be justified by secular argument can meet the requirements of the Establishment Clause.¹¹⁷ Perry, however, notes that many religionists in public life do not base their political views simply on their religious beliefs.¹¹⁸ Political choices are often supported by both secular and sacred rationales.¹¹⁹ Because of this, Perry has asserted the necessity under the Establishment Clause for a law to have a secular justification that, standing alone, is strong

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1417.

¹¹² *Id.*

¹¹³ Perry, *supra* note 11.

¹¹⁴ *Id.* at 734–35.

¹¹⁵ *Id.* at 735.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 735–36.

¹¹⁸ *Id.* at 736.

¹¹⁹ *Id.*

enough to support the government's actions without an additional religious justification.¹²⁰

Interestingly, while Perry has stated in principle that the secular basis for the government's decision would have to be sufficient on its own to justify an action, he acknowledges in practice that "it would be extremely difficult for a court to discern whether [the] government based the choice solely on the secular argument or, instead, partly on the secular argument and partly on the religious argument."¹²¹ Perry concludes that, because of this difficulty, the Establishment Clause as a practical matter must require the government to refrain from making political decisions concerning moral matters "in the absence of a plausible secular rationale."¹²² The role of courts in examining an Establishment Clause question is to determine if the secular reason behind the government's decision is "plausible."¹²³ Additionally, legislators should only support government action in regard to moral issues if "a persuasive secular rationale exists."¹²⁴ Thus, as Perry has contended, religious believers may influence public policy and law, but only to the extent that their political viewpoints overlap and are supported by plausible, independent secular arguments.¹²⁵

The moderate approach to limiting the role of religious motivation in public life is paralleled in the two Supreme Court cases *Lynch v. Donnelly*¹²⁶ and *Wallace v. Jaffree*.¹²⁷ In *Lynch* the Court addressed the constitutionality of a city-sponsored Christmas display containing a

¹²⁰ *Id.* at 737.

¹²¹ *Id.* at 736. In his more recent work, Perry has acknowledged a richer role played by religion in the public square, arguing that religious principles have played a foundational role in the development of the concept of human rights. Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 EMORY L.J. 97 (2005). Perry has voiced concerns that the concept of the inviolability of the human person, one of the linchpins of modern human rights theory, cannot survive outside of the context of a religiously-oriented worldview:

The point is not that morality cannot survive the death of God. There is not just one morality, indeed, there are many moralities. The serious question is whether the morality constituted by the claim that each and every human being is inviolable—which includes any morality constituted by the morality of human rights—can survive the death (or deconstruction) of God.

Id. at 150 (footnote omitted). In a more recent book, Perry's view of the constitutionally appropriate role of religion in the public square, while still guarded, is much more positive. See MICHAEL PERRY, *UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY* (2003).

¹²² Perry, *supra* note 10, at 737–38.

¹²³ *Id.* at 738.

¹²⁴ *Id.* at 739.

¹²⁵ *Id.*

¹²⁶ 465 U.S. 668 (1984).

¹²⁷ 472 U.S. 38 (1985).

nativity crèche.¹²⁸ The Court ruled that the city's action was permissible under the Establishment Clause.¹²⁹ Writing for the Court, Chief Justice Burger reasoned that the history of the United States "is replete with official references to the value and invocation of Divine guidance," particularly in the writings of the Founders.¹³⁰ He pointed to the religious nature of both Thanksgiving and Christmas, and to "countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage."¹³¹ While the Court's defense of the display of religious symbols as part of the heritage of the nation is a strong reaffirmation of the permissibility of religious expression in the civic arena, the Court in *Lynch* was not entirely supportive of religious motivation in public life. Stated clearly, "[t]he Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations."¹³²

While there can be no doubt that the Court's ruling in *Lynch* went a long way in securing the permissibility of government recognition of the nation's religious heritage, the Court's ruling also affirmed that a government enactment supported solely by religious motivation, absent secular justification, would be constitutionally problematic.¹³³ The Court's basic position as outlined in *Lynch* is that some religious motivation is acceptable in public life, but it cannot be the only motive behind the government's public policy decisions—those policies must also be justified by secular reasons.¹³⁴

The Court reiterated this view concerning religious motivation and public policy in *Wallace v. Jaffree*.¹³⁵ In *Wallace*, the Court struck down an Alabama law requiring public schools to open each day with a moment of silence to permit students to engage in voluntary prayer.¹³⁶ The purpose behind the law was to advance religion, thus failing the first prong of the *Lemon* Test.¹³⁷ The Court emphasized that the *Lemon* test's secular purpose prong permitted statutes to be motivated in part by a religious purpose.¹³⁸ A partial religious motivation does not make a

¹²⁸ *Lynch*, 465 U.S. at 671.

¹²⁹ *Id.* at 687.

¹³⁰ *Id.* at 670, 675.

¹³¹ *Id.* at 677.

¹³² *Id.* at 680 (compiling cases).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ 472 U.S. 38 (1985).

¹³⁶ *Id.* at 59–60.

¹³⁷ *Id.* at 56–57, 60.

¹³⁸ *Id.* at 56.

law unconstitutional;¹³⁹ but, if a law's passage is entirely motivated by a purpose to advance religion, as the Court found in *Wallace*, then the law violates the Establishment Clause.¹⁴⁰ The ruling in *Wallace* reinforces the holding of *Lynch*: religious believers can be motivated by their religious traditions, so long as they are also motivated by secular purposes.¹⁴¹ With this holding, the *Wallace* case would seem to accord well with the view of religion and politics put forward by Greenawalt and Perry: If the law enacted has a legitimate secular purpose religious motivation is permissible so long as it is not the sole reason for the legislative enactment.

B. A Stronger Exclusionist View

A second ideological position seeking to limit the role of religion in public life argues that the Establishment Clause creates a wall between church and state that cannot be breached, and that religious ideas and motivations must be kept out of the governing and law-making processes as a matter of constitutional integrity. A major proponent of this position is Kathleen M. Sullivan.¹⁴² Sullivan has argued that the First Amendment religion clauses require a completely secular state.¹⁴³ Just as the government cannot command a believer to violate what he or she believes to be a divine command, so too the government cannot compel a person to live according to God's will.¹⁴⁴ Since the Constitution prohibits the establishment of religion in society, it "implies the affirmative 'establishment' of a civil order for the resolution of public moral disputes."¹⁴⁵ In Sullivan's view, the strong secular nature of this civic order is mandated by the need for peace between striving sectarian groups.¹⁴⁶ To allow religious ideas to be the basis of decisions regarding government action would be to invite "inter-denominational strife,"¹⁴⁷ the exact thing that Sullivan believes the Establishment Clause was crafted to prevent.¹⁴⁸ According to Sullivan, while it is permissible for religious

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Sullivan, *supra* note 6.

¹⁴³ *Id.* at 198.

¹⁴⁴ *Id.* at 197.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 197–98.

¹⁴⁷ *Id.* at 198.

¹⁴⁸ *Id.* Sullivan unfortunately provides no historical authority to support her conclusion that the Establishment Clause was designed to prevent religious strife rather than to provide for religious liberty. Sullivan argues that the state must be "fully agnostic," otherwise, religious strife will erupt. *Id.* at 198 n.10. Her only cited authority in support of the "agnostic" state is John Rawls's, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987). Other scholars have noted that one of the purposes of the

believers to influence the secular order, the resolution of civic moral disputes must be accomplished by the use of principles “articulable in secular terms.”¹⁴⁹

In Sullivan’s view, faith may not be translated into public policy.¹⁵⁰ Religious individuals or groups have no right to use their religious views as a basis for law.¹⁵¹ Thus, “[n]either Bible nor Talmud may directly settle, for example, public controversy over whether abortion preserves liberty or ends life.”¹⁵² To Sullivan, religious liberty in the public square is permitted, but only “insofar as it is consistent with the establishment of the secular public moral order.”¹⁵³ The Establishment Clause prohibits the government from giving any official approval to religion, making religion “off limits to government in the course of its own

Establishment Clause was to remove religion from political life out of a concern for social peace. See, e.g., LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 102 (1999). Leonard Levy asserts, “the establishment clause was also meant to depoliticize religion, thereby defusing the potentially explosive condition of a religious heterogeneous society. By separating government and religion the establishment clause enables such a society to maintain some civility among believers and unbelievers as well as among diverse believers.” *Id.* Levy, however, like Sullivan, fails to provide any historical support for his assertion regarding the purpose of the clause. Historical support that one (but not the only) purpose of the Establishment Clause was to prevent political strife among different religions in the early American nation is provided by Russell Kirk:

The second reason advanced in favor of the [Establishment Clause] was a desire to avert disunity among the several states. The differences in theology and church structure between Congregationalist New England and Episcopalian Virginia were conspicuous enough. Still more formidable, in some ways, were the doctrinal disputes among Presbyterians, Quakers, Baptists, Methodists, Dutch Reformed, deists, and other denominations or religious and quasi-religious associations. Had any one of these churches been established nationally by Congress, the rage of other denominations would have been irrepressible. The only security lay in forbidding altogether the designating of a national church.

RUSSELL KIRK, RIGHTS AND DUTIES: REFLECTIONS ON OUR CONSERVATIVE CONSTITUTION 154 (1997).

Note, however, that Kirk’s explanation of this historical concern underlying the Establishment Clause does not support the idea that the clause was intended to prevent religious motivation in public life; instead, the purpose, as Kirk explains it, was to prevent an institutional connection between church and state in order to effectuate a practical solution to the problem of religious strife caused by an *overt* institutional alliance between the national government and a particular religious organization or denomination. “It was out of expediency, not from anti-religious principle, that Congress accepted, and the states ratified, the first clause of the First Amendment,” which includes the Establishment Clause. *Id.* at 155.

¹⁴⁹ Sullivan, *supra* note 6, at 197.

¹⁵⁰ *Id.* at 198.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

activities . . .”¹⁵⁴ According to Sullivan, the price of religious peace in our constitutional order “is the banishment of religion from the public square . . .”¹⁵⁵ With no surprise, the core of Sullivan’s view, the insistence that civic debate and public policy take place in an environment denuded of any religious influence or input, has both many supporters and many detractors among those who comment on the intersection of law and religion.

The two Supreme Court decisions that most closely resemble the exclusionist view are *Epperson v. Arkansas*¹⁵⁶ and *Edwards v. Aguillard*,¹⁵⁷ both cases dealing with the teaching of “creation science” in public school curricula.¹⁵⁸ In *Epperson*, the Court addressed an Arkansas statute that prohibited public school teachers from teaching the theory of evolution in the science curricula.¹⁵⁹ In evaluating the constitutionality of the Arkansas statute, the Court conspicuously noted that the statute lacked any discernable secular purpose:

[T]here can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas’ law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law’s reason for existence.¹⁶⁰

The Supreme Court reached a similar conclusion in *Edwards* after analyzing a Louisiana law that required any public schools teaching the theory of evolution to also teach biblical creationism.¹⁶¹ Under the *Lemon* test, the Louisiana statute lacked a secular purpose and therefore violated the Establishment Clause.¹⁶² The Court looked at the legislative history of the statute to examine its purpose, particularly at the statements lawmakers made during legislative debate.¹⁶³ While the Act stated that its purpose was to promote academic freedom, statements made by legislators indicated that the underlying motivation behind the law was to promote religion and advance belief in the religious doctrine

¹⁵⁴ *Id.* at 206.

¹⁵⁵ *Id.* at 223.

¹⁵⁶ 393 U.S. 97 (1968).

¹⁵⁷ 482 U.S. 578 (1987).

¹⁵⁸ *Id.* at 581.

¹⁵⁹ *Epperson*, 393 U.S. at 98–99.

¹⁶⁰ *Id.* at 107–08.

¹⁶¹ *Edwards*, 482 U.S. at 581–82.

¹⁶² *Id.* at 585, 594.

¹⁶³ *Id.* at 587, 592.

of creationism.¹⁶⁴ Because the law had a religious purpose as demonstrated by the motivations of individual legislators who supported the Act in the Louisiana legislature, the Court invalidated the statute under the *Lemon* test as a violation of the Establishment Clause.¹⁶⁵ *Edwards* ended precisely in line with the sentiments of Sullivan and others who advocate a strong exclusion of religious values and ideas from public debate: religious motivation can be constitutionally toxic.

IV. PROBLEMS WITH THE RESTRICTIONIST AND THE EXCLUSIONIST
APPROACH TO THE USE OF EXTRINSIC EVIDENCE IN ESTABLISHMENT
CLAUSE CASES

A. *Overbreadth*

While the Supreme Court's approach to church-state issues has resulted in a very competent defense of the institutional separation of church and state, the reasoning the Court has used to arrive at some decisions creates an issue regarding the constitutional appropriateness of religious motivation in public life. For instance, there has been a noted inconsistency in applying the *Lemon* test regarding the level at which the motivations of policy makers can cross over into constitutionally troubled territory.¹⁶⁶ A case like *McGowan v. Maryland* seems to indicate that at least some religious motivation on the part of lawmakers is permissible so long as the basic purpose of a policy or law is designed to further a secular purpose.¹⁶⁷ *Edwards v. Aguillard*, however, undermines that conclusion, suggesting that legislative enactments motivated by religious conviction are per se constitutionally dubious.¹⁶⁸ This inconsistency by the Court has the potential to cause significant difficulties in respect to Establishment Clause jurisprudence on both a practical and a theoretical level.

While there seems to be an almost limitless discourse regarding the role of religious faith in the public square, I would like to focus on three particular problems raised by excluding religious motivation, either in whole or in part, from public life via the Establishment Clause.¹⁶⁹ The

¹⁶⁴ *Id.* at 586, 589, 592–93.

¹⁶⁵ *Id.* at 594.

¹⁶⁶ See David K. DeWolf, *Academic Freedom After Edwards*, 13 REGENT U. L. REV. 447, 461–62 (2001).

¹⁶⁷ 366 U.S. 420 (1961).

¹⁶⁸ 482 U.S. 578 (1987).

¹⁶⁹ Several authors have defended religious activism in the public square, and it is beyond the scope of this Article to articulate those arguments. For a positive overview of the role of religious faith in American civic discourse, see BRENDAN SWEETMAN, *WHY POLITICS NEEDS RELIGION: THE PLACE OF RELIGIOUS ARGUMENTS IN THE PUBLIC SQUARE* (1996). For a detailed historical overview of religion's role in American politics, see

first problem regards the analytical difficulties raised by an overly-broad conflation of purpose and motivation for Establishment Clause purposes. Scholars and jurists who insist on reading the *Lemon* test's secular purpose prong as requiring an exclusion of religious motivation from public life make a critical error regarding the distinction that needs to be drawn between the need for a law to have a secular purpose and the motivation legislators and other policy makers may have in supporting such a secular purpose. Even assuming that it is possible to accurately determine the motives of legislators and other policy makers (an assumption that is far from beyond dispute), the ambiguity caused by the Court's jurisprudence in this area obscures the fact that it is possible for a law to have a secular purpose and, at the same time, be supported by law makers because of religious motivations.¹⁷⁰

There is scholarly support for the possibility of finding overlap between religious conviction and secular purpose in the law.¹⁷¹ "Intent generally concerns the institutional or individual author's meaning which is given to the words that make up the legal text. Purpose, on the other hand, more directly involves the broader teleological issues (the goals) which the text was designed to address and accomplish."¹⁷² By not properly distinguishing between the motivation of policy makers and the purpose of the policies enacted, the Court risks obscuring the vital distinction between intention and purpose, leading to uncertainty regarding the rights of religious believers to fully exercise political liberty.

A closer examination of the implications of *Edwards v. Aguillard*¹⁷³ demonstrates that the Court correctly struck down the Louisiana statute. The state of Louisiana had indeed violated the Establishment Clause by mandating that "creation science" and Darwinian evolution

RELIGION AND AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE PRESENT (Mark A. Noll & Luke E. Harlow eds., 2d ed. 2007).

¹⁷⁰ See *Epperson v. Arkansas*, 393 U.S. 97, 113 (1968) (Black, J., concurring) ("And this Court has consistently held that it is not for us to invalidate a statute because of our views that the 'motives' behind its passage were improper; it is simply too difficult to determine what those motives were."). Of course, ignoring evidence of a policy maker's intention brings its own risks from an interpretive perspective—texts can be read after they have been enacted in ways that go far beyond the initial intention of their authors. See Stanley Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495, 503 (1982) ("Any text, whatever its conditions of production, is capable of being appropriated by any number of persons and read in relation to concerns the speaker could not have foreseen.").

¹⁷¹ Robert John Araujo, S.J., *Method in Interpretation: Practical Wisdom and the Search for Meaning in Public Legal Texts*, 68 MISS. L.J. 225 (1998).

¹⁷² *Id.* at 296.

¹⁷³ 482 U.S. at 581, 596 n.18, 597 (invalidating Louisiana statute that mandated the teaching of "creation science" from a literal reading of the Book of Genesis whenever a public school's curricula also included teaching Darwinian evolution).

were only to be taught together.¹⁷⁴ But the Court made a mistake in assuming that the religious motives for supporting the law of some members of the Louisiana legislature tainted the statute.¹⁷⁵ The law violated the Establishment Clause not because religious people supported it, but because it overtly sought to have a particular religious doctrine taught as a part of the science curriculum in Louisiana public schools. There was no need for the Court to look at the motivation of the legislators in drafting the law. The law was unconstitutional on its face: it attempted to use the public schools to teach religious doctrine.¹⁷⁶ Even if one accepts that the Court was correct in examining the views of the legislators who supported the Louisiana creationism law, the Court's reasoning confused the law's stated purpose with the subjective motivation of the individual legislators who supported the law. The law's overt purpose was to foster the teaching of a religious belief—a literal reading of the creation accounts in the Book of Genesis—in the public schools as a counter to the teaching of the theory of evolution. There simply was no need for the Court to proceed any further. But the Court did proceed further by examining the motivation of the legislators, looking not just at the purpose that they had hoped to achieve (which in this case was clearly unconstitutional) but also why they wished to achieve that purpose.¹⁷⁷ This approach to motivation and purpose implies that religious and secular values cannot share perspectives on issues, even if those perspectives are motivated by different principles and sources of meaning.

Such a broad conflation of motivation and purpose inherent in such an approach can lead to the unnecessary opening of a Pandora's box. As Justice Scalia pointed out in his dissenting opinion in *Edwards*, religious beliefs can motivate a wide range of public policy positions.¹⁷⁸ To deprive religious believers of the right to influence public policy could, he cautioned, have disastrous implications for movements toward social justice.¹⁷⁹ Justice Scalia noted, "Today's religious activism may give us the [Louisiana creationism law], but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims."¹⁸⁰ The conflation of purpose with motivation has the potential to imperil the

¹⁷⁴ *Id.* at 591, 597.

¹⁷⁵ *See id.* at 591.

¹⁷⁶ *Id.* at 594; *Stone v. Graham*, 449 U.S. 39, 41–42 (1980) (posting of the Ten Commandments on school walls had no secular legislative purpose and violated the Establishment Clause); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963) (striking down an effort to use the public schools to foster devotion to the Bible).

¹⁷⁷ *Edwards*, 482 U.S. at 592–93.

¹⁷⁸ *Id.* at 615–16 (Scalia, J., dissenting).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 615.

validity of legislation dealing with topics that have nothing to do with the interplay of religious institutions and the government.

Running with Justice Scalia's idea, imagine that a state legislature enacted a law mandating humanitarian assistance for individuals living with HIV infection. Under this program, medical tests and medication are provided to low-income patients who are infected with the virus. The law arguably has a secular purpose: to provide medical assistance to individuals in need. No churches are directly funded by the program, nor are any religious activities sponsored; the law simply provides for medical tests and medication to those infected with HIV. Be that as it may, Several members of the legislature support this law out of religious conviction. For example, they may belong to churches, synagogues, temples, mosques or other religious institutions that undertake outreach ministries to individuals with HIV, or they may believe, as a matter of general religious principle, that all individuals who suffer illness have a right to necessary medical care. In any event, these legislators' support for the law is predicated on their religious conviction—and they say so, right on the floor of the state assembly when the program is being debated prior to enactment. It simply boggles the mind that such statements of motivation could possibly trigger the Establishment Clause and render the program unconstitutional for a lack of a sufficiently secular purpose. The law has a purely secular purpose: helping those who are ill or who need treatment to prevent becoming ill, but it does lack a purely, or perhaps even predominantly, secular motivation. In such a case, the motive of the legislators in approving the humanitarian legislation should be irrelevant to the constitutionality of the law. And if motive is off-limits in this particular example, then motive should be off-limits in general. So long as a law has a secular purpose, the motivation of the legislators in voting for it should be beyond the scope of review for Establishment Clause purposes.

This is not to say that the concerns raised by either of the previously discussed exclusionist camps regarding religious motivation and religious argument in the public square are without merit. Some of the Founders shared Sullivan's concern, for example, about breeding factionalism as a result of increased religious motivation in the public square, and, as previously discussed, this was one of the concerns behind the inception of the Establishment Clause.¹⁸¹ The concern over factionalism was one of the key issues at the time of the founding.¹⁸² It

¹⁸¹ Sullivan, *supra* note 6, at 202–14.

¹⁸² THE FEDERALIST NO. 10 (James Madison); *see also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 251 (1995) (Stevens, J., dissenting) (citing THE FEDERALIST NO. 10); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 82 n.3 (1990) (Stevens, J., concurring); *Jones v. Bates*, 127 F.3d 839, 859 (9th Cir. 1997) (citing THE FEDERALIST NOS. 10, 51, 63 (James Madison), No. 78 (Alexander Hamilton)).

raised questions regarding political divisions in general, and how to control factions arising from these divisions in a way that would foster the common good of the fledgling Republic. The problem of factionalism is one that should be acknowledged, if for no other reason than the fact that many of the current political issues that religious values can strongly impact—abortion, same-sex marriage, embryonic stem cell research, amid others—tend to have a high temperature, so to speak, when it comes to public debate. It is questionable, though, whether excluding religious motivation from the public square would remove any of the divisiveness from these issues. It seems more likely that it is the very nature of those issues themselves that raises the temperature of public debate and not the religious faith, or lack thereof, that motivates citizens and public officials engaged in the response of the body politic to those topics.¹⁸³

“Politics,” as Harvard University political science professor Harvey Mansfield has written, “is about what makes you angry, not so much about what you want.”¹⁸⁴ The argument that religiously motivated political activism should be constitutionally disfavored because it is divisive overlooks the fact that all politics is divisive in some way or another and that secular political motivations, no less than religious ones, can fragment the public square, as well. As Circuit Judge Michael W. McConnell has argued, the idea that religiously motivated public activism is somehow uniquely divisive “falls short on empirical grounds.”¹⁸⁵ It also fails, he contends, to account for the fact that religious activism has been an integral part of an American political process, a process that by its very nature tends to dilute contentiousness by “fostering compromise and mutual accommodation”¹⁸⁶ And while there is little doubt that those who act out of religious motivation in the public square sometimes exude an excess of zeal, the participation in our political system of people “animated by deep moral commitments . . . can

¹⁸³ See Harvey Mansfield, *Atheist Tracts: God, They're Predictable*, WKLY. STANDARD, Aug. 13, 2007, at 13, 14 (“It is not religion that makes men fanatics; it is the power of the human desire for justice, so often partisan and perverted. That fanatical desire can be found in both religion and atheism. In the contest between religion and atheism, the strength of religion is to recognize two apparently contrary forces in the human soul: the power of injustice and the power, nonetheless, of our desire for justice. The stubborn existence of injustice reminds us that man is not God, while the demand for justice reminds us that we wish for the divine. Religion tries to join these two forces together.”).

¹⁸⁴ Harvey Mansfield, *How to Understand Politics*, FIRST THINGS, Aug./Sept. 2007, at 41, 42.

¹⁸⁵ Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 649 (1999).

¹⁸⁶ *Id.* at 650.

spur the conscience of the nation.”¹⁸⁷ McConnell adds, “It is no accident that virtually every significant social reform movement in our history has been led by religious activists.”¹⁸⁸

If the concern over divisiveness is insufficient to justify the exclusion of religious motivation from the public square, what about the view, similar to that put forward by Perry and Greenawalt, that religious motivation should be curtailed or at least made to partner with principles that do not reflect religious ideology? There certainly is much to be said for this approach in American public life from a prudential standpoint. America is an increasingly pluralistic society, and the kind of religious culture that once existed is becoming increasingly diverse and fragmented. Law and politics are practical endeavors and, as a practical matter, if they want to be successful in the civic arena, religious believers active in the public square will increasingly need to couch their positions in language that will appeal to individuals who do not accept their particular religious commitments and arguments. A speaker who addresses a particular public issue by saying that her interpretation of a religious doctrine or sacred text resolves a given policy question may certainly be compelling to herself, but that does nothing to convince those who do not share her belief in the normative nature of the doctrine or sacred text or in her interpretation of it. The well-worn slogan of the evangelist—“the Bible says”—is only persuasive, after all, to those who

¹⁸⁷ *Id.* at 649; see also Kathleen A. Brady, *Religious Group Autonomy: Further Reflections About What is at Stake*, 22 J.L. & RELIGION 153, 167 (2007) (“Religious groups speak to us not only about the divine but also about the social and civic concerns of the larger community, and our collective progress depends upon the range of insights that different traditions provide, including insights that may initially seem unorthodox and incorrect.”). Furthermore, in modern republics,

political liberty is more in need of the sense of doubt proper to the secular soul than the certainties of religious faith. It needs people who have strong views about political and moral values but with equal passion believe in and experience these values not as absolute truths but as possible choices alongside other possible choices.

MAURIZIO VIROLI, *REPUBLICANISM* 92–93 (1999). For a convincing counter-view to Virolì’s position, see CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* 242–43 (1995). Lasch aptly notes that modern thinkers often misunderstand the relationship of religion in regard to certainty and doubt:

In the commentary on the modern spiritual predicament, religion is consistently treated as a source of intellectual and emotional security, not as a challenge to complacency and pride. Its ethical teachings are misconstrued as a body of simple commandments leaving no room for ambiguity or doubt. . . .

What has to be questioned here is the assumption that religion ever provided a set of comprehensive and unambiguous answers to ethical questions, answers completely resistant to skepticism, or that it forestalled speculation about the meaning and purpose of life, or that religious people in the past were unacquainted with existential despair.

Id.

¹⁸⁸ McConnell, *supra* note 185, at 649.

believe in the authority of the Bible. For this reason, it is beneficial for religious believers in the public square to seek to provide non-religious arguments to support their public policy positions. In so far as such practical political considerations encourage religious believers to seek further support for their positions beyond the shoals of doctrine and sacred texts, such considerations can be quite helpful both for those religious believers who are engaged in the civic arena and for our democratic polity in general.

But to transform such prudential concerns into an abstract legal doctrine that renders religious activism in the public square constitutionally suspect is problematic at the least. In sum, if the simple presence or preponderance of religious motivation in support of a particular law is enough to render it constitutionally suspect, then virtually no piece of legislation or government policy will be safe from constitutional challenge under the Establishment Clause. The war in Iraq, Hurricane Katrina Relief, same-sex marriage, embryonic stem-cell research, and universal access to health care—all of these issues have proponents and opponents who are motivated, at least in part, by religious faith and values. Under the exclusionist perspective toward religious motivation in public life, any government action, pro or con, on those issues could legitimately be disqualified on the basis of a violation of *Lemon*'s secular purpose requirement. As Russell Kirk once observed, "Religious concepts about order and justice and freedom powerfully influence the political beliefs of the large majority of American citizens," and that such influence "is not confined to one party."¹⁸⁹

Embracing the exclusionist perspective would have wide-ranging and absurd results because of its massive undermining of public policy. Thus, that perspective will likely be avoided in one of three probable ways: 1) the courts could seek to undermine the secular purpose prong of the *Lemon* test itself; 2) the courts could adopt either a thinly-veiled or perhaps even overtly partisan approach to such issues, allowing certain religiously-motivated government acts to withstand Establishment Clause scrutiny while ruling other religiously-motivated acts unconstitutional;¹⁹⁰ or 3) the courts could clearly distinguish between motivation and purpose for Establishment Clause purposes. The first option would result in grave damage to the Court's religious liberty jurisprudence by depriving the courts of a useful tool to enforce the strong institutional separation of religion and government that stands as one of the core principles of the Establishment Clause. The second option

¹⁸⁹ KIRK, *supra* note 148, at 157.

¹⁹⁰ For an argument in favor of judges applying legal texts in light of their own personal political convictions, see Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 544–45, 547 (1982).

would have disastrous consequences for the judiciary's fundamental integrity as a non-political branch of government. The third option better fits the Court's consistent efforts to avoid excessive co-mingling of church and state on the one hand, while avoiding the pitfalls of the first two options.¹⁹¹

B. What Would the Founders Do?

1. The Historical Context of the Establishment Clause

At the risk of engaging in some “law office history,” an analysis of the history surrounding the Establishment Clause will highlight the second problem raised by conflating purpose and motivation under the *Lemon* test: notably, the lack of traction such an approach would have with the historical record of the founding and the establishment of our constitutional order. A close reading of the history behind the Establishment Clause does not indicate that its purpose was to purge religious motivation from civic life.¹⁹² Instead, as originally conceived, the Establishment Clause had two key purposes: first, to prevent the federal government from interfering in existing state establishments and second, to prevent the federal government from engaging in religious favoritism by setting up a national religious establishment.¹⁹³ As Leonard W. Levy has noted, the establishment that was targeted included such actions as setting up a government church, providing preferences for one religion over other religions, and providing

¹⁹¹ It also has the benefit of comporting with what is largely the current practice in American democracy. As Kathleen A. Brady points out, the American model of politics is one that is open to the richness of both religious conviction and the practice of American constitutional government:

Informed by our religious and moral traditions, we bring our basic moral values and convictions about social and political truth to bear on our political deliberations as we converse, debate and argue with one another about the appropriate resolution of political questions. We ask ourselves what is right and true when we tackle issues such as poverty, inequality, economic development, the environment, education, family and health. While general agreement may emerge from these debates, more often the outcome is a compromise settled by majority vote.

Brady, *supra* note 187, at 203.

¹⁹² As Russell Kirk stated, “Religion in America never has been a private concern merely.” KIRK, *supra* note 148, at 156.

¹⁹³ *Id.* at 153–55; see also LEVY, *supra* note 148, at 80–84. Levy quotes Madison for the proposition that the “great object” of the Establishment Clause was to limit “the abuse of the powers of the General Government” in the field of religion. *Id.* at 84 (quoting 7 ANNALS OF CONG. 432, 437 (1789) (James Madison, Proposal of Bill of Rights to the House of Representative on June 8); see also Leonard W. Levy, *Bill of Rights*, in ESSAYS ON THE MAKING OF THE CONSTITUTION 258, 301 (Leonard W. Levy ed., 1987) (“The amendment was meant to prevent congressional legislation concerning [state] establishments and to ensure that Congress could not do what those states were doing.”).

institutional aid to any religious churches and organizations.¹⁹⁴ This institutional concern did not entail hostility to religion or religious values, nor did it exclude the idea, prevalent in the early history of the country through the nineteenth century, that religious faith in general should have a recognized role within the broader culture.¹⁹⁵ Originally, the Establishment Clause only applied to the federal government.¹⁹⁶ Since it applied only to the federal government, it ensured the autonomy of each state to determine whether it would officially recognize a particular religious tradition.¹⁹⁷ While most states provided for religious freedom in their constitutions, some states continued to place limitations on religious liberty by “imposing restraints upon the free exercise of religion and in discriminating against particular religious groups.”¹⁹⁸ At the time the Constitution was enacted, almost half of the original Thirteen Colonies still had church establishments and at least four additional states had religious restrictions on public office.¹⁹⁹

¹⁹⁴ Levy, *supra* note 193, at 301. According to the historical context of the Establishment Clause, an establishment “meant public support to all denominations and sects on a nonpreferential basis, not just public support of one over others.” *Id.*

¹⁹⁵ See KIRK, *supra* note 148, at 156 (“[The Establishment Clause] never was meant to signify that the American government was indifferent to religion, or hostile toward it.”).

¹⁹⁶ *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 254 (1963) (Brennan, J., concurring); see also *Permoli v. Mun’y No. 1 of New Orleans*, 44 U.S. (3 How.) 589, 606 (1845) (“The limitation of power in the first amendment of the Constitution is upon Congress, and not the states.”); RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 432 (1974); Clifton B. Kruse, Jr., *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 WASHBURN L.J. 65, 84–85 (1963).

¹⁹⁷ CARTER, *supra* note 7, at 118; KIRK, *supra* note 196, at 436; Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 373 (1954) (stating that the Establishment Clause was meant to function “as a reservation of power to the respective states” and as a “means of forestalling any abridgement of the religious freedom of the free exercise clause on the part of the then suspect federal power”); Kruse, *supra* note 196, at 83–89; see also KIRK, *supra* note 148, at 155 (“[The Establishment Clause], in short, declared that the national government must tolerate all religious beliefs—short of such fanatic beliefs as might undo the civil social order; and that no particular church may be endowed by Congress with privileges of collecting tithes and the like. The purpose of the clause was placatory: America’s ‘dissidence of dissent’ was assured that no orthodoxy would be imposed upon their chapels, bethels, conventicles, and churches.”).

¹⁹⁸ *Everson v. Bd. of Educ.*, 330 U.S. 1, 14 (1947).

¹⁹⁹ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 32–33 (1998) (“In 1789, at least six states had government-supported churches—Congregationalism held sway in New Hampshire, Massachusetts, and Connecticut under local-rule establishment schemes, while Maryland, South Carolina, and Georgia each featured a more general form of establishment in their respective state constitution. Even in the arguably ‘nonestablishment’ states, church and state were hardly separate; at least four of these states, for example—in their constitutions, no less—barred non-Christians or non-Protestants from holding government office. According to one tally, eleven of the thirteen states had religious qualifications for officeholding.”).

In the young American republic, establishment of religion on the state level was hotly debated.²⁰⁰ At the time the First Amendment was ratified, it met with approval from both those who favored state establishments and those who did not.²⁰¹ Those in favor of established state churches approved of the Establishment Clause because it prevented the federal government from interfering with the state churches.²⁰² Those who favored disestablishment approved of the Establishment Clause because it kept the federal government from setting up a national church.²⁰³ Neither group, however, saw in the Establishment Clause a rejection of religious principles; and despite concerns over factionalism, “Americans generally endorsed the idea of a religious foundation for their political order.”²⁰⁴

Both those in favor of state establishment and those opposed to it wanted the federal government to be neutral, neither supporting state efforts to prohibit establishment or codifying existing state establishments into federal law.²⁰⁵ The Establishment Clause reads, “Congress shall make no law respecting an establishment of religion”²⁰⁶ Congress cannot make a law that establishes religion, but neither can it make a law disestablishing religion in the various states.²⁰⁷ The text of the Establishment Clause prohibits the Congress from making any law respecting establishment at the state or national level, either pro or con.²⁰⁸ Thus, through the Establishment Clause, the Constitution at ratification left to the states the decision of whether an

²⁰⁰ See, e.g., James Madison, Memorial and Remonstrance (1785), reprinted in ‘IN GOD WE TRUST’: THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS 308, 308–14 (Norman Cousins ed., 1958). Madison delivered this speech to the Virginia legislature as it debated whether to authorize religious assessments out of the state treasury.

²⁰¹ KIRK, *supra* note 196, at 436.

²⁰² *Id.*; see also CARTER, *supra* note 7, at 118.

²⁰³ KIRK, *supra* note 196, at 436.

²⁰⁴ *Id.* at 438.

²⁰⁵ CARTER, *supra* note 7, at 118.

²⁰⁶ U.S. CONST. amend. I.

²⁰⁷ According to Carter, “there is good reason to think that the principal purpose of the Establishment Clause, and maybe the sole one, was to protect the state religious establishments from disestablishment by the federal government.” CARTER, *supra* note 7, at 118; see also AKHIL REED AMAR, AMERICA’S CONSTITUTION 319 (2005) (“Much of the First Amendment . . . simply textualized the Federalist party line in 1787–88 that Congress had no proper authority to censor opposition speech or meddle with religion in the several states.”); Kruse, *supra* note 196, at 83–85.

²⁰⁸ Cf. Akhil Reed Amar, *The Bill of Rights as a Constitution*, in THE BILL OF RIGHTS: GOVERNMENT PROSCRIBED 274, 311 (Ronald Hoffman & Peter J. Albert eds., 1997) (“The establishment clause did more than prohibit Congress from establishing a national church. Its mandate that Congress shall make no law ‘respecting an establishment of religion’ also prohibited the national legislature from interfering with, or trying to disestablish, churches established by state and local governments.”).

official state church was appropriate. By the 1830s the few states with established churches moved towards disestablishment, although it was not until the passage of the Fourteenth Amendment in 1867 that it became possible to enforce the prohibitions of the Bill of Rights against individual states.²⁰⁹ By 1940, the Supreme Court found that the First Amendment's Free Exercise Clause was applicable to the states,²¹⁰ and the Court has subsequently recognized that the Establishment Clause is as well.²¹¹

The Establishment Clause did not simply protect federalism. It also functioned, and continues to function, to prevent the federal government from taking action to establish an official religion for the Union: "Congress shall make no law respecting an establishment of religion"²¹² does not simply bind the Congress in regards to the states, it is a declarative statement removing from the federal government as a whole the power to establish religion, period.²¹³ Many of the early settlers of the United States had migrated to America at least in part to escape laws that forced them to support and attend government churches in Europe.²¹⁴ Even though many may have come here to escape religious persecution, tolerance in matters of faith was not always a part of the American experience.²¹⁵ Many American minority religious groups, like the Catholics, Baptists, and Quakers, were often the targets of persecution by colonial authorities.²¹⁶ The religion clauses were ratified to prevent the federal government of the new republic from sliding into the habits of religious establishment and persecution.²¹⁷

²⁰⁹ *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 253 (1963) (Brennan, J., concurring) ("Whatever limitations [the First] Amendment now imposes upon the States derive from the Fourteenth Amendment."). For a discussion on the incorporation of the Establishment Clause to the states through the Fourteenth Amendment, see Snee, *supra* note 197, at 397-407.

²¹⁰ *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

²¹¹ *Schempp*, 374 U.S. at 255-58 (Brennan, J., concurring) (outlining the major arguments in favor of incorporating the Establishment Clause through the Fourteenth Amendment to the states); *see also* *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985).

²¹² U.S. CONST. amend. I.

²¹³ *See McGowan v. Maryland*, 366 U.S. 420, 441-42 (1961).

²¹⁴ *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-11 (1947).

²¹⁵ *Id.* at 9-10; *see also* THOMAS JEFFERSON, REPUBLICAN NOTES ON RELIGION AND AN ACT ESTABLISHING RELIGIOUS FREEDOM, PASSED IN THE ASSEMBLY OF VIRGINIA, IN THE YEAR 1786, *reprinted in* 'IN GOD WE TRUST,' *supra* note 200, at 121, 121-25.

²¹⁶ *Everson*, 330 U.S. at 10.

²¹⁷ *Id.* at 11. As the Court pointed out, it was not only the official persecution of minority religions that caused "shock [to] the freedom-loving colonials" but also "[t]he imposition of taxes to pay ministers' salaries and to build and maintain churches and church property . . ." *Id.* Amar explains the emphasis in the early Republic on preventing national establishment while leaving local establishments intact as a result of the lack of a common religious culture in the new nation:

Thus, the almost universally acknowledged purpose of the religion clauses is to secure religious liberty for the people of the United States as a whole.²¹⁸ To ensure this religious liberty, the Establishment Clause prohibits overt fusion or co-mingling of government and religion.²¹⁹ When combined with the Free Exercise Clause, which protects the right of citizens to hold whatever religious views they choose, the two clauses coupled with the Fourteenth Amendment prevent the federal government and the states from establishing an official religious body.²²⁰ There can be no established Church of the United States of America. Yet, while the Establishment Clause was meant to prohibit the institutional alliance of religion and the government, there is no evidence that it was designed to prevent religious believers from taking an active role in public life consistent with their religious principles. Laura Underkuffler-Freund's exhaustive exploration of this point establishes quite clearly that an historical approach to the Establishment Clause does not support the exclusion of "religious values, beliefs, or ideals in the workings of government."²²¹ Far from seeking to place religious motivation in public life outside the scope of constitutional government, the historical focus of the Establishment Clause according to Underkuffler-Freund has been on preventing "the merger of institutional church and state."²²²

Stephen Carter has pointed out that, when enacted, the Establishment Clause was not intended to protect the state from the church, but it was meant to protect the church from the state.²²³ The

Given the religious diversity of the continent—with Congregationalists dominating New England, Anglicans down south, Quakers in Pennsylvania, Catholics huddling together in Maryland, Baptists seeking refuge in Rhode Island, and so on—a single national religious regime would have been horribly oppressive to many men and women of faith; local control, by contrast, would allow dissenters in any place to vote with their feet and find a community with the right religious tone. On a more positive note, allowing state and local establishments to exist would encourage participation and community spirit among ordinary citizens at the grass roots

AMAR, *supra* note 199, at 45.

²¹⁸ CARTER, *supra* note 7, at 105–06; Douglas W. Kmiec, *Preserving Religious Freedom*, in CATHOLICS IN THE PUBLIC SQUARE 90, 94–96 (Thomas Patrick Melady ed., 1995).

²¹⁹ See *Everson*, 330 U.S. at 15–16; *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

²²⁰ *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such.").

²²¹ Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 980–81 (1995).

²²² *Id.* at 981.

²²³ CARTER, *supra* note 7, at 105.

purpose of the Founders, as Carter explains, was to create a situation where religious believers had the maximum amount of religious liberty possible in an ordered society.²²⁴ The Establishment Clause makes this possible by denying to the government the authority to control religion through establishment and regulation.²²⁵ The independence of the church from the state was never intended, according to Carter, to strip religious believers and religious groups of their ability to influence and shape public policy.²²⁶ Rejecting modern views that see the Establishment Clause as “the shielding of the secular world from too strong a religious influence,” Carter states that “the principal task of the separation of church and state is to secure religious liberty.”²²⁷ This liberty is not freedom from religious believers who are motivated by their faith in the public square; it is freedom from government influence on religion.²²⁸

2. The Example of the Founders

While the Founders as a group varied widely in their own personal religious practice and belief, most of them believed that religion had a crucial role to play in public life and appealed to religious principles to support their views on public policy issues.²²⁹ One of the most famous

²²⁴ *Id.* at 105–06.

²²⁵ *Id.* at 106.

²²⁶ *Id.*

²²⁷ *Id.* at 107. Carter is not alone, of course, in this view. Justice O'Connor voiced the same conviction when she wrote that “the goal of the [Religion] Clauses is clear: to carry out the Founders’ plan of preserving religious liberty to the fullest extent possible in a pluralistic society.” *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 882 (2005) (O’Connor, J., concurring).

²²⁸ CARTER, *supra* note 7, at 108–09.

²²⁹ See generally ‘IN GOD WE TRUST,’ *supra* note 200. This anthology includes writings on religion and public life from Benjamin Franklin, George Washington, John Adams, Thomas Jefferson, James Madison, Alexander Hamilton, Samuel Adams, John Jay, and Thomas Paine. For a comprehensive and balanced overview of the Founders’ views of religion, see THE FOUNDERS ON RELIGION (James H. Hutson ed., 2005). For more detailed accounts of the views of the Founders on religion and the American Republic, see generally JAMES H. HUTSON, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC (1998); MICHAEL NOVAK, ON TWO WINGS: HUMBLE FAITH AND COMMON SENSE AT THE AMERICAN FOUNDING (2002); RELIGION AND THE NEW REPUBLIC (James H. Hutson ed., 2000). As Novak notes, “a purely secular interpretation of the founding runs aground on massive evidence.” Novak, *supra*, at 7. “Far from having a hostility toward religion, the founders counted on religion for the underlying philosophy of the republic, its supporting ethic, and its sole reliable source of rejuvenation.” *Id.* at 111. That the appeal to religious principles and beliefs in support of public policy was not limited to the Founders but was spread throughout early American society during the founding period is demonstrated by the massive amount of political sermons surviving from the colonial and revolutionary periods as well as the early American Republic. A two volume set of such sermons, totaling 1,596 pages, has been published by the Liberty Fund. POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805 (Ellis Sandoz ed., 2d ed. 1998); see also GERTRUDE

episodes from the early Republic regarding the use of religious argument to influence public policy is provided by Benjamin Franklin, widely considered to be one of the least pious of the Founders, when he delivered a speech to the Constitutional Convention in Philadelphia in 1787.²³⁰ The convention was deadlocked on several critical issues, and was on the verge of adjourning.²³¹ Franklin appealed to the assembled delegates, reminding them “that God governs in the affairs of men.”²³² Without God’s help, Franklin told the convention, the new Republic will have no greater success than the disastrous Tower of Babel.²³³

Among the Federalists, there was a great deal of support for religious interaction in political life. Alexander Hamilton believed that religion was necessary to provide order in society, and that without religion, the only force capable of maintaining civic society was “the terrors of despotism.”²³⁴ James Wilson, who was a delegate to the Constitutional Convention, a noted Federalist, and a Supreme Court justice until his death in 1798, spent a good deal of his time outlining the relationship between the positive law and the divine law, particularly in his lectures on Law and Obligations, delivered at Harvard College.²³⁵ Wilson argued that there was a universal law, found in “the bosom of God.”²³⁶ He also believed God had established laws, “promulgated by reason and the moral sense” (that is, the natural law) and “promulgated by the holy scriptures”²³⁷ For Wilson, these sources of law, which apply both to human beings and larger national communities, “flow[] from the same divine source: it is the law of God.”²³⁸

George Washington is one Founder often overlooked in regards to his views on the relationship of religion and politics. Washington was an astute thinker who had an enormous impact on the shape of the new nation. As far as the institutional connection between the national government and religion was concerned, Washington opposed any

HIMMELFARB, *ONE NATION, TWO CULTURES* 85–91 (Vintage Books 2001) (1991) (briefly reviewing the relationship between religion, the American founding, and American politics into the more recent past).

²³⁰ See Norman Cousins, *Introduction to Benjamin Franklin: “I Never Was Without Some Religious Principles,”* in *IN GOD WE TRUST*, *supra* note 200, at 16, 17–18.

²³¹ *Id.* at 17.

²³² *Id.* at 18.

²³³ *Id.*

²³⁴ KIRK, *supra* note 196, at 433 (quoting Alexander Hamilton, *The Stand No. III* (N.Y., Apr. 7, 1798), reprinted in 21 *THE PAPERS OF ALEXANDER HAMILTON* 402, 405 (Harold C. Syrett ed., 1974)).

²³⁵ 1 JAMES WILSON, *Of the General Principle of Law and Obligation*, in *THE WORKS OF JAMES WILSON* 49 (James DeWitt Andrews ed., 1895).

²³⁶ *Id.* at 49–50.

²³⁷ *Id.* at 92.

²³⁸ *Id.* at 93.

attempt to use tax dollars to support religious institutions.²³⁹ At the same time, he shared Hamilton's view that religion was vitally necessary for the civic well-being of the Republic.²⁴⁰ In his First Inaugural Address, Washington stated his belief that God guides the affairs of nations.²⁴¹ In his Farewell Address on September 19, 1796, Washington told the nation, "Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports."²⁴² Washington also urged that national policy in regard to foreign affairs be shaped by religious principles, declaring that religion enjoins the United States to "[o]bserve good faith and justice towards all Nations."²⁴³ Washington's belief that religion was vital to the life of the republic included a strong belief in the necessity of religious freedom. In a letter to the United Baptist Churches in Virginia, written soon after his election to the presidency, Washington reiterated his strong commitment to religious liberty.²⁴⁴ "If I could have entertained the slightest apprehension, that the constitution framed in the convention, where I had the honor to preside, might possibly endanger the religious rights of any ecclesiastical society, certainly I would never have placed my signature to it"²⁴⁵

Washington also reassured the Baptists that he believed in the necessity of "effectual barriers against the horrors of spiritual tyranny, and every species of religious persecution."²⁴⁶ In a letter to a church in Baltimore, Washington stated that in America everyone has the right to worship God as his or her own conscience requires, and Washington emphasized that the right to be protected by the law and to hold public office would not be taken away because of an individual's religious beliefs.²⁴⁷

²³⁹ Letter from George Washington to George Mason (Oct. 3, 1785), in 'IN GOD WE TRUST,' *supra* note 200, at 64, 64–65. Washington believed that state tax support for religious bodies was "impolitic." *Id.* at 65.

²⁴⁰ Letter from George Washington to the Clergy of Different Denominations Residing in and Near the City of Philadelphia (Mar. 3, 1797), in 'IN GOD WE TRUST,' *supra* note 200, at 63, 63 (stating "that *Religion* and *Morality* are the essential pillars of Civil society").

²⁴¹ George Washington, From the First Inaugural Address (Apr. 30, 1789), in 'IN GOD WE TRUST,' *supra* note 200, at 66, 66.

²⁴² George Washington, Farewell Address (Sept. 19, 1796), in 'IN GOD WE TRUST,' *supra* note 200, at 69, 69.

²⁴³ *Id.*

²⁴⁴ Letter from George Washington to the General Committee of the United Baptist Churches in Virginia (May 1789), in 'IN GOD WE TRUST,' *supra* note 200, at 58, 58–59.

²⁴⁵ *Id.* at 58.

²⁴⁶ *Id.*

²⁴⁷ Letter from George Washington to the Members of the New Church in Baltimore (Jan. 27, 1793), in 'IN GOD WE TRUST,' *supra* note 200, at 62. For a detailed view of George

Perhaps the two Founders who are most often referenced regarding the Establishment Clause are James Madison and Thomas Jefferson. Jefferson, particularly, is often portrayed as having some degree of hostility to the intersection of religion and public life.²⁴⁸ However, neither Madison nor Jefferson was as hostile to religion and religious involvement in the public square as they are often portrayed. Jefferson himself based his arguments for disestablishment on religious principles.²⁴⁹ This can be seen by his free use of religious arguments and language in the bill that he introduced in Virginia to support religious freedom.²⁵⁰ The bill sought to guarantee religious liberty and to prohibit public taxation for the support of religious institutions, and Jefferson often referred to religious beliefs that supported the purpose of religious freedom.²⁵¹ He stated that religious freedom was required because “Almighty God hath created the mind free”²⁵² Further, the Act stated that state persecution of people because of their religious beliefs constitutes “a departure from the plan of the Holy Author of our

Washington’s views regarding religion and public life, see TARA ROSS & JOSEPH C. SMITH, JR., *UNDER GOD: GEORGE WASHINGTON AND THE QUESTION OF CHURCH AND STATE* (2008).

²⁴⁸ AMAR, *supra* note 199, at 34 (noting that Jefferson is “often invoked today as a strong opponent of religious establishment . . .”).

²⁴⁹ See JEFFERSON, *supra* note 215, at 125–27. While Jefferson was a rigorous opponent of federal religious establishments, he was less opposed to state recognition of religion in public life:

Although he argued for an absolutist interpretation of the First Amendment—the federal government should have *nothing* to do with religion in the states, control of which was beyond Congress’s limited delegated powers—he was more willing to flirt with governmental endorsements of religion at the state level, especially where no state coercion would impinge on dissenters’ freedom of conscience. The two ideas were logically connected; it was especially easy to be an absolutist about the federal government’s involvement in religion if one understood that the respective states had broad authority over their citizens’ education and morals.

AMAR, *supra* note 199, at 34–35; see also DANIEL L. DREIBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 55–59 (2002). As Dreisbach explains, while Jefferson had a strong commitment to the separation of church and state at the national level, he viewed the principle largely as a jurisdictional one:

The principal importance of his “wall,” like the First Amendment it metaphorically represents, is its clear demarcation of the legitimate jurisdictions of federal and state governments on religious matters. In short, the “wall” constructed by Jefferson separated the federal regime on one side and ecclesiastical institutions and state governments on the other. This jurisdictional (or structural) interpretation of the metaphor is rooted in the text, structure, and historic, pre-Fourteenth Amendment understanding of the Bill of Rights, in general, and of the First Amendment, in particular.

Id. at 56.

²⁵⁰ JEFFERSON, *supra* note 215, at 125–27.

²⁵¹ *Id.*

²⁵² *Id.* at 125.

religion”²⁵³ To use the authority of the state to compel someone to pay a tax to support a religion that he does not believe is, according to Jefferson’s Act, “sinful.”²⁵⁴ Finally, not only do religious requirements for public office deprive people of their civil rights, they also corrupt religion “by bribing, with a monopoly of worldly honors and emoluments, those who will externally profess and confirm to it”²⁵⁵

James Madison also used religious principles as grounds for public policy positions, particularly to oppose a Virginia proposal to support Protestant religion teachers.²⁵⁶ Madison believed that the state should not tax citizens to support religious institutions or the missionary efforts of religious believers.²⁵⁷ His defense of the separation of church and state was grounded in his belief that the state was subject to God, and could not require of any person a higher loyalty than that person’s loyalty to God.²⁵⁸ “Before any man can be considered as a member of Civil Society,” Madison wrote, “he must be considered as a subject of the Governor of the Universe”²⁵⁹ Madison’s basis for defending religious liberty was not that the state needed to be protected from the church, or that theological motivation had to be purged from public life; instead, Madison argued for the institutional separation of church and state to protect the church.²⁶⁰ Madison believed that abuses of religious liberty are not offenses against human beings, but against God Himself.²⁶¹ As such, religious violations should only be punished by God.²⁶² To interject the state into the business of the church by giving government subsidies to teach religion would engage the state in something beyond its competence and endanger the integrity of religion itself.²⁶³ Madison’s religious objections to government financial support for religion also included explicitly Christian themes as well. In his sixth objection to the tax, Madison stated that the establishment of religion is “a contradiction to the Christian Religion itself,” for it forces believers to depend on the state rather than on God.²⁶⁴ In objection twelve, Madison stated that the tax will actually burden the Christian faith, preventing the spread of

²⁵³ *Id.*

²⁵⁴ *Id.* at 126.

²⁵⁵ *Id.*

²⁵⁶ See Madison, *supra* note 200, at 308–14.

²⁵⁷ See *id.* at 309–10.

²⁵⁸ *Id.*; see also CARTER, *supra* note 7, at 116; KIRK, *supra* note 196, at 436.

²⁵⁹ Madison, *supra* note 200, at 309.

²⁶⁰ See *id.* at 310; see also CARTER, *supra* note 7, at 116; KIRK, *supra* note 196, at 436.

²⁶¹ Madison, *supra* note 200, at 310.

²⁶² *Id.*; see also CARTER, *supra* note 7, at 116.

²⁶³ Madison, *supra* note 200, at 310.

²⁶⁴ *Id.* at 311.

“the light of Christianity” to those who languish “under the dominion of false Religions”²⁶⁵ These uses of religious belief to support his position demonstrates that Madison, *the man who wrote the First Amendment*,²⁶⁶ did not believe that disestablishment (a principle for which he had fought long and hard) required the exclusion of religious motivation in public life . Madison used religious arguments and principles to foster support for disestablishment, grounding his efforts to find the establishment of religion in Virginia in his religious belief that only God could judge religious offenses.²⁶⁷

The compatibility of religious motivation as a basis for public policy with the principle of nonestablishment is also demonstrated by the fact many of those who most strongly opposed establishments of religion in early America did so out of theological motivation. As Leonard W. Levy has pointed out, among the most fervent supports of disestablishment in the early American republic were evangelical Protestants.²⁶⁸ Presbyterians, Quakers, and Baptists were all in the forefront of seeking disestablishment, and all on religious grounds.²⁶⁹ These evangelicals believed that God’s will demanded the separation of church institutions and the state, and they acted on those beliefs in the public square. They did not put their arguments in secular terms; rather, they demanded the separation of church and state because they believed that God willed it, and the purity of religious truth was supported by it.²⁷⁰ Their actions were not carried out in a spirit of secularism, but rather, in a spirit of submission to the will of God. It would be tragic if the principle of religious freedom that they fought so hard for is used to deprive modern-day religionists of the same right to have their religious ideas influence their political views.

This fundamentally religious commitment to the principle of nonestablishment is reflected in the work of one of the earliest commentators on the Constitution, St. George Tucker.²⁷¹ In his discussion of the Constitution’s protection of religious liberty and freedom of conscience, Tucker notes that those rights are “absolute

²⁶⁵ *Id.* at 312–13.

²⁶⁶ KIRK, *supra* note 196, at 435 (discussing Madison’s authorship of the First Amendment).

²⁶⁷ Madison, *supra* note 200, at 310.

²⁶⁸ LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE 63–64* (2d ed., North Carolina Press 1994) (1986).

²⁶⁹ *Id.* at 63.

²⁷⁰ *Id.* at 64–65. Levy recounts that the early opposition to state support for religion was motivated by a fear that official support would corrupt the church with error. He quotes one petition from Cumberland County, dated October 26, 1785, that said, “religious establishment has never been a means of prospering the gospel.” *Id.* at 64.

²⁷¹ See generally ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS* (Liberty Fund, Inc., 1999) (1803).

rights which man hath received from the immediate gift of his Creator”²⁷² While governments from the beginning have sought to restrain such rights, such attempts are in vain—the “right of personal opinion . . . in all matters relative to religion” and in “speech and of discussion in all speculative matters, whether religious, philosophical, or political” cannot be successfully constrained because they are part and parcel of human nature itself.²⁷³ Our Constitution’s guarantee of religious liberty is not simply a grant from the political machinery of the government, it is “interwoven in the nature of man by his Creator”²⁷⁴ According to Tucker, the American system was not content with merely with toleration, where an established church permits dissenters to worship while retaining a privileged place for itself within the political system. Rather, the American system sought to follow more closely the true teachings of Jesus Christ by extending true equality and rejecting any establishment of religion.²⁷⁵ As Tucker wrote:

Jesus Christ has established a perfect equality among his followers. His command is, that they shall assume no jurisdiction over one another, and acknowledge no master besides himself. It is, therefore, presumption in any of them to claim a right to any superiority or pre-eminence over their brethren. Such a claim is implied, whenever any of them pretend to tolerate the rest. Not only all christians, but all men of all religions, ought to be considered by a state as equally entitled to its protection, as far as they demean themselves honestly and peaceably. Toleration can take place only where there is a civil establishment of a particular mode of religion; that is, where a predominant sect enjoys exclusive advantages, and makes the encouragement of it’s [sic] own mode of faith and worship a part of the constitution of the state; but at the same time thinks fit to suffer the exercise of other modes of faith and worship. Thanks be to God, the new American states are at present strangers to such establishments. In this respect, as well as many others, they have shewn in framing their constitutions, a degree of wisdom and liberality which is above all praise.²⁷⁶

Tucker lists a parade of horrors associated with religious establishment, noting at the end that “genuine religion is a concern that lies entirely between God and our own souls.”²⁷⁷ Any attempt to use government to aid religion results in religion being “contaminated” by

²⁷² ST. GEORGE TUCKER, *Of the Right of Conscience; and of the Freedom of Speech and of the Press*, in *id.*, at 371, 371.

²⁷³ *Id.* at 372.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 372–73.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 373.

“worldly motives and sanctions”²⁷⁸ Instead of seeking to use the power of the government to aid religion, public officials should inculcate by example a “conscientious regard” for religion “in those forms which are most agreeable to their own judgments, and by encouraging their fellow citizens in doing the same.”²⁷⁹ As Tucker puts it, any attempt at using the power of the state to coerce religious belief “has done [religion] an essential injury, and produced some of the worst consequences.”²⁸⁰ By establishing official orthodoxies, establishments also harm efforts at improving human conditions in the world.²⁸¹ To prevent such evils, and to foster the rise of a “rational and liberal religion,”²⁸² Americans are guaranteed the right of liberty of conscience in regard to religion, a right protected, as Tucker notes, by the Constitution and its First Amendment.²⁸³

One need not agree with Tucker regarding the basis of the Establishment Clause to see that in his work, and in the work of the Founders in general, the idea of nonestablishment was not fostered out of a desire for a public arena desiccated of all religious conviction. The push towards nonestablishment was motivated in large part by a religious motivation—a motivation which sought to purify religion from too great a dependence upon and control by the secular power of the government. Hence, the irony is that the Establishment Clause that some would use to restrict the scope of religious motivation in public life is itself largely a product of religious motivation. Understanding the perspective of the founding period regarding the permissibility of religious motivation in civic life does not entail eliminating the barrier between the institutional power of religion and the state.

It is critically important that any theory of the Establishment Clause also incorporate the wisdom of the American founding in distinguishing the proper sphere of government from the proper sphere of religion. As Fr. John Courtney Murray, S.J., described it,

the American system made government simply an instrumental function of the body politic for a set of limited purposes. Its competence was confined to the political as such and to the promotion of the public welfare of the community as a political, i.e., lay, community. In particular, its power of censoring or inhibiting utterance was cut to a minimum, and it was forbidden to be the secular arm of any church. In matters spiritual the people were committed to their freedom, and religion was guaranteed full freedom

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 374.

²⁸² *Id.* at 375.

²⁸³ *Id.* at 376.

to achieve its own task of effecting the spiritual liberation of man. To this task the contribution of the state would be simply that of rendering assistance in the creation of those conditions of freedom, peace, and public prosperity in which the spiritual task might go forward.²⁸⁴

The genius of the founding was in recognizing that neither religion nor government is aided by a formal alliance between the two. Whenever such alliances occur, government power is extended into areas beyond its competence and religion is degraded into areas below its dignity. Any action by the government to force people to accede to religious beliefs, to conform to particular types or theories of divine worship, to provide direct tangible financial benefits to religious institutions must be held to violate the Establishment Clause.²⁸⁵ The Establishment Clause means that the government may not erect a state church that is supported by taxes and at the mercy of the secular order for its very existence.²⁸⁶ To employ a sentiment from St. George Tucker, both the church and the state must be kept free from such corruption.²⁸⁷ For this reason, no matter what the motivation, there must be a robust institutional separation of religious institutions and the government. Under the American system of constitutional order, the government has no business enacting laws to foster purely religious purposes; the salvation of souls and the strengthening of faith are not the concern of the government because the temporal power is utterly incompetent to deal with such issues. The government should restrict its activities to providing for the secular needs and benefits of the population as a whole in accord with the common good. Such an approach, however, does not mean that a secular constitutional order in line with the Founders' vision must exclude religious values from influencing public laws.²⁸⁸ Quite to the contrary, the practice and principles of the American founding indicate that religious values and ideals have a key role to play within the public arena.

²⁸⁴ JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS* 182 (1960).

²⁸⁵ As the Supreme Court noted in *Sch. Dist. of Grand Rapids v. Ball*, such activities violate the very core of the Establishment Clause: "The Establishment Clause . . . primarily proscribes 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" 473 U.S. 373, 381 (1985) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

²⁸⁶ *Id.*; see also *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

²⁸⁷ See TUCKER, *supra* note 272, at 371–73.

²⁸⁸ See Araujo, *supra* note 7, at 493. The purpose of Araujo's article is to demonstrate that it is both Constitutionally permissible and helpful (and quite possibly essential) to American republican democracy that the church (and individuals holding religious beliefs) (can and ought to) participate in the public discourse involving a wide variety of political and social issues with which our local, state, and national communities are concerned.

C. Equal Citizenship and Religious Motivation

1. Religion and the Law: Harmonizing and Coinciding

A robust distinction between religious institutions and the government does not mandate the separation of religious values from the public square; rather, the principle of religious liberty guarantees religious believers the right to participate fully in the civic discussion of the American polity. Both of the religion clauses of the First Amendment share a single primary purpose: to ensure that people in the United States enjoy religious liberty.²⁸⁹ The Establishment Clause should not be used as a tool to limit religious liberty or marginalize religious believers within the body politic—to so use the clause in such a manner is to do violence to its very reason for being. Nothing in the history of the clauses or in the founding of the United States supports the assertion that the purpose of the First Amendment was meant to prohibit people of faith from acting in accord with their religious beliefs, including in their activities as voters and elected officials. Using the Establishment Clause to mandate the constitutional impermissibility of religious motivation in public life would be to misconstrue the singular purpose of both religion clauses.

McGowan v. Maryland most strongly supports the permissibility of religious motivation in public life.²⁹⁰ In *McGowan*, the appellants challenged a Maryland law that required, with some exceptions, that all commercial activity cease on Sundays.²⁹¹ Ms. McGowan and six other employees of a department store were convicted of violating the law and were fined.²⁹² They appealed their convictions, first to the Maryland Court of Appeals, which upheld the conviction, and then to the Supreme Court of the United States.²⁹³ The appellants argued that the law violated the Establishment Clause because the purpose of the law was to encourage church attendance.²⁹⁴ The Court disagreed, ruling that Maryland's Sunday closing law was constitutional.²⁹⁵

McGowan was a pre-*Lemon* case, but the Court basically employed the secular purpose criteria that comprises the first prong of the *Lemon* test.²⁹⁶ The Court found that the Establishment Clause does not prohibit the federal or state governments from enacting laws or regulations that

²⁸⁹ CARTER, *supra* note 7, at 105–06. Kmiec, *supra* note 218, at 94–95.

²⁹⁰ 366 U.S. 420 (1961).

²⁹¹ *Id.* at 422.

²⁹² *Id.* at 422, 424.

²⁹³ *Id.* at 424–25.

²⁹⁴ *Id.* at 431.

²⁹⁵ *Id.* at 452–53.

²⁹⁶ *Id.*; *see also* *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

coincide with the tenets of a particular religion or religion in general.²⁹⁷ After a historical survey of Sunday closing laws, the Court acknowledged that the motivation behind the Sunday closing law was originally religious in nature, but this religious motivation did not automatically invalidate the law.²⁹⁸ Similarly, as the Court pointed out, murder, adultery and polygamy, theft, and fraud are all illegal, and are all prohibited by the “Judeo-Christian religions”²⁹⁹ Such religious roots, the Court noted, do not invalidate laws prohibiting such activities under the Establishment Clause, so long as the legislature concludes “that the general welfare of society, *wholly apart* from any religious considerations, demands such regulation.”³⁰⁰ So long as laws serve secular purposes and meet secular needs, they can be harmonious with religious teaching.³⁰¹ The Court found in *McGowan* that the Sunday closing law had a constitutionally sufficient secular justification, namely the provision to the general population of a day of rest to recover from the past week and to prepare for the coming one.³⁰² Since the law had a secular purpose, the religious motivation that may have supported the law did not present a fatal concern under the Establishment Clause. While the purpose of the law must be secular, the motivation of those enacting the law may be formed and shaped by religious values, traditions, histories, and perspectives without fear that any coincidental harmonies between secular law and sacred principles will result in a constitutional violation.³⁰³

One issue that the Court wrestled with in *McGowan* was the simple fact that many of our laws have their roots in religion or in the ethical teachings proposed by the various religious traditions historically dominant in western civilization.³⁰⁴ As constitutional law professor Jesse Choper has observed, this creates a problem when attempting to police the boundary between permissible and impermissible religious influence on the law and public policy. As he points out, many of our laws, including our prohibitions against murder and theft, have their origin in religious morality, and “rest to a significant degree on religious understandings of the world, of human beings, and of social relationships.”³⁰⁵ Given this fact, it is no surprise that the question of

²⁹⁷ *Id.* at 442.

²⁹⁸ *Id.* at 445–49.

²⁹⁹ *Id.* at 442.

³⁰⁰ *Id.* (emphasis added).

³⁰¹ *Id.*

³⁰² *Id.* at 450–52.

³⁰³ *Id.* at 442.

³⁰⁴ *Id.*

³⁰⁵ CHOPER, *supra* note 11, at 47 (quoting Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1, 7 (1991)).

religious motivation on civic law was not definitively settled by *McGowan*, but reappeared in the post-*Lemon* case, *Harris v. McRae*.³⁰⁶

In *McRae*, the Supreme Court ruled on the constitutionality of the Hyde Amendment, a federal law that restricts Medicaid payments for abortion-related medical services.³⁰⁷ Opponents of the law argued that the law lacked a necessary secular purpose under the *Lemon* test because it was based on the social teaching of the Roman Catholic Church that human life begins at conception and that abortion is a sin.³⁰⁸ The Court rejected the argument.³⁰⁹ Quoting *McGowan*, the Court found that while a law must have a secular purpose, that purpose is not jeopardized when it “happens to coincide or harmonize with the tenets of some or all religions.”³¹⁰ The Court drew an analogy between the moral teaching of the Judeo-Christian tradition regarding the sinfulness of stealing with secular laws prohibiting larceny, reasoning that so long as there was not “more” in the record to indicate an Establishment Clause violation, such a coincidental concord between religious teaching and secular law did not render a law constitutionally void.³¹¹

While *McGowan* and *McRae* affirm that the mere concordance of public law with religious values is not sufficient to render laws unconstitutional, the rule nevertheless places religious motivation in public life in something of a suspect category.³¹² So long as the parallels between religious values and secular law remain at the level of happenstance harmonies, a constitutional problem is avoided, but if there is, in the *McRae* Court’s phrasing, “more” to the congruence of law and religious principle than simple coincidence, the Establishment

³⁰⁶ 448 U.S. 297 (1980); see also *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

³⁰⁷ *Id.* at 300–301.

³⁰⁸ *Id.* at 318–19.

³⁰⁹ *Id.* at 319–20.

³¹⁰ *Id.* at 319 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

³¹¹ *Id.* at 319–20.

³¹² See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting) (citing *McGowan*, 366 U.S. at 429–53, to contend that “[t]he legitimacy of secular legislation depends . . . on whether the State can advance some justification for its law beyond its conformity to religious doctrine”) *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003). *But see* *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 566 (1989) (Stevens, J., concurring in part and dissenting in part) (citing *McGowan*, 366 U.S. at 442, and *McRae*, 448 U.S. at 319–20, to support his position that the unconstitutionality of a state law stating that life begins at conception “does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions or on the fact that the legislators who voted to enact it may have been motivated by religious considerations”); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (O’Connor, J., plurality opinion) (“Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.”).

Clause could be implicated.³¹³ Such an approach goes far to at least ensure the preservation of the historical and cultural assumptions built into Anglo-American law over the centuries of its germination within a social, political, and cultural context shaped by the religious background of western civilization; it does little to prevent the First Amendment from being used to cudgel lawmakers and even ordinary citizens who, in the exercise of their roles within our polity, seek to be informed and even guided by their respective religious traditions.

2. The Compartmentalization of the Human Person

Infringing on the activities of religious believers as citizens and participants in our political process is significant. In fact, it strikes at the very heart of what the religion clauses together are supposed to provide: the ability of religious believers to live lives in accord with their faith commitments and to not be excluded from public life because of their religious views. As Circuit Judge Michael W. McConnell has noted, requiring believers to provide a secular rationale for their positions in the public square “degrades religious persons from the status as equal citizens.”³¹⁴ The consequences of this kind of degradation of citizenship rights requires a person of faith exercising her rights in the public square to commit an act of psychological apartheid: she must rigorously keep separate her religious views from her non-religious views.³¹⁵ Even Michael Perry, has acknowledged the negative consequences that such spiritual schizophrenia can cause in the integrity of a religious believer’s personhood.³¹⁶ To commit such an act, Perry says, “would preclude *her*—the *particular* person *she* is—from engaging in moral discourse with other members of society.”³¹⁷

Hence, to force religious believers to deny their religious convictions when entering the political arena is to force them to deny their ability to participate in American civic institutions without doing significant violence to their own personal integrity and wholeness. It places the believer in the position of having to obey her conscience or the requirements of the state, to “bracket” her faith from her own personality—“precisely what,” as Jean Bethke Elshtain notes, “a devout

³¹³ *McRae*, 448 U.S. at 319–20.

³¹⁴ McConnell, *supra* note 185, at 656.

³¹⁵ Cf. CARTER, *supra* note 7, at 56 (citing MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 72–73 (1988) (explaining the difficulty of “bracketing” religious convictions from one’s personality)).

³¹⁶ PERRY, *supra* note 315, at 72–73.

³¹⁷ *Id.* at 73. That assumes, however, that such an act of psychological compartmentalization is even possible, an assumption that is difficult to sustain. See generally Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 101 (2007).

person cannot do.”³¹⁸ If the religion clauses were meant to prevent anything, it is such a situation. Any theory of the Establishment Clause that seeks to be true to the overarching purpose of the clause itself—namely, religious liberty—and that seeks to view the Establishment Clause as an ally rather than an enemy of the Free Exercise Clause must make room for religious believers to be believers in the public square.³¹⁹

Strong support for this position is found in Justice Brennan’s concurrence in *McDaniel v. Paty*.³²⁰ In *McDaniel*, decided several years after *Lemon v. Kurtzman*, the Court voided a section of the Tennessee constitution that prohibited ordained clergy from holding public office.³²¹ The Court found that the provision violated the First Amendment’s Free Exercise Clause,³²² but Justice Brennan determined that Tennessee’s law had also impacted the citizenship rights of religious believers protected by the Establishment Clause.³²³ Forcefully, Justice Brennan refused to countenance any limitation on the rights of religious individuals and institutions to participate fully and vigorously in the public square. “The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally.”³²⁴ Beyond ensuring that the government is prevented from “supporting or involving itself in religion or from becoming drawn into ecclesiastical disputes,”³²⁵ Justice Brennan contended that the Establishment Clause did not properly function to restrict religionists from the civic arena—and the Court in his view should not go beyond enforcing the basic purpose of the Establishment Clause to prevent such institutional intertwining of church and state.³²⁶

³¹⁸ Elshtain, *supra* note 7, at 150.

³¹⁹ See CHOPER, *supra* note 11, at 162. Choper argues that while it may be necessary in some situations to limit the benefits that can be extended to religion in general, such a necessity can never serve as a justification “to restrict[] the kinds of beliefs that are catalysts for lawmaking.” *Id.* While the separation of church and state is very much a part of our constitutional order, “the Establishment Clause permit[s] government officials to be stimulated by ideological values of any kind.” *Id.* To forbid religious motivation in the formulation of public policy would not only violate the Free Exercise Clause, it would also probably be futile because it would only encourage lawmakers to conceal their real motivations in an attempt to ensure a law’s constitutionality. *Id.* at 163.

³²⁰ 435 U.S. 618 (1978).

³²¹ *Id.* at 621, 629.

³²² *Id.* at 629.

³²³ *Id.* at 630 (Brennan, J., concurring).

³²⁴ *Id.* at 640.

³²⁵ *Id.* at 642.

³²⁶ *Id.* at 641.

The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities. *Government may not inquire into the religious beliefs and motivations of officeholders—it may not remove them from office merely for making public statements regarding religion, or question whether their legislative actions stem from religious conviction.*

In short, government may not as a goal promote “safe thinking” with respect to religion and fence out from political participation those, such as ministers, whom it regards as overinvolved in religion. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here. It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.³²⁷

Dealing with concerns that religious believers would seek to influence government policy, Justice Brennan proposed a solution based not on the bracketing of religious motivation in public life, but on the robust political give and take of liberal democracy: “The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls.”³²⁸ This solution protects the institutional separation of religion and the government, defends the right of people of faith to participate fully in the political life of the country, and carefully brackets the proper scope of the Court's investigation into the motivation and beliefs of religionists in public life. Such an approach charts a better path than the *McGowan-McRae* approach for the courts to follow in navigating the tricky constitutional waters surrounding the issue of whether religious motivation is constitutionally problematic under the Establishment Clause. It makes better sense of the constitutional history of the Establishment Clause, the early practices of our Founders, and the rights of religious liberty guaranteed by the Constitution.

V. CONCLUSION

The use of extrinsic evidence in religion cases is well-established by Supreme Court precedent, dating from the nineteenth century all the way into the present era. While the use of such extrinsic evidence is well-

³²⁷ *Id.* (emphasis added) (citations omitted).

³²⁸ *Id.* at 642.

supported in the case law, the scope of such use needs clarification, particularly in regard to the use of extrinsic evidence of religious motivation by policy makers as a ground for rendering a government action invalid under the Establishment Clause. Religious principles and religious motivation have always formed a crucial component of American civic life. While some voices have been raised both within legal academia and on the Supreme Court that seek to limit the legitimacy of religious motivation in the political arena, there is nothing inherent in the Establishment Clause itself that supports this view. Instead, the history of the Establishment Clause and the practices of the Founders indicate that religion was never meant to be banished from the public square of the American experiment in democracy. While it is absolutely vital to maintain a strong wall of institutional separation between religious organizations and the government, Supreme Court jurisprudence needs to recognize the legitimacy of religious motivation in the public square and its validity under the First Amendment. In order to accomplish this task, the Court should make a distinction between purpose and motivation in regards to the first prong of the *Lemon* test, and it should read the Establishment Clause in accord with its historical purpose to protect religious liberty and maintain the full equality of all American citizens in the public square, whatever their religious convictions.