RELIGIOUS PREMISES, LEGISLATIVE JUDGMENTS, AND THE ESTABLISHMENT CLAUSE

Scott C. Idleman†

INTRODUCTION 2
I. DOCTRINAL STANDARDS OF CONSTITUTIONAL VALIDITY 9
A. THE CONSTRAINTS ON LEGISLATIVE PURPOSE 10
1. *The Requirement of a Secular Purpose* 11
2. *The Restriction on Religious Purposes* 21
B. THE LIMITS ON PRINCIPAL OR PRIMARY EFFECT 24
1. *The Endorsement or Disapproval of Religion* 24
2. *The Advancement or Inhibition of Religion* 32
C. THE PROHIBITION ON EXCESSIVE ENTANGLEMENT 35
1. *Doctrinal Entanglement* 37
a. The Degree of Legislative Translation 38
b. The Degree of Legislative Reliance 43
2. *Political Entanglement* 47
D. THE PROSCRIPTION AGAINST RELIGIOUS COERCION 48
E. THE PRESUMPTIVE BAR ON INTERRELIGIOUS DISCRIMINATION 52
II. JUDICIAL AFFIRMATIONS OF TRADITIONAL STATE AUTHORITY 58
A. THE VALIDATION OF LONGSTANDING PRACTICES UNDER THE ESTABLISHMENT CLAUSE 59
B. THE RECOGNITION OF MORALITY REGULATION UNDER THE POLICE POWER 65
III. NORMATIVE PRINCIPLES OF DEMOCRATIC LEGITIMACY 71
A. THE PARTICIPATORY EQUALITY OF CITIZENS 72
B. THE MORAL RESONANCE OF LAW 78
CONCLUSION 82

---

† Associate Professor, Marquette University Law School. The article has benefited greatly from the comments of Daniel O. Conkle, Elizabeth Staton Idleman, Michael O'Hear, Michael J. Perry, Steven D. Smith, and several of the participants in the online discussion group, Law & Religion Issues for Law Academics (religionlaw@listserv.ucla.edu), moderated by Professor Eugene Volokh. It is dedicated to the memory of Dean Howard B. Eisenberg.

INTRODUCTION

Recent years have witnessed significant changes in the interpretation, and in turn the doctrines, of the Establishment Clause.[1] The metaphorical wall of separation between church and state, though by no means in ruins, has clearly been construed to be less rigid or less insurmountable than certain prior cases had seemed to suggest.[2] Nevertheless, there has persisted in some circles the view that laws that are discernibly informed by religious moral premises violate the First Amendment. The purpose of this article is to assess, and ultimately to question, the tenability of this interpretation.

The litany of statutes and ordinances that have been alleged to offend this supposed principle is impressive indeed. Laws governing subjects as diverse as capital punishment,[3] public school dances,[4] obscenity,[5] sexual contact with minors,[6] fornication,[7] fetal homicide,[8] ab-

---

[1] U.S. Const. amend. I (prohibiting any "law respecting an establishment of religion"). Although the Clause's limitations textually apply to Congress alone, "[t]he Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions." Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000).

[2] *See, e.g.*, Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002) (upholding a state voucher program, which allows redemption of the vouchers at religious schools); Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion) (upholding federal funding for state and local governmental agencies to lend educational materials and equipment to public and private schools, including religious schools, and overruling *Meek v. Pittinger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977)); Agostini v. Felton, 521 U.S. 203, 222–36 (1997) (upholding a state's use of federal funding to send public school teachers into parochial schools to provide remedial education to disadvantaged children and overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), and partly overruling *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985)); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that a school district's provision of an interpreter to aid a deaf student at a religious school would not violate the Establishment Clause); Bowen v. Kendrick, 487 U.S. 589, 604 n.8 (1988) (upholding a federal teenage sexuality counseling program, "some of the goals of [which] . . . coincide[d] with the beliefs of certain religious organizations" and which allowed religious organizations to receive unrestricted funding); Marsh v. Chambers, 463 U.S. 783 (1983) (upholding Nebraska's practice of legislative prayer by a state-sponsored chaplain).

[3] *See, e.g.*, Hanson v. State, 55 S.W.3d 681, 695–96 (Tex. Ct. App. 2001), *review denied* (Tex. Mar. 20, 2002); Holberg v. State, 38 S.W.3d 137, 139–40 (Tex. Crim. App. 2000), *cert. denied*, 122 S. Ct. 394 (2001).

[4] *See, e.g.*, Clayton by Clayton v. Place, 884 F.2d 376, 379–81 (8th Cir. 1989).

[5] *See, e.g.*, Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 407–11 (1963).

[6] *See, e.g.*, Moore v. State, 912 P.2d 1113, 1115–16 (Wyo. 1996).

[7] *See, e.g.*, State v. Saunders, 326 A.2d 84, 89 (N.J. Essex County Ct. 1974), *aff'd*, 361 A.2d 111 (N.J. Super. Ct. App. Div. 1976), *rev'd*, 381 A.2d 333 (N.J. 1977).

[8] *See, e.g.*, State v. Alfieri, 724 N.E.2d 477, 484 (Ohio Ct. App. 1998), *appeal disallowed*, 709 N.E.2d 849 (Ohio 1999); State v. Bauer, 471 N.W.2d 363, 365–66 (Minn. Ct. App. 1991).

stinence education,[9] abortion,[10] homosexual orientation or conduct,[11]

---

[9] *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 604 & n.8 (1988); Julie Jones, *Money, Sex, and the Religious Right: A Constitutional Analysis of Federally Funded Abstinence-Only-Until-Marriage Sexuality Education*, 35 CREIGHTON L. REV. 1075, 1089–99 (2002); Gary J. Simson & Erika A. Sussman, *Keeping the Sex in Sex Education: The First Amendment's Religion Clauses and the Sex Education Debate*, 9 S. CAL. REV. L. & WOMEN'S STUD. 265 (2000); NAT'L COALITION AGAINST CENSORSHIP, *35 Free Speech Groups Launch Campaign to Oppose Government Censorship of Sexuality Education*, June 7, 2001, *at* http://www.ncac.org/issues/sexualityeducation.html.

[10] *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 565–69 (1989) (Stevens, J., concurring in part and dissenting in part); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 778 (1986) (Stevens, J., concurring); Right to Choose v. Byrne, 398 A.2d 587, 595–96 (N.J. Super. Ct. Ch. Div. 1979); David R. Dow, *The Establishment Clause Argument for Choice*, 20 GOLDEN GATE U. L. REV. 479 (1990); John Morton Cummings, Jr., Comment, *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 CATH. U. L. REV. 1191 (1990); Jan D. Feldman, Comment, *The Establishment Clause and Religious Influences on Legislation*, 75 Nw. U. L. REV. 944, 945–47 & n.21 (1980) (citing cases). *Cf.* Crossen v. Breckenridge, 446 F.2d 833, 840 (6th Cir. 1971) (declining to address the argument that an abortion law "violates the establishment clause . . . in that it enacts as law the religious beliefs of certain groups not held by other persons.").

[11] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting) ("That certain . . . religious groups condemn [homosexual sexual conduct] gives the State no license to impose the judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine."); Nat'l Gay Task Force v. Bd. of Educ., No. CIV-80-1174-E, 1982 WL 31038, at *10–12 (W.D. Okla. June 29, 1982), *rev'd on other grounds*, 729 F.2d 1270 (10th Cir. 1984), *aff'd*, 470 U.S. 903 (1985); Paula A. Brantner, Note, *Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495, 521 (1992); Marc L. Rubinstein, Note, *Gay Rights and Religion: A Doctrinal Approach to the Argument that Anti-Gay-Rights Initiatives Violate the Establishment Clause*, 46 HASTINGS L.J. 1585 (1995); Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905, 1921–22 (1993); Heather M. Ross, *Same-Sex Marriage Should Be Allowed*, LAS VEGAS REV.-J., July 9, 1998, at B11 ("Most people who oppose same-sex marriage cite the Bible, which calls homosexuality an 'abomination.' The problem with this argument is that . . . [i]n America, laws can't be passed based solely on religious beliefs. The First Amendment protects us from that."), *available at* 1998 WL 7220134; Nancy E. Roman, *Navratilova, 6 Others Sue to Void Law Against Gay Rights Ordinances*, WASH. TIMES, Nov. 13, 1992, at A5 (reporting Colorado ACLU Executive Director James Joy's position that Colorado Amendment 2 "violates the Constitution's mandate of separation of church and state because the amendment was motivated by religious values."), *available at* 1992 WL 8144765.

sodomy,[12] adultery,[13] prostitution,[14] marriage,[15] AIDS education,[16] public nudity,[17] alcohol vending,[18] and endangered species protection[19] have all been questioned or challenged for purportedly reflecting or embodying religious moral tenets. At the same time, respected scholars and others have proposed, in part on their interpretation of the Establishment Clause, that legislative determinations cannot rest on nondemonstrable religious beliefs or premises,[20] that religious purposes cannot play a

---

12 *See, e.g.*, DePriest v. Commonwealth, 537 S.E.2d 1, 6 (Va. Ct. App. 2000); Stewart v. United States, 364 A.2d 1205, 1208–09 (D.C. 1976); People v. Baldwin, 112 Cal. Rptr. 290, 292 (Cal. Ct. App. 1974); Connor v. State, 490 S.W.2d 114, 115 (Ark. 1973), *appeal dismissed*, 414 U.S. 991 (1973).

13 *See, e.g.*, Phyllis Coleman, *Who's Been Sleeping in My Bed? You and Me, and the State Makes Three*, 24 IND. L. REV. 399, 414 (1991) ("[G]overnment punishment of adultery is arguably violative of the constitutional requirement of separation of church and state. Religion, rather than civil law, is the source of adultery laws." (footnote omitted)); Scott Titshaw, Note, *Sharpening the Prongs of the Establishment Clause: Applying Stricter Scrutiny to Majority Religions*, 23 GA. L. REV. 1085, 1126–27 (1989) (contending that prohibitions on adultery — as well as prostitution, obscenity, polygamy, seduction, fornication, and sodomy — should violate the Establishment Clause because they represent majority religious convictions).

14 *See, e.g.*, Edward Tabash, *Legalized Prostitution? Yes, Its Time Has Come*, NEWSDAY, Aug. 13, 1993, at 58 ("Religious-based arguments asserting the immorality of prostitution should be given no legal credence. In a society that separates church and state, no person should lose her or his freedom because of someone else's religious beliefs. Only those actions that can be demonstrated by empirical evidence, independently of religious dogma, to warrant criminal sanctions should be punished."), *available at* 1993 WL 11387218.

15 *See, e.g.*, Dean v. District of Columbia, Civ. A. No. 90-13892, 1992 WL 685364, at *4–*8 (D.C. Super. Ct. 1992), *aff'd*, 653 A.2d 307 (D.C. 1995); John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1185–88 (1999); James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335, 348–73 (1997); Sherryl E. Michaelson, Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301 (1984).

16 *See, e.g.*, Mark Barnes, *Toward Ghastly Death: The Censorship of AIDS Education*, 89 COLUM. L. REV. 698, 722–24 (1989) (book review).

17 *See, e.g.*, Cathy's Tap, Inc. v. Vill. of Mapleton, 65 F. Supp. 2d 874, 892 (C.D. Ill. 1999) (addressing challenge to ordinances prohibiting nude dancing and attendant liquor sales); Comments of Randall D.B. Tigue, First Amendment Lawyers Ass'n (C-SPAN television broadcast, Nov. 10, 1999 (discussing then-pending arguments in *Erie, Pa. v. Pap's A.M.*, 529 U.S. 277 (2000), which addressed the validity of an ordinance regulating nude dancing)).

18 *See, e.g.*, Steven L. Lane, Note, *Liquor and* Lemon*: The Establishment Clause and State Regulation of Alcohol Sales*, 49 VAND. L. REV. 1491, 1517–21 (1996).

19 *See, e.g.*, John Copeland Nagle, *Playing Noah*, 82 MINN. L. REV. 1171, 1238 (1998) (noting such arguments).

20 *See, e.g.*, Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 528–30 (contending that the Establishment Clause, informed by democratic theory, should be read to preclude religious beliefs from undergirding governmental policies); Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 492 (1996) (contending that the First Amendment should be interpreted to prohibit the government from, among other things, "mak[ing] decisions that are themselves based on contested religious beliefs that cannot be rationally supported"); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992) (contending that "public moral disputes may be resolved only on grounds articulable in secular terms"); *see also* Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42

causative role in the enactment of legislation,[21] and that legislators should largely refrain from expressly justifying laws on religious bases.[22] Some have gone so far as to suggest that electoral candidates and possibly even citizens should curtail their own religious speech in the political arena.[23]

Allegations that religiously informed laws violate the Establishment Clause, far from subsiding, seem only to have intensified in recent years amidst bioethical controversies over issues such as physician-assisted suicide,[24] partial-birth abortion,[25] human cloning,[26] and stem-cell re-

---

DEPAUL L. REV. 191,i217 (1992) (observing that, "[i]n academic circles, the proposition that civil law must not be based on religious arguments is remarkably common"); Steven D. Smith, *Legal Discourse and the De Facto Disestablishment*, 81 MARQ. L. REV. 203, 206 (1998) (similar).

21 *See, e.g.*, Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 910 (1987) (advocating "the invalidation of any law that would not have been adopted if a nonsecular purpose had not been considered" even if "such a purpose may not have been the exclusive or even the primary one motivating adoption"); Simson & Sussman, *supra* note 9, at 292–93 (similar).

22 *See, e.g.*, Steven G. Gey, *When Is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379, 406 ("[A]t the very least, the Establishment Clause should support limitations on policymakers' prominent public expression of religious motivations for their official actions."); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993). Professor Greene's concern is one of alienation: "[b]asing law on an express reference to an extrahuman source of value . . . effectively excludes those who don't share the relevant religious faith from meaningful participation in the political process." *Id.* at 1619. Accordingly, laws must "have an express secular purpose rather than merely a plausible one," *id.* at 1622, and "any expressly religious purpose for the law must be no more than ancillary and not itself dominant." *Id.* at 1624 (footnote omitted).

23 *See, e.g.*, ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS (1996). The constitutional untenability of Kramnick and Moore's position is examined in Scott C. Idleman, *Liberty in the Balance: Religion, Politics, and American Constitutionalism*, 71 NOTRE DAME L. REV. 991, 1001–15 (1996).

24 *See, e.g.*, Brief Amici Curiae of 36 Religious Orgs., Leaders & Scholars in Support of Respondents at 17, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96–110), and Vacco v. Quill, 521 U.S. 793 (1997) (No. 95-1858) ("[B]ecause the common-law's historical bans upon suicide are rooted in the incorporation of Roman Catholic canon law into the English common law, laws banning physician-assisted suicide raise serious Establishment Clause concerns. Laws that endorse one religious view over others, and have overtly religious purposes, are irreconcilable with the values underlying the Establishment Clause."), *available at* 1996 WL 711178, at *3; Matthew P. Previn, Note, *Assisted Suicide and Religion: Conflicting Conceptions of the Sanctity of Human Life*, 84 GEO. L.J. 589, 603–07 (1996).

25 *Cf., e.g.*, Brief of Amici Curiae of Religious Coalition for Reprod. Choice et al. in Support of Respondent at 10, 21, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830) (arguing that Nebraska's statute banning partial-birth abortion statute "has unconstitutionally imbedded into law certain religious beliefs over others" though framing the legal issue as one of "individual conscience"), *available at* http://www.crlp.org/pdf/032900NEamicibrief3.pdf; *Abortion Initiatives Blasted*, ROCKY MTN. NEWS, Oct. 17, 1998, at A36 (reporting that the executive director of Americans United for the Separation of Church and State "urged defeat" of a state ballot issue that would have banned partial-birth abortions).

26 *See, e.g.*, Elizabeth Price Foley, *The Constitutional Implications of Human Cloning*, 42 ARIZ. L. REV. 647, 721 & n.484 (2000) (contending that "moral, theologically based objec-

search.[27] In an online commentary, for example, Professor Sherry Colb has argued that the new restrictions on federal funding of stem-cell research illustrate the Bush administration's "commitment to using its power to enforce religious injunctions"[28] — apparently not unlike al Qaeda and the Taliban.[29] The problem, according to Colb, is that this "commitment conflicts with the spirit, and in some instances with the letter, of the Constitution's Establishment Clause," which allegedly prohibits the government from "act[ing] on the basis of purely religious motivations."[30]

This article provides an important counterpoint to arguments such as these by systematically demonstrating that laws informed by religious moral premises generally do not, by that fact alone, violate the First Amendment.[31] This position draws support not only from the case law and doctrines that comprise contemporary Establishment Clause jurisprudence, but also from the perspectives of traditional governance and dem-

---

tions [to human cloning] . . . may . . . run afoul of the Establishment Clause" and "[i]f the governmental justification for banning human cloning is that it is antithetical to a certain theology, such a ban would clearly attempt to 'establish' a religion by imposing upon society the religious views of the majority"); Gregory J. Rokosz, *Human Cloning: Is the Reach of FDA Authority Too Far a Stretch?*, 30 SETON HALL L. REV. 464, 483 (2000) ("[G]overnment restriction or prohibition on human cloning, based purely on religious grounds, would likely violate the Establishment Clause."). *Cf.* Richard Cohen, *Personhood in a Petri Dish*, WASH. POST, May 29, 2002, at A25 (objecting to a proposed congressional cloning ban because it "is nothing less than an attempt to impose a religious doctrine on the rest of us"), *available at* http://www.washingtonpost.com/wp-dyn/articles/A30701-2002May29.html.

27 *See, e.g.*, Sherry F. Colb, *A Creeping Theocracy? How the U.S. Government Uses Its Power to Enforce Religious Principles*, WRIT, Nov. 21, 2001, *at* http://writ.news.findlaw.com/colb/20011121.html; Sharon M. Parker, Comment, *Bringing the "Gospel of Life" to American Jurisprudence: A Religious, Ethical and Philosophical Critique of Federal Funding for Embryonic Stem Cell Research*, 17 J. CONTEMP. HEALTH L. & POL'Y 771, 775 (2001) ("[R]eligious arguments can and have contributed to American public debates on political matters throughout the course of our nation's history. However, given the premises of religious liberty and differing spheres of church and state, it is appropriate to ground political choices in plausible secular arguments.").

28 Colb, *supra* note 27.

29 *See id.* ("The government's continuing willingness to press a religious agenda should worry us greatly at a time like this, when our very lives are threatened by extremists who would impose their will in the name of God.").

30 *Id.*

31 Although "the question of the establishment of particular values by government" is "one of the most difficult controversies in Establishment Clause jurisprudence," Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARYiL. REV. 837,i979 (1995), the position taken in this article appears to have received little systematic development in the academic literature. A recent and important exception is Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARYiL. REV. 663, 670 (2001) (explaining that the nonestablishment norm "does not forbid legislators . . . to make a political choice disfavoring conduct on the basis of a religiously grounded belief that the conduct is immoral"), although Professor Perry would likely agree that his analysis is both more theoretical and doctrinally less systematic than the present undertaking.

ocratic legitimacy. And while this interpretation is not without limits — government actions, among other things, must have a secular purpose and may not foster excessive entanglement with religious doctrine — these limits are narrowly defined and ought seldom to be violated.

The focus is specific, and deliberately so, in three respects. First, the concern is with the doctrine of the Establishment Clause as articulated and applied by federal and state courts, and not with the philosophically proper role of religion in public life or civil discourse as such.[32] Although this latter inquiry is valuable and to some extent overlaps with the former,[33] analytically they are separable issues and their inadvertent conflation very likely fuels the misperception that religiously informed laws necessarily run afoul of the First Amendment.[34] Second, the focus is on the validity of criminal or nonfiscal regulatory laws, particularly those embracing a collective judgment that the regulated conduct is unduly offensive or immoral. Accordingly, the article does not address the governmental funding of religiously operated institutions or programs, such as charitable or school choice arrangements, although recent doctrines articulated in the funding context could very well support this article's position.[35] Lastly, the focus is primarily on legislative and possibly executive lawmaking, not on judicial decisionmaking, the latter of which arguably presents unique, though not entirely different, considerations.[36]

---

32 Regarding this latter inquiry, see generally ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON (2000); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995); MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (1997); RELIGION AND CONTEMPORARY LIBERALISM (Paul J. Weithman ed., 1997); Symposium, *Religiously Based Morality: Its Proper Place in American Law and Public Policy*, 36 WAKE FOREST L. REV. 217 (2001).

33 *But see* Richard H. Jones, *Concerning Secularists' Proposed Restrictions on the Role of Religion in American Politics*, 8 BYU J. PUB. L. 343, 365–66 (1994) (arguing that "the Establishment Clause is the *only* restriction we should recognize in this democracy on the issue of religion in political life" (emphasis added)).

34 This predominant focus on doctrine is not to suggest that the doctrine itself is entirely satisfactory, whether from the standpoint of historical or theoretical legitimacy, internal consistency, or overall coherence and administrability. It is, however, the principal grammar of applied legal discourse — the working language of judges and lawyers — and must therefore feature centrally in any effort, such as this article, which purports to address these audiences.

35 The overriding concern of recent cases is the equal treatment of religion and nonreligion, embodied in the revised concept of neutrality. *See* Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997). In turn, one might argue that such neutrality permits, if not requires, legislative cognizance of religious and nonreligious moral premises alike. *See* Mark W. Cordes, *Politics, Religion, and the First Amendment*, 50 DEPAUL L. REV. 111, 116 (2000) (essentially advancing this position, though with an emphasis on free speech principles).

36 *See generally* Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989); Teresa S. Collett, *"The King's Good Servant, But God's First": The Role of Religion in Judicial Decisionmaking*, 41 S. TEX. L. REV. 1277 (2000); Mark B. Greenlee, *Faith on the Bench: The Role of Religious Belief in the Criminal Sentencing Decisions of Judges*, 26 U. DAYTON L. REV. 1 (2000); Symposium, *Religion and the Judicial Process: Legal, Ethical, and Empirical Dimensions*, 81 MARQ. L. REV. 177 (1998).

This specificity of focus corresponds to a comparable specificity of purposes. The article's most obvious objective, of course, is to delineate in a systematic manner what contemporary Establishment Clause jurisprudence dictates about the permissibility of religiously informed laws. As a corollary to this purpose, the article is also intended to counterbalance commentary that advances a different, typically less generous perspective. Lastly, though perhaps most fundamentally, the article seeks to put a halt to invocations of the Establishment Clause for political or ideological reasons having little or nothing to do with the history, theory, or doctrine of that provision. Because the meaning of this third objective, which differs in kind from the other two, may be comparatively less self-evident, it might be helpful at this juncture to explain the objective in greater detail, with particular reference to the cultural and legal contexts that define its contemporary relevance.

It turns out that the laws that have been challenged under the Establishment Clause as being impermissibly religious in substance are overwhelmingly ones that embody traditional moral norms. To be sure, such challenges appear to have become one of the key legal frontlines of the so-called "culture war," in which largely incompatible worldviews purportedly battle for dominion over the nation's moral future.[37] Whether or not such a full-blown culture war is actually afoot, it does seem that these Establishment Clause challenges are, in fact, makeshift attempts to undermine certain laws not because they are religious per se, but simply because they enforce traditional morality. Religion, in other words, serves as a proxy for moral conservatism, and the Establishment Clause (like the Due Process Clause before it) becomes merely an expedient armament in the service of reform-minded efforts.[38]

In this author's view, such a strategy amounts to a misguided exploitation of the First Amendment. If advocates seek to expunge laws that reflect traditional moral norms — and they are certainly entitled to pursue that end — then they should do so honorably through the political processes and through suitable legal provisions, whether federal or state. They should not do so by manipulating or commandeering one of this nation's most fundamental and philosophically significant constitutional

---

[37] *See* Am. Family Ass'n, Inc. v. City & County of S.F., 277 F.3d 1114, 1126 (9th Cir. 2002) (Noonan, J., dissenting) (discussing "the culture wars of the last century" and how they "have, almost inevitably, brought about challenges to [the Jewish and Christian] teaching" of which "[o]ur culture has been the product, at least in part"). For a discussion of the culture war and its impact on constitutional analysis, see Douglas W. Kmiec, *America's "Culture War" — The Sinister Denial of Virtue and the Decline of Natural Law*, 13 ST. LOUIS U. PUB. L. REV. 183 (1993).

[38] *Cf., e.g.*, Harris v. McRae, 448 U.S. 297,i319 (1980) (noting that the statute in question, challenged for being unduly informed by the teachings of the Roman Catholic Church, "is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion").

guarantees, the Establishment Clause, and by collaterally eviscerating the legitimate role of religion in the legislative arena. Such manipulations necessarily dilute the Clause, potentially corrode its internal and doctrinal coherence, and in the end, portend an interpretation that is either so broad as to call into question the very idea that law might be informed by any meaningful moral principles, or so riddled with attendant fictions and inconsistencies as to call into question the very institutions of written constitutionalism and judicial review.

The article is divided into three parts. Part I addresses the validity of religiously informed lawmaking in terms of the most relevant Establishment Clause doctrines — the various constraints on legislative purpose, the limits on the effective endorsement or advancement of religion, the prohibition on excessive entanglement of government and religion, the proscription against religious coercion, and the presumptive bar on interdenominational discrimination. Part II then examines the legislative use of religious premises in light of the judicial deference accorded to traditional interactions of government and religion. Specifically examined are both the validation of longstanding practices under the Establishment Clause and the recognition of moral regulatory authority under the police power. Finally, Part III considers the significance of religiously informed lawmaking in terms of constitutional democratic legitimacy, with particular emphasis on the principles of participatory equality and moral resonance.

I. DOCTRINAL STANDARDS OF CONSTITUTIONAL VALIDITY

The task of constitutional analysis ordinarily begins with the text or phrasing of the constitutional provision at issue. The contemporary understanding of whether a "law respect[s] an establishment of religion" is sufficiently removed from these words, however, that it is customary in Establishment Clause cases to start not with the text, but instead with authoritative judicial interpretations.[39] As it happens, the Supreme Court has distilled from the history and theory of the Clause several doctrinal requirements that all legal enactments must satisfy in order to be consti-

---

[39] *See* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 485 (1986) (noting that "the Court's opinions in this area have at least clarified 'the broad contours of our inquiry'" (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 761 (1973))); Wolman v. Walter, 433 U.S. 229, 236 (1977) ("[T]he wall of separation that must be maintained between church and state 'is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.' Nonetheless, the Court's numerous precedents 'have become firmly rooted,' and now provide substantial guidance." (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971); *Nyquist*, 413 U.S. at 761)).

tutional.[40] As the following sections will demonstrate, not one of these tests categorically or presumptively precludes a legislature from utilizing religious norms or premises, although a number of them appear to impose outer limits on the nature or the extent of such utilization.

A. THE CONSTRAINTS ON LEGISLATIVE PURPOSE

Under current doctrine, a law will be deemed an impermissible establishment of religion if it lacks a legitimate or "clearly" secular purpose,[41] or if its actual purpose is to advance or inhibit religion.[42] This is the so-called purpose prong of *Lemon v. Kurtzman*,[43] a decision that articulates a much-criticized though still-employed tripartite analysis (the *Lemon* test) for cases arising under the Establishment Clause.[44] With regard to the prohibition of traditionally immoral conduct, such as sodomy or public nudity, the challenge to legislative purpose essentially proceeds as follows: If the conduct cannot be shown to be materially and nonconsensually harmful to the person or property of another, and if the historical basis of its prohibition or regulation is a function of religious morality, then one must conclude that its contemporary prohibition or regulation lacks a clearly secular purpose and thus transgresses the Establishment Clause.[45] For convenience and for lack of a more precise term, this line of reasoning can be referred to as the reformist argument.

---

[40] The Supreme Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." Lynch v. Donnelly, 465 U.S. 668, 679 (1984). Within any given case, "[t]he decision to apply a particular Establishment Clause test rests upon the nature of the Establishment Clause violation asserted." Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 344 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000).

[41] *See* Lee v. Weisman, 505 U.S. 577, 585 (1992); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989); Bowen v. Kendrick, 487 U.S. 589, 602–03 (1988); Edwards v. Aguillard, 482 U.S. 578, 589–94 (1987); Wallace v. Jaffree, 472 U.S. 38, 56 (1985); Stone v. Graham, 449 U.S. 39, 41–42 (1980) (per curiam); *Lemon*, 403 U.S. at 612.

[42] *See* Agostini v. Felton, 521 U.S. 203, 222–23 (1997); *Edwards*, 482 U.S. at 585; *Wallace*, 472 U.S. at 56; Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963). Alternatively, the actual purpose cannot be to endorse or disapprove of religion. *See infra* note 140.

[43] 403 U.S. 602 (1971).

[44] *See id.* at 612–13 ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970))).

[45] *See, e.g.*, People v. Baldwin, 112 Cal. Rptr. 290, 292–93 (Cal. Ct. App. 1974) (addressing a challenge to a state anti-sodomy statute based on "the argument . . . that sodomy and oral copulation . . ., defined as crimes in our law, are so defined only because they were regarded as sins in the system of morals of the Judaeo-Christian religions, which uniquely among religions consider them to be morally wrong" and that "[t]he definition of them as crimes . . . establishes, in that respect, a religious principle as a part of the criminal law, in violation of the constitutional proscription against such establishment"); Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352, 401 (1985) (arguing that "[i]f legislation is adopted because behavior is bad, judged from a religious perspective, but without belief that that bad behavior causes secular harm to entities deserving protection, then the

1. *The Requirement of a Secular Purpose*

Before examining this argument in detail, it is useful to delineate the broad contours of the secular purpose requirement. First, the requirement has been described, and rightly so, as "a fairly low hurdle"[46] that "is often easily satisfied . . . ."[47] Generally speaking, what is necessary is that the law in question have at least one plausible and nonmarginal secular purpose.[48] At the same time, religious purposes can be entirely valid as long as they are neither "pre-eminent"[49] nor exclusive.[50] Thus, "[t]he [Supreme] 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."[51] Indeed, "[w]ere the test that the government must have 'exclusively secular' objectives, much of the con-

---

legislation should be held to violate the establishment clause," though limiting this interpretation to situations in which no plausible secular objective can be demonstrated and an "unambiguous connection to religion can be shown to be the main basis for the legislation"); Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 61 & n.241 (1991) (noting this position as expressed by Professor David A.J. Richards and Justice John Paul Stevens, among others). This position roughly corresponds to what Professor Gedicks calls a secular individualist interpretation of the First Amendment. *See* FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE (1995).

46 Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1345 (4th Cir. 1995).

47 Commack Self-Serv. Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 431 (2d Cir. 2002).

48 *See* Lynch v. Donnelly, 465 U.S. 668,i681 n.6 (1984) (explaining that "all that *Lemon* requires" is that the government "has a secular purpose" and rejecting the notion that its purposes must be "exclusively secular"); Am. Family Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1122 (9th Cir. 2002) (explaining that under "the secular purpose prong, . . . it appears that any secular purpose, no matter how minimal, will pass the test"). One commentator contends that a statute must have a "primary" secular purpose, *see* Donovan, *supra* note 15, at 373, but that is not what the Court's cases require, and no authority is offered for the contention.

49 Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam). As Professor Abner Greene explains, "government may enact legislation with a predominantly secular justification, but may not enact legislation with a predominantly religious justification." Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 453 (1995).

50 *See* Bowen v. Kendrick, 487 U.S. 589,i602 (1988) (explaining that "a court may invalidate a statute only if it is motivated wholly by an impermissible purpose"). Thus a law can be valid "even if [a sincere] secular purpose is but one in a sea of religious purposes." Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 344 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000).

51 *Lynch*, 465 U.S. at 680 (emphasis added). *See also* Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (explaining that "the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion" and "a statute that is motivated in part by a religious purpose may satisfy the first criterion [of *Lemon*]"); Tom Stacy, *Euthanasia and the Supreme Court's Competing Conceptions of Religious Liberty*, 10 ISSUES L. & MED. 55, 58 (1994) (noting that "[t]he Court's establishment jurisprudence . . . rather clearly indicate[s] that an establishment clause violation will be found only when the movement and reasons leading to such a law's passage are exclusively religious").

duct and legislation th[e] Court has approved in the past would have been invalidated."[52]

Second, courts begin with the presumption that any given law possesses a secular purpose, if only to be consistent with the presumption of constitutionality that attends all legislative enactments.[53] Accordingly, "[t]o warrant a finding that a statute is unconstitutional for lack of secular purpose, a *challenger* must demonstrate conclusively that the statute 'was motivated wholly by religious considerations.'"[54] This is not to suggest that the government may simply remain silent; as a practical adjudicative matter, it should and typically does defend its laws by affirmatively expounding their nonreligious objectives.[55] But courts should "normally [be] deferential to a State's articulation of a secular purpose"[56] and "reluctan[t] to attribute unconstitutional motives to the state[ ], particularly when a plausible secular purpose . . . may be discerned from the

---

[52] *Lynch*, 465 U.S. at 681 n.6.

[53] *See* Cohen v. City of Des Plaines, 8 F.3d 484, 489–90 (7th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994).

[54] People v. Carter, 592 N.E.2d 491, 497 (Ill. Ct. App. 1992) (emphasis added and emphasis in original omitted), *appeal denied*, 602 N.E.2d 461 (Ill. 1992); *accord* Bauchman v. W. High Sch., 132 F.3d 542, 554 (10th Cir. 1997) ("To sustain her Establishment Clause claim, [the plaintiff] must allege facts indicating the defendants have no 'clearly secular purpose' . . . ."), *cert. denied*, 524 U.S. 953 (1998); Universal Life Church v. Utah, 189 F. Supp. 2d 1302, 1314 n.11 (D. Utah 2002) (indicating that the plaintiff must "offer[i] . . . evidence that [the challenged law] has no secular purpose"); Associated Contract Loggers, Inc. v. United States Forest Serv., 84 F. Supp. 2d 1029, 1037 (D. Minn. 2000) (rejecting a purpose challenge where the "[p]laintiffs' complaint sets forth no facts which demonstrate that the [government's] purpose . . . was anything other than secular"), *aff'd*, No. 00-1730, 2001 WL 605010 (8th Cir. June 5, 2001) (per curiam).

[55] And failure to do so may be critical, particularly in the absence of an otherwise obvious secular purpose. *See Wallace*, 472 U.S. at 57 (emphatically and perhaps dispositively noting that "[t]he State did not present evidence of *any* secular purpose"); Epperson v. Arkansas, 393 U.S. 97, 107 (1968) (observing that "[n]o suggestion has been made that [the challenged state] law may be justified by considerations of state policy other than the religious views of some of its citizens"); Jabr v. Rapides Parish Sch. Bd., 171 F. Supp. 2d 653, 660 (W.D. La. 2001) ("[The government] does not articulate, or attempt to articulate, a secular purpose for [its action]. Instead, this court is left to hypothesize and enunciate a secular purpose on our own, a task we will not perform.").

[56] Edwards v. Aguillard, 482 U.S. 578, 586 (1987); *accord* Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (explaining that "the stated legislative intent . . . must . . . be accorded deference" in the absence of evidence that undermines it); Brown v. Gilmore, 258 F.3d 265, 276 (4th Cir. 2001) ("[I]n assessing a statute's purpose we act with appropriate deference to the legislature."), *injunction denied*, 533 U.S. 1301 (2001) (per Rehnquist, C.J.), *cert. denied*, 122 S. Ct. 465 (2001); Gonzales v. N. Twp. of Lake County, Ind., 4 F.3d 1412, 1419 (7th Cir. 1993) ("We will defer to a municipality's sincere articulation of a religious symbol's secular purpose."); McLean v. Ark. Bd. of Educ., 529 F. Supp. 1255, 1263 (E.D. Ark. 1982) ("[C]ourts should look to legislative statements of a statute's purpose in Establishment Clause cases and accord such pronouncements great deference."). Even a "governmental . . . profess[ion] of a secular purpose for an *arguably* religious policy . . . is . . . entitled to some deference." Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (emphasis added).

face of the statute."[57] Only if the challenger can meaningfully call into question the statute's objectives, and only if the government cannot then either identify an enumerated secular purpose or articulate a secular purpose in litigation, will the presumption of constitutionality be removed.[58] Needless to say, this is an uncommon occurrence, and typically results when the government's articulation is not "plausible" or a "sham,"[59] or when the very subject matter of the law is "intrinsically religious"[60] — as, for example, when the state mandates that the Ten Commandments ("undeniably a sacred text in the Jewish and Christian faiths"[61]) be posted in public school classrooms,[62] or specifically adds prayer ("per-

---

57 Mueller v. Allen, 463 U.S. 388, 394–95 (1983). Deference may be less forthcoming as to later-articulated purposes. *See* Friedman v. Bd. of County Comm'rs, 781 F.2d 777,i780 n.3 (10th Cir. 1985) ("[C]ourts must be wary of accepting after-the-fact justifications by government officials in lieu of genuinely considered and recorded reasons for actions challenged on Establishment Clause grounds."), *cert. denied*, 476 U.S. 1169 (1986).

58 *See* Koenick v. Felton, 190 F.3d 259, 265 (4th Cir. 1999) ("[The state's purpose] need not . . . be entirely secular, but if there is no evidence of a legitimate, secular purpose, then the statute must fail." (citation omitted)), *cert. denied*, 528 U.S. 1118 (2000); Metzl v. Leininger, 57 F.3d 618,i622 (7th Cir. 1995) ("When there is no evidence concerning a critical fact, here the feasibility of keeping the public schools of Illinois open on Good Friday, the allocation of the burden of production of evidence becomes critical. We think it properly belongs on the state in this case . . . . On its face, and even without regard to the governor's proclamation, the challenged statute, given the unambiguously sectarian character of Good Friday, promotes one religion over others . . . ."); *and see* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. REV. 1, 21 (1986) (commenting that the secular purpose requirement "has been invoked only against transparent endorsements of religion"). For an argument in favor of such a burden-shifting approach, albeit one that conflates purpose with motivation, see Paul Jefferson, Note, *Strengthening Motivational Analysis Under the Establishment Clause: Proposing a Burden-Shifting Standard*, 35 IND. L. REV. 621 (2002).

59 The articulated purpose must be "sincere and not a sham." *Edwards*, 482 U.S. at 587; *accord* Bowen v. Kendrick, 487 U.S. 589, 604 (1988). "Unless it seems to be a sham, . . . the government's assertion of a legitimate secular purpose is entitled to deference. [The court] must be cautious about attributing unconstitutional motives to state officials." Chaudhuri v. Tennessee, 130 F.3d 232, 236 (6th Cir. 1997) (citations omitted), *cert. denied*, 523 U.S. 1024 (1998). As the Fifth Circuit has stated, "Deference . . . ought not be confused with blind reliance. . . . [W]e examine each of the . . . avowed purposes [for the challenged policy] to ensure that the purpose is sincere and not a sham." Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 344 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000).

60 Jager v. Douglas County Sch. Dist., 862 F.2d 824, 830 (11th Cir. 1989) (concluding that "an intrinsically religious practice cannot meet the secular purpose prong of the *Lemon* test"), *cert. denied*, 490 U.S. 1090 (1989); *see also Edwards*, 482 U.S. at 585 ("A governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose. This intention may be evidenced by promotion of religion in general, or by advancement of a particular religious belief." (citations omitted)); N.C. Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145, 1150 (4th Cir. 1991) ("[A]n act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon* test."), *cert. denied*, 505 U.S. 1219 (1992).

61 Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam).

62 *See, e.g.*, *id.* at 41--42; Books v. City of Elkhart, 235 F.3d 292, 302–04 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001); *see generally* Tarik Abdel-Monem, Note, *Posting the Ten Commandments as a Historical Document in Public Schools*, 87 IOWA L. REV. 1023 (2002).

haps the quintessential religious practice"[63]) to an existing moment-of-silence statute,[64] or displays a crucifix or Latin cross ("the principal symbol of Christianity around the world"[65]) in a public park.[66]

Of course, these general doctrinal principles by themselves do not conclusively dispose of the contention that a law regulating public morality, especially one initially informed by religious premises, should be held to lack a secular purpose. They are, after all, merely general principles, and by design they leave many specific issues unresolved. It is only by examining the niceties of the purpose requirement, and by parsing more closely the reformist argument itself, that one can discern the errors of this contention, which arguably persists in part because of a failure to engage the Establishment Clause at this deeper level of analysis.

One of the reformist argument's most evident problems is its fixation on a statute's original and purportedly religious purposes. An examination of the case law, however, reveals that a statute's original purposes are not necessarily dispositive to an assessment of its present-day constitutionality, particularly where there is reason to believe that the original purposes have been augmented or abandoned.[67] In the words of

---

63 Karen B. v. Treen, 653 F.2d 897,i901 (5th Cir. Unit A Aug. 1981), *aff'd*, 455 U.S. 913 (1982).

64 *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 58 (1985).

65 Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 792 (1995) (Souter, J., concurring in part and concurring in the judgment).

66 *See, e.g.*, Gonzales v. N. Twp. of Lake County, Ind., 4 F.3d 1412, 1419–21 (7th Cir. 1993); ACLU of Ga. v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098, 1110–11 (11th Cir. 1983). Another line of cases that might fit within this compendium involves laws regulating the teaching of creationism — ordinarily, but not necessarily, a religious concept — in public schools. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578,i593 (1987); *cf. also* Epperson v. Arkansas, 393 U.S. 97, 106 (1968).

67 *See* Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617,i626 (1961); McGowan v. Maryland, 366 U.S. 420, 444–45 (1961); Metzl v. Leininger, 57 F.3d 618, 621 (7th Cir. 1995); Cammack v. Waihee, 932 F.2d 765, 776 (9th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992); Hatheway v. Sec'y of the Army, 641 F.2d 1376, 1383–84 (9th Cir. 1981), *cert. denied*, 454 U.S. 864 (1981); Florey v. Sioux Falls Sch. Dist. 49-5, 619 F.2d 1311, 1315 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980); Jewish War Veterans of U.S. v. United States, 695 F. Supp. 3, 12 (D.D.C. 1988); DePriest v. Commonwealth, 537 S.E.2d 1, 6 (Va. Ct. App. 2000); Stewart v. United States, 364 A.2d 1205, 1208–09 (D.C. 1976); State v. Saunders, 326 A.2d 84, 89 (N.J. Essex County Ct. 1974), *aff'd*, 361 A.2d 111 (N.J. Super. Ct. App. Div. 1976), *rev'd on other grounds*, 381 A.2d 333 (N.J. 1977); Jerome A. Barron, Comment, *Sunday in North America*, 79 HARV. L. REV. 42, 49 (1965) (discussing *McGowan* for the rule that "legislative purpose has a dynamic of its own, and it is the judicial analysis of the contemporary legislative purpose that ought to be constitutionally dispositive"). In other constitutional contexts, compare Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 70–71 (1983) (allowing the government to "advance[i] interests that concededly were not asserted when the [statute in question] was enacted into law," explaining that "[t]his reliance is permissible since the insufficiency of the original motivation does not diminish other interests that the restriction may now serve"), and Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447,i460 (1978) ("[T]he fact that the original motivation behind the ban on solicitation today might be considered an insufficient justification for its perpetuation does not detract from the force of the other interests the ban continues to serve."), with Hunter v. Underwood, 471 U.S. 222, 233 (1985) (invalidating a

the Fourth Circuit: "When determining whether a statute retains a secular purpose, [courts] look not to the purpose of the statute when enacted, but at its contemporary purpose."[68] Thus, even if a law is initially informed by religious considerations, under the secular purpose requirement properly construed, that fact may largely be irrelevant to the law's present-day validity.[69]

In addition, the reformist argument appears to misapprehend the concept of a legitimate secular purpose. This apparent misapprehension takes several forms. First, while it is true that "*Lemon* requires . . e that the law at issue serve a 'secular legislative purpose' . . . [t]his does not mean that the law's purpose must be unrelated to religion . . . ."[70] Likewise, the Court has repeatedly explained that a statute will not be deemed to have "an impermissible religious purpose simply because some of the goals of the statute coincide with the beliefs of certain religious organizations."[71] More fundamentally, the reformist argument overlooks the fact that the regulation of morality, in and of itself, is a legitimate secular purpose. It is likely that much of the reformist argument's contemporary

---

state constitutional provision originally enacted to achieve racial discrimination and refusing to "decide[i] whether [the provision] would be valid if enacted today without any impermissible motivation"). Thanks to Daniel Conkle, Marty Lederman, and Eugene Volokh for providing these citations during an online discussion.

[68] Koenick v. Felton, 190 F.3d 259,i 266 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000). This rule does not conflict with the Supreme Court's position that it "has previously found the postenactment elucidation of the meaning of a statute to be of little relevance in determining the intent of the legislature contemporaneous to the passage of the statute." *Edwards*, 482 U.S. at 596 n.19. Contemporary purposes that vary from original purposes, and contemporary interpretations of original purposes, are different objects of inquiry.

[69] Correspondingly, an originally valid law may over time lose its secular purpose and become unconstitutional. *See* Rojas v. Fitch, 928 F. Supp. 155, 163 n.4 (D.R.I. 1996), *aff'd*, 127 F.3d 184 (1st Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); DiLoreto v. Bd. of Educ., 87 Cal. Rptr. 2d 791, 797 (Cal. Ct. App. 1999).

[70] Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)); *accord* Bauchman v. W. High Sch., 132 F.3d 542, 553 (10th Cir. 1997), *cert. denied*, 524 U.S. 953 (1998). Nor "does . . . [it] follow . . . that government policies with secular objectives may not incidentally benefit religion" or "that legislative categories [may] make no explicit reference to religion." Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 10 (1989). "Even where the benefits to religion were substantial, . . . [the Court has seen] a secular purpose and no conflict with the Establishment Clause." Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (citations omitted).

[71] Bowen v. Kendrick, 487 U.S. 589, 604 n.8 (1988); *accord* Marsh v. Chambers, 463 U.S. 783, 792 (1983) ("The Establishment Clause does not always bar a state from regulating conduct simply because it 'harmonizes with religious canons.'" (quoting McGowan v. Maryland, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring))); Bob Jones Univ. v. United States, 461 U.S. 574,i604 n.30 (1983); Harris v. McRae, 448 U.S. 297, 319–20 (1980) (holding that a government action does not violate "the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions'" (quoting *McGowan*, 366 U.S. at 442)); Clayton by Clayton v. Place, 884 F.2d 376, 380–81 (8th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990); Epstein v. Maddox, 277 F. Supp. 613,i618 (N.D. Ga. 1967) ("The mere fact that a police regulation parallels some religious commandment does not make it invalid as a religious enactment."), *aff'd*, 401 F.2d 777 (5th Cir. 1968) (per curiam).

appeal stems from a cultural trend towards defining the permissibility of conduct, or of the regulation or prohibition of that conduct, exclusively in terms of whether it causes demonstrable material or physical harm to another nonconsenting individual.[72] But the concept of a secular purpose is not so confined, and "[n]owhere does the Constitution state that the promotion of morality is an impermissible state objective."[73] To the contrary, the relevant cases indicate that it is a legitimate secular purpose "to further the interests of public decency,"[74] "to preserve the moral standards and values of society as a whole,"[75] or to "protect[ ] the moral sensibilities of [a] substantial segment of society . . . ."[76]

---

[72] *See, e.g.*, Sidney Buchanan, *A Constitutional Cross-Road for Gay Rights*, 38 HOUS. L. REV. 1269, 1280 (2001) (proposing that ifione's disapproval of same-sex conduct "rests primarily on factors unrelated to individualized harm, factors such as religious and moral dictates that do little more than condemn the conduct in question, that reality may be a sign that moral opposition should not lead to legal regulation").

[73] State v. Walsh, 713 S.W.2d 508, 511 (Mo. 1986). "[W]hether or not a third party is harmed by a consensual and private act of oral or anal sex . . . [t]he legislature is within constitutional authority to proscribe its commission. Any claim that private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." State v. Smith, 766 So. 2d 501, 509 (La. 2000).

[74] Stewart v. United States, 364 A.2d 1205, 1209 (D.C. 1976). *See also* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59 (1973) (affirming that "there is a 'right of the Nation and of the States to maintain a decent society[i]'" (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting))); Flanigan's Enters., Inc. of Ga. v. Fulton County, Ga., 242 F.3d 976,i983 n.9 (11th Cir. 2001) (noting "the inherent police power of every state to regulate to promote public decency"), *cert. denied*, 122 S. Ct. 2356 (2002); State v. Turner, 683 N.W.2d 252, 255 (Minn. Ct. App. 1986) (noting "a legitimate governmental interest in the preservation of public decency and order").

[75] Brown v. Brown, 459 So. 2d 560, 565 (La. Ct. App. 1984). *See also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (noting "a substantial government interest in protecting order and morality"); Chaplinsky v. New Hampshire, 315 U.S. 568,i572 (1942) (accepting "the social interest in order and morality" as a legitimate government interest); Williams v. Pryor, 240 F.3d 944,i949 (11th Cir. 2001) (explaining that "[t]he crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest"); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (en banc) (explaining that "implementing morality" is "a permissible state goal"), *cert. denied*, 478 U.S. 1022 (1986); Lawrence v. State, 41 S.W.3d 349, 354 (Tex. Ct. App. 2001) (noting "[t]he State's power to preserve and protect morality"), *review denied* (Tex. Apr. 17, 2002), *cert. granted*, 123 S. Ct.i—, 2002 WL 1611564 (U.S. Dec. 2, 2002) (No. 02-102).

[76] United States v. Biocic, 928 F.2d 112, 115 (4th Cir. 1991). *See also* Williams v. District of Columbia, 419 F.2d 638,i646 (D.C. Cir. 1969) ("Apart from punishing profane or obscene words which are spoken in circumstances which create a threat of violence, the state may also have a legitimate interest in stopping one person from 'inflict[ing] injury' on others by verbally assaulting them with language which is grossly offensive because of its profane or obscene character. The fact that a person may constitutionally indulge his taste for obscenities in private does not mean that he is free to intrude them upon the attentions of others." (footnote omitted) (quoting *Chaplinsky*, 315 U.S. at 572)); Roe v. Butterworth, 958 F. Supp. 1569, 1583 (S.D. Fla. 1997) ("[I]t is reasonable to believe that the majority of citizens of the State of Florida condemn the act of prostitution as 'immoral and unacceptable,' and it is not this Court's place to tell them that they are wrong. While this moral judgment obviously will offend and aggravate a few, . . i it does not implicate the Fourteenth Amendment."), *aff'd*, 129

This, in fact, is the only position that can be reconciled with the traditional formulation of the police power. As will be discussed more thoroughly later in the article,[77] that formulation recognizes the power and prerogative of government to regulate for the health, welfare, safety, *and morals* of its citizens.[78] Not only does this traditional rendition necessitate the secular legitimacy of morality-based legislation, but also the separate enumeration of health, welfare, and safety indicates rather clearly that "morals" cannot be limited to the kind of demonstrable harms that these other categories already and quite naturally encompass.[79] As the Supreme Court itself has expressly recognized, "[t]he fact that a [legislative] directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is

---

F.3d 1221 (11th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998); Craft v. Hodel, 683 F. Supp. 289, 294 (D. Mass. 1988) (explaining that the government interest in "shielding the population" from "offensive conduct" has "been recognized by numerous courts as legitimate and important"; citing cases); People v. David, 585 N.Y.S.2d 149, 151 (N.Y. Monroe County Ct. 1991) ("Clearly, protecting the public's sensibilities is a legitimate government interest." (citation omitted)); *see generally* John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265 (2001). This general position is not unqualified. First, where the regulated conduct is itself constitutionally protected, the government's interest in preventing moral offense may lose its legitimacy. *See, e.g.*, BSA, Inc. v. King County, 804 F.2d 1104, 1109 (9th Cir. 1986) (free speech); W. Side Women's Servs., Inc. v. City of Cleveland, 573 F. Supp. 504, 523 (N.D. Ohio 1983) (abortion); Population Servs. Int'l v. Wilson, 398 F. Supp. 321, 339 (S.D.N.Y. 1975) (free speech), *aff'd sub nom.* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977). Second, recent cases indicate that the government, under the Equal Protection Clause, "cannot merely justify singling out a group of citizens for disfavor simply because it morally disapproves of them." Lofton v. Kearney, 157 F. Supp. 2d 1372, 1383 (S.D. Fla. 2001) (citing Romer v. Evans, 517 U.S. 620, 633 (1996)).

77 *See infra* Part II.B.

78 *See* R.R. Co. v. Husen, 95 U.S. 465, 470–71 (1877) ("What th[e] [police] power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety."); State v. Brenan, 772 So. 2d 64, 73 (La. 2000) ("The traditional description of state police power does embrace the regulation of morals as well as the health, safety, and general welfare of the citizenry."); *accord* Berman v. Parker, 348 U.S. 26, 32 (1954); Manigault v. Springs, 199 U.S. 473,i480 (1905); Christensen v. State, 468 S.E.2d 188, 190 (Ga. 1996); Smith v. State Hwy. Comm'n, 346 P.2d 259, 267 (Kan. 1959); Gundaker Cent. Motors, Inc. v. Gassert, 127 A.2d 566, 570 (N.J. 1956).

79 *See* Hoke v. United States, 227 U.S. 308, 322 (1913) ("[T]he powers reserved to the states and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material *and moral*." (emphasis added)); State v. Smith, 766 So. 2d 501, 509 (La. 2000) ("There has never been any doubt that the legislature, in the exercise of its police power, has authority to criminalize the commission of acts which, *without regard to the infliction of any other injury*, are considered immoral." (emphasis added)); Michael v. Hertzler, 900 P.2d 1144, 1149 (Wyo. 1995) ("The police power is the inherent plenary power possessed by the state not only to prevent its citizens from harming one another, but to promote all aspects of public welfare."). As the Supreme Court has stated in the zoning context: "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

not a sufficient reason to find that statute unconstitutional."[80] Needless to say, the presence or absence of consent does not intrinsically limit the legislature's power in this regard, nor does it somehow render the government's interest automatically illegitimate.[81]

The reformist argument also appears to conflate a law's *purposes*, as stated in the law or in litigation or as evidenced by the law's design,[82] with either the *motivations* of the individual legislators or the *premises* upon which they based their votes.[83] In general, however, "[w]hat is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law."[84] The first prong of

---

80 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 62 (1973). *See* Cordes, *supra* note 35, at 169 (explaining that under the Court's cases, "'traditional' values, which themselves might have been largely shaped by religious influences, suffice for the necessary secular purpose"). For critiques apart from the Establishment Clause, which advocate either no role or a more restricted role for morality-based justifications, see Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998); Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331 (1995); Charlene Smith & James Wilets, *Lessons from the Past and Strategies for the Future: Using Domestic, International, and Comparative Law to Overturn Sodomy Laws*, 24 SEATTLE U. L. REV. 49, 61–63 (2000); S.I. Strong, Romer v. Evans *and the Permissibility of Morality Legislation*, 39 ARIZ. L. REV. 1259 (1997); and D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67.

81 *See* State v. Walsh, 713 S.W.2d 508, 511 (Mo. 1986) (rejecting the argument "that the legislation of morality which affects private consensual conduct is not a legitimate state interest").

82 *See* United States v. Allen, 760 F.2d 447, 451–52 (2d Cir. 1985) (assessing satisfaction of the secular purpose requirement in light of "the statute's broad scope").

83 This textual assertion requires two points of clarification. First, the differentiation among purposes, motivations, and premises is an analytical ideal; in practice, such differentiation may be difficult and in some cases unwarranted. The statutory purpose, for example, may be precisely to advance a certain premise, while the motivation may simply be to effectuate the statutory purpose. Second, "premises" should be understood broadly. While it can include straightforward moral edicts — *e.g.*, that slavery is wrong — it can also include more sophisticated moral principles as well as various conceptual and empirical postulates — *e.g.*, that by divine creation and sacrificial redemption, all persons "enjoy an equal dignity," *Catechism of the Catholic Church* para. 1934 (1994), this dignity precludes one from being treated instrumentally and endows one with the right to be economically productive through one's free will and industry, see *id.* para. 2426–32, and therefore "[i]t is a sin against the dignity of persons and their fundamental rights to reduce them by violence to their productive value or to a source of profit." *Id.* para. 2414.

84 Bd. of Educ. v. Mergens, 496 U.S. 226, 249 (1990) (plurality opinion) (emphases omitted); *accord* McLean v. Ark. Bd. of Educ., 529 F. Supp. 1255, 1263 (E.D. Ark. 1982) (explaining that "courts should look to legislative statements of a statute's purpose in Establishment Clause cases" and that "remarks by the sponsor or author of a bill are not considered controlling in analyzing legislative intent"); Todd v. State, 643 So. 2d 625, 629 (Fla. Ct. App. 1994), *review denied*, 651 So. 2d 1197 (Fla. 1995), *cert. denied*, 515 U.S. 1143 (1995). As Professor Esbeck explains, "Legislative purpose should not be confused with legislative motive. A judicial inquiry may not go into the motive of each legislator supporting a legislative bill. A motive analysis would have implications not only for the denial of religious freedom, but also for violating separation of powers." Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV.

Lemon, after all, is principally an inquiry into statutory *purpose*, not the psychological or metaphysical dimensions of legislative judgment.[85] These considerations may be relevant to the question of doctrinal entanglement under *Lemon*'s third prong,[86] and underlying motives or operative premises can in some circumstances (as when the statutory subject matter is intrinsically religious) confirm a preliminary judicial determination of purpose, thus allowing or inviting an examination of legislative history.[87] But ordinarily such an examination cannot by itself sustain a determination of purpose,[88] and certainly "the legislative history cannot be construed to override the express statutory language articulating a clear secular purpose and also disclaiming a religious purpose."[89]

581, 599 n.67 (1995) (citations omitted); *see also* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 130 (1986) (noting that "the Court refuses to examine legislative motives" and, as a consequence, "usually accepts whatever secular purposes the government . . . announces"); Scott W. Breedlove & Victoria S. Salzmann, *The Devil Made Me Do It: The Irrelevance of Legislative Motivation Under the Establishment Clause*, 53 BAYLOR L. REV. 419 (2001) (articulating a general position against motivation analysis); Jamin B. Raskin, *Polling Establishment: Judicial Review, Democracy, and the Endorsement Theory of the Establishment Clause — Commentary on Measured Endorsement*, 60 MD. L. REV. 761, 767 (2001) ("[W]hat matters in Establishment Clause analysis, and constitutional analysis generally, is not why a particular legislator favors a bill, or even why all legislators favor a bill . . ., but what the legislative purpose . . . of the enactment is. Thus, the purpose behind an ordinary school lunch bill is the perfectly secular one of providing a nutritional midday meal to all public school students — even if all of the legislators voting for it openly professed, on the floor of Congress, to vote for it out of personal religious concerns.").

85 *See* Am. Family Ass'n, Inc. v. City & County of S.F., 277 F.3d 1114, 1121 (9th Cir. 2002) ("Our analysis under this prong focuses purely on purpose; we do not question the propriety of the means to achieve that purpose or whether the defendants were correct or even reasonable in the assumptions underlying their actions . . . .").

86 *See infra* Part I.C.1.b.

87 *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 56–61 (1985) (examining legislative history to confirm the absence of an evident secular purpose); Doe v. Sch. Bd., 274 F.3d 289, 294 (5th Cir. 2001) (explaining that "the legislative history confirms that the amendment was passed to return verbal prayer to the public schools"); Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464, 1471 (11th Cir. 1997) (examining legislative history and concluding that it is "not inconsistent with the express statutory language articulating a clear secular purpose and disclaiming a religious purpose"). In all events, the examination of legislative history does not, of course, extend to an examination of legislative church attendance. *See* Michael W. McConnell, *Stuck with a* Lemon, A.B.A. J., Feb. 1997, at 46 (noting that the secular purpose requirement "has been taken by some courts to mean that legislation inspired by religious conviction is constitutionally forbidden — leading to such spectacles as the surveillance of Rep. Henry J. Hyde, R-Ill., attending mass to prove that the legislative amendment bearing his name (passed in the mid-1970s to eliminate public funding of abortions) is religiously motivated").

88 *See* Discount Records, Inc. v. City of N. Little Rock, 671 F.2d 1220, 1222 (8th Cir. 1982) (per curiam) (rejecting a "post hoc attempt to reconstruct legislative intent contrary to the stated [legislative] purpose"). In addition, there remains the issue of multiple motivations and premises. *See* Holberg v. State, 38 S.W.3d 137, 140 (Tex. Crim. App. 2000) ("[I]n assessing the legislative purpose, a court cannot assume that the selected statements of a few legislators, even the sponsors of the legislation, reflected the motivation of the entire Legislature."), *cert. denied*, 122 S. Ct. 394 (2001).

89 *Bown*, 112 F.3d at 1472. For various critiques of motivation analysis, see Edwards v. Aguillard, 482 U.S. 578, 636–39 (1987) (Scalia, J., dissenting); Laycock, *supra* note 58, at

Of course, none of this is to suggest that the secular purpose requirement is wholly irrelevant to religiously informed laws, or that such a law might not, for more particular reasons, transgress this requirement. Already discussed, for example, are instances where the subject matter of the statute may be considered intrinsically religious, in which case courts appear effectively to jettison, if not reverse, the presumption that there is a plausible and nonmarginal secular purpose.[90] Another possible scenario is where a statute's subject matter is not intrinsically religious, but where the most obvious potential objectives are religious and nonreligious (perhaps causing the court to remove, though not reverse, the presumption of constitutionality) and the government for whatever reason asserts only a religion-related objective in court. Consider, for example, a statutory prohibition on adultery. Ordinarily this type of statute would not be problematic under the Establishment Clause as long as the government presents to the court one or more nonmarginal secular purposes, such as preventing the adverse physical, mental, or social consequences of marital infidelity.[91] This should be true even if the statute reflects religiously inspired premises concerning the virtue of chastity and the spiritual institution of marriage. If, however, the government exclusively presents to the court a statutory purpose that is religious (such as preventing citizens from jeopardizing their relationship to God), then the statute could violate the Establishment Clause, notwithstanding its plausible but unasserted secular objectives and notwithstanding the independent legitimacy of its religious premises.

A third and final scenario is where a statute's subject matter is again not intrinsically religious, or at best there are both religious and nonreligious potential objectives, but the specific wording or design of the statute suggests that the actual, preeminent objective is religious or religiously related. One federal appeals court, in fact, has indicated that "*explicit* statutory incorporation of a *particular* religion's belief may violate the Establishment Clause."[92] So, for example, while "Judaeo-Chris-

---

22–24; Hal Culbertson, Note, *Religion in the Political Process: A Critique of* Lemon*'s Purpose Test*, 1990 U. ILL. L. REV. 915; Jeffrey S. Theuer, Comment, *The* Lemon *Test and Subjective Intent in Establishment Clause Analysis: The Case for Abandoning the Purpose Prong*, 76 KY. L.J. 1061 (1988).

90 *See supra* notes 60–66 and accompanying text.

91 *See* Kent Greenawalt, *Religiously Based Premises and Laws Restrictive of Liberty*, 1986 BYU L. REV. 245, 246 (noting the potential impact of marital infildelity on family life and children).

92 Jane L. v. Bangerter, 61 F.3d 1505, 1516 (10th Cir. 1995) (emphases added). *Cf. also* ACLU of Ohio Found., Inc. v. Ashbrook, 211 F. Supp. 2d 873, 886–87 (N.D. Ohio 2002) (noting that among the cases addressing displays of the Ten Commandments that "[w]hen a governmental entity *specifically* decides to display the Ten Commandments, whether or not part of a larger display, Courts generally find that action to have a religious rather than a secular purpose" but that, "[w]hen . . . the Ten Commandments are an incidental or essentially inconspicuous part of a larger secular display or are integrated within a larger secular goal,

tian religio[us] oppos[ition] [to] stealing does not mean that a State or the Federal Government may not . . . enact laws prohibiting larceny,"[93] according to this court, if "a religion only opposed stealing from a particular group and the state outlawed stealing only from that group, it might be a closer case . . . and would require inquiry into the legitimacy of government interests,"[94] presumably because the statutory objective no longer appears to be theft prevention per se (the secularity of which may ordinarily be presupposed), but rather the enforcement of a denominationally specific religious edict (the secularity of which may fairly be subject to question).

2. *The Restriction on Religious Purposes*

The first prong of *Lemon* not only requires a secular purpose; alternatively formulated, it also prohibits laws which have the purpose of advancing or inhibiting religion.[95] It is possible, of course, that this latter formulation may simply be another way of expressing the rule that religious purposes, while generally valid, cannot be preeminent or exclusive and that the secular purpose, correspondingly, cannot be marginal. There are at least two reasons, however, to think that this alternative formulation is not coterminous with, but instead reaches beyond, the secular purpose requirement. First, prohibiting a preeminent or exclusive religious purpose is not necessarily synonymous with prohibiting the purpose of advancing or inhibiting religion, although the distinction, from a doctrinal standpoint, may be an unadministrably fine one. Second and more importantly, several cases indicate that this alternative formulation prohibits not merely laws that have *the* purpose of religious advancement (which suggests preeminence or exclusivity), but laws that have the *primary* purpose of religious advancement,[96] and "primary" is arguably a

---

Courts generally find a secular purpose and, thus, no violation."), *stay denied*, No. 1:01CV0556, 2002 WL 1558823 (N.D. Ohio June 14, 2002).

93 Harris v. McRae, 448 U.S. 297, 319 (1980).

94 *Jane L.*, 61 F.3d at 1516 n.10. *Compare, e.g.*, Epstein v. Maddox, 277 F. Supp. 613, 618 (N.D. Ga. 1967) (holding that alcohol sale prohibition on all Sundays does not violate the purpose limitations of the Establishment Clause), *aff'd*, 401 F.2d 777 (5th Cir. 1968) (per curiam), *with* Griswold Inn, Inc. v. State, 441 A.2d 16, 20–21 (Conn. 1981) (holding that an alcohol prohibition exclusively on Good Friday, but no other holiday, violates the secular purpose limitation of the Establishment Clause).

95 *See* Agostini v. Felton, 521 U.S. 203, 222–23 (1997) (explaining that the Court "ask[s] whether the government acted with the purpose of advancing or inhibiting religion"); Wallace v. Jaffree, 472 U.S. 38, 56 (1985) ("In applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring))).

96 *See* Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (invalidating a statute because "the primary purpose . . . [was] to advance a particular religious belief"); Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 481 (1973) (asking whether "challenged state aid has the primary purpose or effect of advancing religion or religious education"); ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 308 (6th Cir. 2001) (en banc);

broader term than "preeminent."[97] In fact, taken literally, this prohibition could invalidate a law with multiple nonmarginal secular purposes if it also had as its primary (but not preeminent) purpose the advancement or inhibition of religion.

To the extent that this alternative formulation has independent force, therefore, the critical question is whether a law that reflects religious moral premises or positions should, for that reason, be seen as having the primary purpose of advancing religion, either by its enactment or by its anticipated implementation. In general, the answer is that it probably should not. After all, what the legislature is fundamentally attempting to advance is not religion per se — there is presumably no intended quantifiable subsidy or quid pro quo to one or more religious institutions — but rather a vision of a decent or just social order. When the state, in other words, is permissibly regulating on behalf of welfare or morals, regardless of whether it derives its sense of these concepts from religious or nonreligious premises, presumably the primary purpose is still the advancement of welfare or morals, not religion. As one court has noted, "there is a difference between a purpose to 'advance or endorse' religion, on the one hand, and merely being motivated by religious convictions, on the other. Only the former is forbidden under *Lemon*."[98] To be sure, a recognition of this reality is likely one reason for the rule that mere harmonization between a law's premises and the values of one or more religions does not render the law invalid.[99] It is only when the government actually equates welfare or morals with the transcendent or religious well-being of its citizens — when it attempts, for example, to use state power to prohibit blasphemy or to save souls — that it crosses the line.[100]

Books v. City of Elkhart, 235 F.3d 292, 302 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001); Droz v. Comm'r, 48 F.3d 1120, 1124 (9th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996); Hall v. Bd. of Sch. Comm'rs, 656 F.2d 999, 1002 (5th Cir. Unit B Sept. 1981); Hatcher v. Comm'r, 688 F.2d 82, 84 (10th Cir. 1978).

97 My thanks to Professor Daniel Conkle for clarifying this point.

98 Dean v. District of Columbia, Civ. A. No. 90-13892, 1992 WL 685364, at *5 (D.C. Super. Ct. June 2, 1992), *aff'd*, 653 A.2d 307 (D.C. 1995) (per curiam).

99 *See supra* note 71 and accompanying text.

100 *See, e.g.*, State v. West, 263 A.2d 602, 605 (Md. Ct. Spec. App. 1970) (invalidating a state anti-blasphemy law in part because it was "[p]atently . . . intended to protect and preserve and perpetuate the Christian religion in this State" and "to serve as a mantle of protection by the State to believers in Christian orthodoxy and extend to those individuals the aid, comfort and support of the State."). According to one scholar, "the First Amendment is properly understood to preclude, at least in general, the use of law or other government action to advance religious purposes that are spiritual in nature; by this I mean purposes that directly address spiritual, as opposed to worldly, matters." Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & RELIGION 1, 11 (1994). *See also* Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 1000–01 (1989) (discussing the notion that "secular" need not mean nonreligious, but rather temporal in focus,

There are, in all events, two serious flaws inherent in the argument that legislation, if informed by religious premises, should be deemed an advancement of religion under *Lemon*'s purpose prong. First, it must be remembered that according to this prong's alternative formulation, the government's purpose may be neither to advance *nor to inhibit* religion. If a legislature's conscious use of religious premises could be deemed the advancement of religion, then it would seem to follow that a legislature's conscious nonuse of religious premises — or its use of exclusively secular premises — could correspondingly be deemed the inhibition of religion and, thus, be unconstitutional. This, of course, is absurd if only from the standpoint of judicial administrability, and as such calls into question the argument as a whole. Second, it is difficult to avoid the fact that treating the utilization of religious premises as unconstitutional advancement effectively disenfranchises or disables the religious voice in the public square (a problem which, for that very reason, will be addressed more thoroughly in Part III). Under such a rule, religious citizens or institutions may interject their deepest beliefs into the legislative process, but they may not — indeed they must not — be manifestly successful. This, too, is an unacceptable result, politically and constitutionally,[101] and only further reveals the deficiency, and at bottom the untenability, of the argument from which it would logically flow.

To summarize, the legislative utilization of religious premises categorically transgresses neither the requirement that there be a secular purpose nor the alternative prohibition on having the (primary) purpose of advancing religion, as long as the statute in question is today intended to achieve a temporal objective otherwise within the delegated or police power of the government.[102] This is true even if the original purposes were religious, even if the present-day objective is abstractly qualitative (such as social welfare, decency, or morality), and even if the regulated or prohibited conduct is consensual and does not cause material harm to persons or property. Only if a law genuinely lacks a secular contempo-

---

such that certain "beliefs, values, and practices that occur within and are plainly relevant to terrestrial concerns" could be deemed secular even though they are "'religious' in the sense that they are central to institutions and belief systems generally regarded as religious.").

101 *See* Cathy's Tap, Inc. v. Vill. of Mapleton, 65 F. Supp. 2d 874, 892 (C.D. Ill. 1999) ("It would be a severe infringement on the free speech rights of those persons or groups with religious views to forbid them from lobbying their local government or, if allowed to lobby, to require them to leave their religious beliefs and convictions at the steps of city hall."); Myers, *supra* note 45, at 57 (noting that "aggressive use of the secular purpose requirement would exclude religious citizens from the political process" and that "[i]t would be inconceivable to hold that any legislation that resulted from religious activism . . . was unconstitutional simply because of the religious motivations of those involved in the legislative process.").

102 *See generally* Ruti Teitel, *A Critique of Religion as Politics in the Public Square*, 78 CORNELL L. REV. 747, 768–70 (1993) (delineating the secular purpose requirement, arguing that under current case law it is only minimally demanding).

rary purpose, and especially if its subject matter is intrinsically religious or the state has conflated temporal and spiritual concerns, would the law potentially run afoul of the purpose limitations imposed by the Establishment Clause.

B. THE LIMITS ON PRINCIPAL OR PRIMARY EFFECT

The inquiry into purpose is merely the first of the *Lemon* test's three prongs. The second, known as the effect prong, further prohibits laws that have the principal or primary effect of advancing or inhibiting religion.[103] In recent years the Supreme Court has modified this prong, as well as the alternative formulation of the purpose prong, to account specifically for the *outward appearance* of governmental actions that in some way relate to religion. In particular, the Court has held that the Establishment Clause forbids not only laws that have the purpose or primary effect of *advancing or inhibiting* religion, but also laws that would appear to a reasonable observer to be *endorsing or disapproving* of religion.[104] The following subparts will address each of these two doctrinal variations, beginning with endorsement.

1. *The Endorsement or Disapproval of Religion*

Under the so-called endorsement test, a plaintiff now "must allege facts indicating the [law] ha[s] a *principal* or *primary* effect of . . . endorsing religion"[105] or that "the objective effect of [the law's] passage is to suggest government preference for a particular religious view or for religion in general."[106] Despite criticism by many, the test remains part of the Court's jurisprudence and, where appropriate, continues to be invoked and developed by lower courts.[107] And while the full scope and applicability of the test remain somewhat uncertain, the basic notion of endorsement is fairly simple to state. According to the Court, "the prohibition against governmental endorsement of religion 'preclude[s] govern-

---

103 *See* Agostini v. Felton, 521 U.S. 203,i223 (1997); Edwards v. Aguillard, 482 U.S. 578, 583 (1987); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

104 *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763–69 (1995); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 593–94 (1989); *accord* Koenick v. Felton, 190 F.3d 259, 267 (4th Cir. 1999) ("The Government may, through speech and actions, recognize religion or a religious holiday, but it may not overtly endorse a religion, or religion in general." (citation omitted)), *cert. denied*, 528 U.S. 1118 (2000).

105 Bauchman v. W. High Sch., 132 F.3d 542, 555 (10th Cir. 1997) (as corrected), *cert. denied*, 524 U.S. 953 (1998).

106 Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1345 (4th Cir. 1995).

107 *See, e.g.*, Elewski v. City of Syracuse, 123 F.3d 51, 53–54 (2d Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998); Kunselman v. W. Reserve Local Sch. Dist., 70 F.3d 931, 932–33 (6th Cir. 1995). In all likelihood, the test could probably still garner the necessary five votes on the Supreme Court — namely, Justices Stevens, O'Connor, Souter, Breyer, and Ginsburg. *See* Gey, *supra* note 22, at 391 n.58.

ment from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred.*'"[108] The "essential principle" of the prohibition is that government may not "appear[ ] to take a position on questions of religious belief or . . . 'mak[e] adherence to a religion relevant in any way to a person's standing in the political community.'"[109] Because it is perception-based, moreover, "the endorsement test is particularly concerned with whether governmental practices create a 'symbolic union' of church and state."[110]

Of course, not all such symbolic unions are or could be forbidden, and the endorsement test as a consequence has a number of refining characteristics. For one thing, its analytical focus is both highly fact-specific and purposefully holistic.[111] Government actions must be "viewed in context and in their entirety,"[112] thereby allowing a court to assess whether certain extrinsic factors might "neutralize the message of governmental endorsement"[113] that could otherwise be perceived using a more reductionist perspective.[114] For another thing, the test is objective, not subjective: a government action is problematic only if it would be seen as an endorsement or disapproval of religion from the vantage point

---

108 *County of Allegheny*, 492 U.S. at 593–94 (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment)).

109 *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668,i687 (1984) (O'Connor, J., concurring)).

110 Brooks v. City of Oak Ridge, 222 F.3d 259, 264 (6th Cir. 2000) (quoting Agostini v. Felton, 521 U.S. 203, 220–23, 227 (1997)), *cert. denied*, 531 U.S. 1152 (2001).

111 *See, e.g.*, Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 495 (7th Cir. 2000) ("look[ing] to the unique facts and circumstances . . . to determine whether a reasonable person would perceive the . . . [government action as] promot[ing] or disfavor[ing] religion or a particular religious belief"); *Elewski*, 123 F.3d at 53 (describing endorsement analysis as "a highly fact-specific test" and noting the importance of viewing a government action "in its particular context"); ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1486 (3d Cir. 1996) (noting "[t]he importance of the context of a challenged practice"); Bonham v. D.C. Library Admin., 989 F.2d 1242, 1245 (D.C. Cir. 1993) (noting that "[t]he resolution of the endorsement question requires a more factbound analysis").

112 Bauchman v. W. High Sch., 132 F.3d 542,i555 (10th Cir. 1997), *cert. denied*, 524 U.S. 953 (1998); *accord* Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2469–69 (2002) (explaining that "'the reasonable observer in the endorsement inquiry must be deemed aware' of the 'history and context' underlying a challenged program" (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001))); Adland v. Russ, 107 F. Supp. 2d 782, 786 (E.D. Ky. 2000) (examining "the entirety" of a Ten Commandments display, including its "historical context, location, and size.").

113 *Elewski*, 123 F.3d at 54.

114 *See Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (explaining that the particular setting may "negate[i] any message of endorsement of [religious] content."); Gonzales v. N. Twp. of Lake County, 4 F.3d 1412, 1421–22 (7th Cir. 1993) ("The context in which the religious symbol is displayed may affect the message. For instance, the display of a creche might advance or endorse religion only in certain settings."); *Bonham*, 989 F.2d at 1245 (noting that the endorsement inquiry, among other things, asks "whether the [government] has sought to counteract or neutralize any possible religious message.").

of a "reasonable observer,"[115] a construct that has been likened to the hypothetical reasonable person of tort law.[116]

What makes this observer "reasonable" appears, in turn, to be a function of at least three considerations. First, the observer possesses reasonable familiarity with the relevant community's history, traditions, and contemporary practices,[117] and perhaps with the governing constitutional principles,[118] although lower courts remain uncertain "as to the proper level of understanding to impute onto [this] mythical reasonable observer."[119] Second, the observer is an individual of reasonable as opposed to heightened (or diminished) sensitivity. Thus, a court "do[es] not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the [government's action], or whether some reasonable person *might* think [the government] endorses religion. Instead, [the court] ask[s] whether *the* reasonable ob-

---

115 *See Elewski*, 123 F.3d at 53; Kunselman v. W. Reserve Local Sch. Dist., 70 F.3d 931, 932–33 (6th Cir. 1995). "The question . . . is not the subjective intent of [the government] in enacting the [law], but whether the objective effect of its passage is to suggest government preference for a particular religious view or for religion in general." Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1345 (4th Cir. 1995). "If a reasonable observer would conclude that the message communicated is one of either endorsement or disapproval of religion, then the challenged practice is unlawful." Chaudhuri v. Tennessee, 130 F.3d 232, 237 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998).

116 *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he applicable observer is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'" (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984))); ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 302 (6th Cir. 2001) (en banc) ("Our 'reasonable observer' is a judicial construct, of course — much like the 'reasonable person' in the law of torts . . . .").

117 *See Bauchman*, 132 F.3d at 555 (employing a reasonable observer that is "aware of the purpose, context and history" of the region and of culture generally); *Elewski*, 123 F.3d at 54 ("[T]he endorsement test necessarily focuses upon the perception of a reasonable, informed observer [who] must be deemed aware of the history and context of the community and forum in which the religious display appears." (internal quotation marks omitted)); Chabad-Lubavitch of Ga. v. Miller, 5 F.3d 1383, 1390 n.11 (11th Cir. 1993) ("[T]he endorsement inquiry is based on the perceptions of the reasonable observer who is presumed to be aware of the history of the context in which the religious display may be found."); Kreisner v. City of San Diego, 1 F.3d 775, 784 (9th Cir. 1993) ("This hypothetical observer is informed as well as reasonable; we assume that he or she is familiar with the history of the government practice at issue, as well as with the general contours of the [relevant constitutional law] doctrine[s]."), *cert. denied*, 510 U.S. 1044 (1994).

118 *See Chabad-Lubavitch*, 5 F.3d at 1390 n.11 ("The endorsement test . . . is not based on perceptions of the ill-informed, first-time visitor who simply views a religious symbol in a government building without regard to public forum issues."); *accord Kreisner*, 1 F.3d at 784.

119 Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 495 n.2 (7th Cir. 2000) (citing cases). At the very least, "such an observer is not to be deemed omniscient." *Capitol Square Review & Advisory Bd.*, 243 F.3d at 302. By the same token, "[i]t is probably not the case . . . that the idealized observer ought to be deemed as ill-informed as he or she almost certainly would be in real life." *Id.* at 303.

server *would* conclude that [the government] endorses religion by [its action]."[120] Finally, and congruent with the holistic nature of the analysis, the observer is one who could reasonably situate and comprehend a government action in its proper context, neither overemphasizing nor underemphasizing its apparent religious dimensions.[121]

By design, the endorsement test is most suited to cases involving public religious symbolism, such as nativity scenes, as well as to cases involving public schools.[122] This is because the inherently expressive nature of symbols and the relative impressionability of schoolchildren, respectively, create heightened probabilities of perceived governmental communication of religious approval. In addition, some courts have employed the endorsement test when examining public holidays that neatly correspond to religious observances, such as Good Friday, although various factors — including the legitimating element of religious accommodation and the settled validity of Sunday closing laws[123] — have confounded judicial analysis and produced divergent holdings in the holiday context.[124] Be that as it may, what is significant is that, apart from these areas, the endorsement test's coherent administrability has yet to be fully demonstrated and even its threshold applicability has been seriously questioned.[125]

---

120 Ams. United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538, 1544 (6th Cir. 1992), *cited in part with approval by Capitol Square Review & Advisory Bd.*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment); *accord Bauchman*, 132 F.3d at 555 ("This is an objective inquiry, not an inquiry into whether particular individuals might be offended by the content or location of the [government's action], or consider such [actions] to endorse religion.").

121 *See Elewski*, 123 F.3d at 54 ("A reasonable observer is not one who wears blinders and is frozen in a position focusing solely on the [religious symbol].").

122 *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305, 307, 316 (2000) (briefly but repeatedly noting the existence of "perceived and actual endorsement" resulting from a public school event); *cf.* Agostini v. Felton, 521 U.S. 203, 235 (1997) (noting, largely as an analytical postscript, that an educational aid program did not create endorsement).

123 *See* McGowan v. Maryland, 366 U.S. 420, 448–53 (1961).

124 *Compare* Koenick v. Felton, 190 F.3d 259 (4th Cir. 1999) (upholding Friday-to-Monday Easter holiday for public schools), *cert. denied*, 528 U.S. 1118 (2000), *and* Bridenbaugh v. O'Bannon, 185 F.3d 796 (7th Cir. 1999) (upholding Good Friday holiday for state employees), *cert. denied*, 529 U.S. 1003 (2000), *and* Granzeier v. Middleton, 173 F.3d 568 (6th Cir. 1999) (upholding Good Friday closing of governmental offices), *and* Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991) (upholding state Good Friday holiday), *cert. denied*, 505 U.S. 1219 (1992), *with* Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) (invalidating state statute requiring public school closures on Good Friday), *and* Freedom from Religion Found., Inc. v. Thompson, 920 F. Supp. 969 (W.D. Wis. 1996) (invalidating state Good Friday afternoon holiday).

125 *See* DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 411 (2d Cir. 2001) (interpreting recent Supreme Court decisions "as casting doubt on the vitality of the endorsement test as a stand-alone measure of unconstitutionality in most Establishment Clause cases" though noting that it "remains a viable test of constitutionality in certain unique and discrete circumstances — for example, where the government embraces a religious symbol or allows the prominent display of religious imagery on public property").

Nevertheless, there is language from certain opinions of the Supreme Court, as well as some lower courts, suggesting that the criterion of endorsement might be relevant to the constitutionality of religiously informed laws. In one opinion, for example, the Court explained that the Establishment Clause "prohibits . . . legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally" and forbids the government from "plac[ing] its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general . . . ."[126] And in an earlier case, the Court had stated that the Clause prohibits the government from placing its "official support . . . behind the tenets of one or of all orthodoxies."[127] Likewise, lower courts have issued various declarations — such as "the State can neither impose religious rules nor endorse religious norms"[128] and "[t]he government must appear neutral in matters of religious significance"[129] and "[g]overnment neutrality . . . assures its citizens . . . that no official imprimatur lies behind any set of religious beliefs or practices"[130] — which might appear, at least superficially, to call into question a legislature's use of religious premises.

In fact, to the extent that a law does derive its moral premises from religious traditions, either directly or as reflected in public opinion, one could very well conclude that the government *is* in a sense endorsing or at least looking favorably upon the underlying religious beliefs.[131] This may be especially true when the premises are embodied in the form of criminal law, which — being the power to prohibit conduct upon threat of loss of liberty or property or even life — is arguably the most prominent expression of a state's sovereignty. Given this prospect, the critical question at this point is whether a *reasonable observer* would conclude that such a law, when properly perceived, is an unconstitutional endorsement of religion.

---

126 Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 8, 9 (1989).

127 Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963); *cf. Agostini*, 521 U.S. at 223 ("[G]overnment inculcation of religious beliefs has the impermissible effect of advancing religion.").

128 Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353, 1360 (N.J. 1992), *cert. denied*, 507 U.S. 952 (1993).

129 Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1345 (4th Cir. 1995).

130 Brandon v. Bd. of Educ., 635 F.2d 971, 975 (2d Cir. 1980), *cert. denied*, 455 U.S. 983 (1982). *See also* Freedom from Religion Found., Inc. v. Bugher, 249 F.3d 606, 610 (7th Cir. 2001) ("The Establishment Clause . . . prevents the government from promoting or affiliating with any religious doctrine or organization.").

131 *Cf.* Harlan Loeb & David Rosenberg, *Fundamental Rights in Conflict: The Price of a Maturing Democracy*, 77 N.D. L. REV. 27, 31 n.26 (2001) ("[W]hen a court evidences a preference for a particular mode of 'moral' conduct as more valuable than another, it is implicitly labeling one as more valuable, and thus making it the preferred kind of conduct.").

The key, of course, is context. If the appropriate context, for example, were to include both temporal and lateral perspectives, as arguably it should, then an endorsement would likely not be discerned. The temporal context would simply be the nation's historical tradition of basing certain laws, at least in part, on religious premises and understandings.[132] In turn, a reasonable familiarity with that tradition would enable one to see that such a legislative practice is less an endorsement of religion, and more an attempt to represent predominant moral principles and to invoke norms that appear, as a matter of experience, to have adequately served the interests of civilized society.[133] Likewise, the lateral or contemporary context would be the reality that moral premises from a variety of sources necessarily inform legislation, and that religious moral premises distinctly or manifestly inform only a modest percentage of present-day positive law. A reasonable observer would view a state's or municipality's legal code — or perhaps a relevant subset, such as regulations of sexual conduct — in its entirety, and this perspective would invariably yield the perception that religious premises are not uniquely favored[134] and that they certainly do not exceed a level that one would statistically expect to occur in a nation where religious belief flourishes.[135] Lastly,

---

132 *See infra* notes 269–70 and accompanying text.

133 Regarding legislative reliance on religious premises indirectly through representation of public opinion, see People v. Baldwin, 112 Cal. Rptr. 290, 292 (Cal. Ct. App. 1974) (upholding a statutory sodomy prohibition and explaining that "[a]ny non-dormant legislative enactment of long standing reflects a public consensus, however arrived at and from whatever derivation, as to the subject matter of the legislation" and that "[i]t is not uncommon that the original source of the ideas expressed is so remote that subjective awareness of the source is absent and the opinion expressed seems to be endemic in the public consciousness"); *cf. also* Cammack v. Waihee, 932 F.2d 765, 778 (9th Cir. 1991) (noting in a challenge to a Good Friday holiday that "[m]any Christians presumably will take at least part of the day off anyway, in order to attend religious services, and non-Christians have enjoyed the holiday for fifty years — the entire working life of the vast majority of the public workforce" and that "[n]o endorsement of religion is implicated merely because the legislature is cognizant of these truths"), *cert. denied*, 505 U.S. 1219 (1992).

134 *See* Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2469 (2002) (upholding a voucher scheme and explaining that "[a]ny objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general"); Murray v. City of Austin, 947 F.2d 147, 154–55 (5th Cir. 1991) (upholding the inclusion of a Christian cross in a municipal insignia, noting that "[i]f we focus exclusively on the inclusion of the religious symbol, display, or practice, then every use of religious symbolism — and prayer — would fail" but if, as the Establishment Clause requires, "we need ask only if the City's insignia, as a whole, has the principal or primary effect of advancing or inhibiting religion, the answer must be no"), *cert. denied*, 505 U.S. 1219 (1992).

135 To the contrary, they could appear rather underrepresented if it is true, as the courts have remarked, that "religion has been closely identified with our history and government," Sch. Dist. v. Schempp, 374 U.S. 203, 212 (1963), and "is a pervasive force in our society," Roberts v. Madigan, 921 F.2d 1047, 1053 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992), and that "our culture is permeated by religious symbols and rituals." *Id.* Moreover, even if religious values played a more significant or pervasive role in legislative decisionmaking, this

though not as critically, the reasonable observer would also understand that it is not impermissible to enact laws that harmonize with the values or tenets of religion[136] and that "[a] governmental decision coinciding with the desires of a religious group does not automatically constitute the primary advancement of that religion."[137]

What the foregoing analysis suggests, then, is that in order to trigger the endorsement prohibition, a legal enactment probably has to be written in such a way as to give the unmistakable impression that a specific religious belief, let alone a specific practice or denominational position, constituted the very essence of the enactment.[138] For illustration, it may be helpful to consider hypothetically an array of government regulations of the ordinarily secular activity of meat sale or meat consumption. It is not difficult to imagine that a state or municipality might, for health rea-

---

still might not be unconstitutional. *Cf.* Doe v. City of Clawson, 915 F.2d 244, 248 (6th Cir. 1990) ("Dominance alone is not controlling on the question of whether or not a given religious display . . . constitutes an endorsement of religion. Rather, dominance is considered within the composition of the display.").

136 *See supra* note 71 and accompanying text. *See also* Jane L. v. Bangerter, 794 F. Supp. 1537, 1543, 1545--46 (D. Utah 1992) (upholding a certain abortion restriction against an Establishment Clause challenge, finding that it "is as fully consistent with a traditional moral framework as it is with the viewpoint of any one or several religions" and "therefore reject[ing] the notion that the Act 'advances or inhibits' a particular religion as its primary effect").

137 Associated Contract Loggers, Inc. v. United States Forest Serv., 84 F. Supp. 2d 1029, 1037 (D. Minn. 2000), *aff'd*, No. 00-1730, 2001 WL 605010 (8th Cir. June 5, 2001) (per curiam). "It is a sophistry to say that [certain advocates'] religion disfavors [a particular activity]; the [government] sometimes does not allow [that activity]; and therefore, the [government] had taken a position advancing religion. This is as illogical as saying that if a tall man advocates a position, and the government takes a position in accord with the tall man's wishes, it therefore follows that the government has necessarily established the views of tall men." *Id.*

138 *See, e.g.*, Summum v. City of Ogden, 152 F. Supp. 2d 1286, 1294 (D. Utah 2001) (differentiating between a municipality's acceptance of a "non-sectarian" Ten Commandments monument from a "secular" fraternal organization and its refusal to accept "a gift from an admittedly religious organization wishing to promote a sectarian message" and holding that the latter, if accepted, "would easily be seen to be an endorsement of religion"), *aff'd in part and rev'd in part*, 297 F.3d 995 (10th Cir. 2002); Doe v. County of Montgomery, Ill., 915 F. Supp. 32, 37–38 (C.D. Ill. 1996) (holding that a county's display of a sign reading "The World Needs God" is necessarily "a promotion or endorsement of Christianity" because, "[b]y its plain language, the sign's message endorses and praises the redemptive powers of 'God' — the supreme being at the heart of Christianity" and "sends the message that the world needs to be rescued or saved by 'God.'"); Williams v. Lara, 52 S.W.3d 171, 191–92 (Tex. 2001) (concluding that a jail religion-education program "endorses one religious view while excluding others, and thus conveys the impermissible message of official preference for one specific religious view" where the sheriff and the chaplain "acknowledged that they were personally involved in selecting and screening the religious teachings offered . . ., not for penological reasons, but to ensure compliance with their own personal religious beliefs," where the chaplain "acknowledged that he had never considered allowing other religious views to be taught," and where the sheriff "admitted to making 'no bones about the fact that [he] applies the yardstick of [his] own belief system to what may permissibly go on'" and "conceded that denying the existence of the Holy Trinity would have been a sufficient reason for excluding certain instruction.").

sons, impose restrictions on the sale of meat, and there is no reason to believe that such restrictions would implicate, much less violate, the Establishment Clause. A largely vegetarian community might even go so far as to ban meat sales or consumption altogether.[139] Consider, though, a state or municipal regulation forbidding the sale of meat — and especially a regulation forbidding the consumption of meat — only on Fridays and only during late winter and early spring. In that instance, one could readily conclude that the government's enactment, both in its effect and in its purpose, is essentially an endorsement of the practice of some Christians of abstaining from meat consumption during the liturgical season of Lent.[140]

There is, however, no *categorical* prohibition under the endorsement test on the utilization of religious premises in the legislative process. That this position must be correct is evident merely by considering the implications of the converse when the endorsement test is invoked in its entirety. Recall that under this test, the government's action may not appear to a reasonable observer to be either an endorsement *or a disapproval* of religion. As with the inquiry into purpose, a categorical rule would arguably transgress the prohibition on disapproval, for the government's systematic rejection of religious premises would presumably appear to a reasonable observer as disfavoritism, if not hostility, towards particular religious beliefs or towards religion in general.[141] Indeed, re-

---

139 There may be some question, however, as to whether vegetarianism might itself be functionally religious. *Cf., e.g.*, David Haldane, *Panel Backs Fired Vegetarian Bus Driver*, L.A. TIMES, Aug. 24, 1996, at A18 (reporting on an EEOC ruling that an employee's vegetarian beliefs had to be accommodated under federal anti-religious discrimination law); *see generally* Caroline L. Kraus, Note, *Religious Exemptions — Applicability to Vegetarian Beliefs*, 30 HOFSTRA L. REV. 197 (2001).

140 *See supra* notes 92–94 and accompanying text (discussing the potential problem with religiously informed laws that are overly customized); *see, e.g.*, Griswold Inn, Inc. v. State, 441 A.2d 16, 21 (Conn. 1981) (holding that a state law prohibiting alcohol sales exclusively on Good Friday had the impermissible effect of advancing religion, finding that "the very existence of that legal prohibition on this major Christian religious holiday gives the state's clear stamp of approval both to the Christian rites and practices observed on that day and to Christianity in general" and that "[i]t indicates a bias in favor of Protestant and Catholic forms of Christianity over Eastern Orthodox, nonChristian and nonreligious practices and beliefs"). Little mention has been made thus far of the relationship between the purpose inquiry and the endorsement test. It is this author's sense that, by and large, this inquiry is addressed either by the normal purpose inquiry or by the endorsement-modified effect inquiry. In addition, the endorsement-modified purpose inquiry (in part because it conflates subjective and objective standards) has rightly been described as "an unworkable standard that offers no useful guidance to courts, legislators or other government actors who must assess whether government conduct goes against the grain of religious liberty the Establishment Clause is intended to protect." Bauchman v. W. High Sch., 132 F.3d 542, 552 (10th Cir. 1997), *cert. denied*, 524 U.S. 953 (1998).

141 *See* McDaniel v. Paty, 435 U.S. 618, 636 (1978) (Brennan, J., concurring in the judgment) (reckoning that a state's argument that barring clergy from public office was necessary to prevent specific religious objectives and goals from being injected into the lawmaking pro-

call further that the "essential principle" of the endorsement test is that government may not "appear[ ] to take a position on questions of religious belief or from 'making adherence to a religion relevant *in any way* to a person's standing in the political community."[142] Surely the presumptive disqualification of one's beliefs or values in the legislative process, precisely because they arise from one's "adherence to a religion," would be a clear transgression — if not the paradigmatic violation — of this essential principle.

2. *The Advancement or Inhibition of Religion*

The endorsement test, as noted, is basically a modification of the original *Lemon* prohibition against laws having the principal or primary effect of advancing or inhibiting religion. Because this original formulation remains valid, it is further necessary to ask whether a law reflecting religious premises can, for that reason, be seen as having the primary effect of advancing religion. Under the case law as currently formulated, the answer appears to be that it generally cannot.

Effective advancement is most often an issue where the government has provided to religious institutions some form of quantifiable assistance, such as funding or in-kind services,[143] or where the government is regulating intrinsically religious subject matter, such as prayer or worship.[144] Its heightened relevance to these scenarios is, upon reflection,

---

cess "manifests patent hostility toward, not neutrality respecting, religion"); Chess v. Widmar, 635 F.2d 1310, 1317 (8th Cir. 1980) (holding that a state university policy, which prohibited students from conducting religious services in university buildings, "has the primary effect of inhibiting religion, an effect which violates the Establishment Clause just as does governmental advancement of religion" and that the policy "singles out and stigmatizes certain religious activity and, in consequence, discredits religious groups"), *aff'd sub nom.* Widmar v. Vincent, 454 U.S. 263 (1981); *see also* Frederick Mark Gedicks & Roger Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1598 (1987) ("If religious morality can influence law only when disguised as secular morality, then the implicit message sent by law is that the former is less legitimate than the latter, less worthy of consideration by those who conduct the nation's business."); Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1086 (2000) ("Walling out religion from . . . political debate . . . could reflect the kind of hostility to religion that the First Amendment guards against.").

142 County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 593–94 (1989) (emphasis added) (quoting Lynch v. Donnelly, 465 U.S. 668,i687 (1984) (O'Connor, J., concurring)).

143 *See, e.g.*, Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002); Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion); Agostini v. Felton, 521 U.S. 203 (1997); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Bowen v. Kendrick, 487 U.S. 589 (1988); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

144 *See, e.g.*, Karen B. v. Treen, 653 F.2d 897, 901 (5th Cir. Unit A Aug. 1981) (finding impermissible promotion of religion by a statute and implementing guidelines relating to student prayer at public schools, given "the inherently religious character of the exercise"), *aff'd*,

quite understandable. In assistance cases, for example, it turns out that effect can be quantifiably (albeit indirectly) assessed by the actual or market value of the assistance, and courts are undoubtedly attracted to the relative concreteness that such an assessment provides. In the intrinsic subject-matter cases, correspondingly, it is likely that courts adopt the premise that religious advancement will be the law's natural effect. Laws, after all, tend to advance or inhibit the subject matter which they address, and if the subject matter is itself religious, then the law will likely result in the advancement or inhibition of religion.

With regard to religiously informed laws, by contrast, there is neither a simple yardstick by which religious advancement might be measured nor a particularly strong reason to believe that religious advancement will be the natural, much less the primary, effect. The principal or primary effect of a law prohibiting public nudity, for instance, is obviously to reduce its incidence or to punish those who engage in it, assuming that the law is neutrally and efficaciously enforced. True, an indirect and not insignificant effect of the prohibition will presumably be the creation or maintenance of a societal atmosphere that is more suitable to citizens whose sensibilities, whether religious or nonreligious, are offended by the regulated conduct. To the extent that this is not the primary and direct effect of the prohibition, however, the second prong of *Lemon* would not be violated.[145]

This understanding of effective advancement is not merely a postulate of common sense. It finds in the case law both explicit and implicit support. There is, first of all, a line of judicial decisions explicitly distinguishing between direct and indirect effects, holding that only the former are problematic. According to the Supreme Court, its own precedents

---

455 U.S. 913 (1982); Hall v. Bradshaw, 630 F.2d 1018, 1021 (4th Cir. 1980) ("A prayer, because it is religious, does advance religion . . . . The clear effect of any officially composed and published prayer is to advance religion as it is conceived by the official acting for the state."), *cert. denied*, 450 U.S. 965 (1981).

145 *See* Cathy's Tap, Inc. v. Vill. of Mapleton, 65 F. Supp. 2d 874, 892 (C.D. Ill. 1999) (holding that municipal ordinances prohibiting nude dancing and attendant liquor sales "neither advance nor inhibit religion in their principle [sic] or primary effect"; that, "[w]hile, presumably, the beliefs of some religious groups and individuals are furthered by the enactment of these Ordinances, these benefits are neither directed toward nor limited to religious individuals"; and that "the Ordinances cannot be said to advance the religious tenets of those who live in and around the Village of Mapleton any more than the Civil Rights Act of 1964 can be said to have advanced the religious tenets of the many African-American clergymen who successively lobbied Congress for the codification of equal rights"); Todd v. State, 643 So. 2d 625, 630 (Fla. Dist. Ct. App. 1994) (holding that the primary effect of a law enhancing one's sentence if the crime involves religious property provides "some benefit to religious institutions since there is a greater deterrence for criminal mischief involving religious property, but such benefit is indirect" and "it cannot be said that the statute's primary effect is to advance or endorse religion"), *review denied*, 651 So. 2d 1197 (Fla. 1995), *cert. denied*, 515 U.S. 1143 (1995); People v. Carter, 592 N.E.2d 491, 498 (Ill. Ct. App.) (similar), *appeal denied*, 602 N.E.2d 461 (Ill. 1992).

"plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear . . . that 'not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid.'"[146] Or, as the Seventh Circuit has explained, "a law that promotes religion may nevertheless be upheld either because of the secular purposes that the law also serves or because the effect in promoting religion is too attenuated to worry about."[147]

Providing implicit support, as well, are various decisions holding that the Establishment Clause is not violated simply because a secularly-oriented government action is substantively offensive to the religious sensibilities of citizens and, as a consequence, has the secondary effect of disparaging their beliefs or advancing a contrary moral position.[148] Legislatures, by nature, must render judgments on the morality and regulability of conduct, and the judiciary has taken the pragmatic position that the incidental, nonsystematic disfavoritism of particular religious norms or beliefs is not itself sufficient to render such judgments doctrinally invalid under the Establishment Clause.[149] By the same token, however, the jurisprudential values of consistency and symmetry strongly suggest that the incidental *favoritism* of particular religious norms or beliefs inherent in certain legislative judgments, which may have the secondary effect of advancing those norms or beliefs, should also not create an Establishment Clause violation,[150] particularly given

---

146 *Lynch*, 465 U.S. at 683 (quoting *Nyquist*, 413 U.S. at 771); *accord* Koenick v. Felton, 190 F.3d 259, 267 (4th Cir. 1999) ("The Supreme Court has stated repeatedly that a statute does not automatically violate the Establishment Clause simply because it confers an incidental benefit upon religion."), *cert. denied*, 528 U.S. 1118 (2000).

147 Metzl v. Leininger, 57 F.3d 618,i620 (7th Cir. 1995); *accord Koenick*, 190 F.3d at 267 ("A statute whose primary effect is to advance a secular purpose, rather than a religious one, is still constitutional even if it conveys an incidental benefit to those of a specific religion."). Even a law that is religious in nature, but has no measurable religious effect, might be deemed permissible. *See* ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289,i308 (6th Cir. 2001) (en banc) ("[W]e do not believe that a state advances religion impermissibly by adopting a motto ['With God, All Things Are Possible'] that provides no financial relief to any church but pays lip service to the puissance of God. . . . [T]he primary effect of the state motto is not to advance religion . . . .").

148 *See, e.g.*, Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49, 76 (2d Cir. 2001) ("[T]he Establishment Clause does not prohibit teaching about a doctrine, such as evolution, merely because it conflicts with the beliefs of a religious group."), *cert. denied*, 122 S. Ct. 68 (2001); Fleischfresser v. Dirs. of Sch. Dist. 200, 15 F.3d 680, 689 (7th Cir. 1994) (similar); Crowley v. Smithsonian Inst., 636 F.2d 738, 742–43 (D.C. Cir. 1980) (similar); Florey v. Sioux Falls Sch. Dist. 49-5, 619 F.2d 1311, 1318 (1980) (similar), *cert. denied*, 449 U.S. 987 (1980).

149 This does not mean that the cumulative disfavoritism resulting from the *judicial invalidation* of duly enacted morality legislation cannot be significant. *See infra* Part III.B.

150 Correspondingly, only an unreasonable observer — one totally ignorant of the political process, or radically beholden to a materialistic vision of law — would conclude that the *primary* effect of such legislative judgments is the endorsement of religion. *Cf.* Vernon v. City of L.A., 27 F.3d 1385, 1398–99 (9th Cir. 1994) (explaining that inferable incidental disap-

the inevitable environmental influence of religion in American law and politics.[151] It is only when the favoritism of those norms is more than incidental — when the advancement of religion becomes, in actuality, the direct or primary effect — that the second prong of *Lemon* would render the law invalid.

Whether analyzed in terms of endorsement or advancement, then, the Establishment Clause's limitations on effect do not categorically bar the legislative use of religious premises. As with purpose, one must examine the particular manner in which those premises are employed, and their relationship to the overall design and operation of the law. Even then, the evidentiary burden rests with the challenger to demonstrate either that the law primarily and directly advances religion or that a reasonable observer, one familiar with relevant history and one of moderate sensitivity, would conclude that the law, when situated in its proper context, constitutes an endorsement of a particular religion or of religion in general. For the overwhelming number of laws that reflect religious premises, this is likely an impossible demonstration to make, and certainly it is more modest than the notion that religiously informed laws are presumptively, let alone conclusively, invalid.

C. THE PROHIBITION ON EXCESSIVE ENTANGLEMENT

The third and final prong of *Lemon* provides that a law will violate the Establishment Clause if it fosters an excessive entanglement of government and religion.[152] Although entanglement can take many forms,[153] the two that are most relevant here include doctrinal entangle-

---

proval of certain religious beliefs does not violate the endorsement test where it "cannot objectively be construed as the primary focus or effect" of the governmental action), *cert. denied*, 513 U.S. 1000 (1994).

151 *See* Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1, 7 (1991) ("In addressing social problems, lawmakers inevitably make value judgments. These judgments require a resolution of competing claims concerning what is good and what is evil. In a society as religious as ours, it is hardly surprising that citizens and their representatives frequently rely on religious beliefs in resolving these questions."); *cf.* Bauchman v. W. High Sch., 132 F.3d 542,i554 (10th Cir. 1997) ("Courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally. Courts also have recognized that 'a variety of motives and purposes are implicated' by government activity in a pluralistic society." (quoting *Lynch*, 465 U.S. at 680)), *cert. denied*, 524 U.S. 953 (1998).

152 *See* Agostini v. Felton, 521 U.S. 203, 222–23 (1997); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126–27 (1982); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

153 *See* Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1170–71 (4th Cir. 1985) (addressing substantive and procedural entanglement), *cert. denied*, 478 U.S. 1020 (1986); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11, at 1226–32 (2d ed. 1988) (dividing entanglement into administrative, vesting, political, regulatory, and doctrinal); Robert A. Destro, *Developments in Liability Theories and Defenses*, 37 CATH. LAW. 83, 96–97 (1997) (dividing entanglement into administrative, doctrinal, and political); Note, *Government*

ment and political entanglement."[154] Doctrinal entanglement arises when the government interprets provisions or decides issues of religious doctrine or ecclesiastical law,[155] while political entanglement arises when the government delegates civil power to religious institutions or authorities, especially if the delegation is tied to their religious status."[156] As the following analysis will reveal, the use of religious premises in lawmaking could, but generally does not, create excessive entanglement of either type as forbidden by the First Amendment.

As a prelude to this analysis, it is useful to set forth the broad parameters of the entanglement prohibition as it has been judicially discerned over the past several decades. First, as with the other Establishment Clause tests, the initial burden is on the challenger to "prove[] that [a law] fosters 'excessive governmental entanglement with religion.'"[157] Second, it is important to recognize that "[n]ot all interaction between the government and religious authority . . . runs afoul of the Establishment Clause."[158] As the Supreme Court has explained, "[i]nteraction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause."[159] In turn, the Court has characterized entanglement as "a question of kind and degree"[160] and has indicated that the clause, "in a complex modern

---

Noninvolvement with Religious Institutions, 59 TEX. L. REV. 921, 935–41 (1981) (discussing doctrinal and administrative entanglement).

154 In recent cases, the Supreme Court has indicated that the entanglement inquiry may be subsumed under the effect inquiry. *See Agostini*, 521 U.S. at 232–33; Hugh Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 UCLA L. REV. 343, 406 (1998) (discussing this development). This merger, however, is arguably limited to questions of administrative entanglement within the context of public funding. *Compare* Koenick v. Felton, 190 F.3d 259, 265 n.6 (4th Cir. 1999) (explaining that, even after *Agostini*, in some contexts "the two inquiries are best considered separately"), *cert. denied*, 528 U.S. 1118 (2000), *with* ACLU of N.J. *ex rel.* Lander v. Schundler, 168 F.3d 92, 97 (3d Cir. 1999) ("[T]he statement [in *Agostini*] appears to mean that entanglement, standing alone, will not render an action unconstitutional if the action does not have the overall effect of advancing, endorsing, or disapproving of religion."). Because the focus here, by contrast, is on doctrinal or political entanglement within the context of regulatory or criminal legislation, the entanglement analysis remains distinct.

155 *See* Hernandez v. Comm'r, 490 U.S. 680, 696 (1989) (explaining that impermissible entanglement may occur when the government makes "inquiries into religious doctrine").

156 *See Larkin*, 459 U.S. at 125–27; Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1342–43 (4th Cir. 1995).

157 DePriest v. Commonwealth, 537 S.E.2d 1, 6 (Va. Ct. App. 2000) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 667 (1970)).

158 Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 385 (6th Cir. 1999).

159 *Agostini*, 521 U.S. at 233 (citation omitted); *accord Koenick*, 190 F.3d at 268; Church of Scientology v. Comm'r, 83 T.C. 381,1463 (1984) ("Entanglement, per se, is not objectionable. What is objectionable is excessive entanglement."), *aff'd*, 823 F.2d 1310 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988).

160 Lynch v. Donnelly, 465 U.S. 668, 684 (1984).

society," must allow for "[s]ome limited and incidental entanglement between church and state authority . . . ."[161] Whether there is excessive entanglement in any given interaction between these authorities, therefore, necessarily "depend[s] on all the circumstances of a particular relationship."[162]

1. *Doctrinal Entanglement*

With these principles in mind, the focus turns first and chiefly to the prospect of doctrinal entanglement. The question, in essence, is to what extent the legislative use of religious premises impermissibly places the legislature in the position of interpreting or expounding religious tenets or scriptural ordinances. Normally, problems with doctrinal entanglement arise in the adjudicative rather than the legislative context, as when intradenominational institutions or factions compete for church property[163] or when religious institutions or clergy are alleged to have committed tortious conduct.[164] Nonetheless, one encounters in the adjudicative context a number of broad declarations that could readily be transposed to the legislative realm. For example, courts have admonished that "[i]t is not the province of government officials or courts to determine religious orthodoxy"[165]; that judges, and presumably other officers of government, must "abst[ain] from evaluating the merits of a scriptural interpretation"[166]; and that "[t]he entanglement test . . . forbids government adoption and enforcement of religious law."[167] In the words of the Supreme Court, "to inquire into the significance of words and

---

161 *Larkin*, 459 U.S. at 123; *accord* Carter v. Broadlawns Med. Ctr., 857 F.2d 448, 456 (8th Cir. 1988) (upholding a county hospital's hiring of a chaplain even though "[i]t is obvious that employing a chaplain causes some entanglement"), *cert. denied*, 489 U.S. 1096 (1989).

162 Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.").

163 *See, e.g.*, Jones v. Wolf, 443 U.S. 595 (1979); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Wis. Conf. Bd. of Trs. of the United Methodist Church, Inc. v. Culver, 627 N.W.2d 469 (Wis. 2001).

164 *See generally* Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 229–38 (2000) (examining the risk of doctrinal entanglement in the context of tort adjudication).

165 Teterud v. Burns, 522 F.2d 357,i360 (8th Cir. 1975); *see also* Saunders-El v. Tsoulos, 1 F. Supp. 2d 845,i848 (N.D. Ill. 1998) (noting "the undesirability of judges donning religious robes over judicial ones" and that "courts are not equipped to resolve intra-faith differences among followers of a particular creed in relation to the Religion Clauses"); Havurah v. Zoning Bd. of Appeals, 418 A.2d 82, 87 (Conn. 1979) ("What are the particular tenets of a recognized religious group is not a matter for secular decision.").

166 Callahan v. Woods, 658 F.2d 679, 686 (9th Cir. 1981); *see also* Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation."); Glass v. First United Pentecostal Church of DeRidder, 676 So. 2d 724, 731 (La. Ct. App. 1996) (similar).

167 Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353, 1362 (N.J. 1992) ("That test also forbids government resolution of religious disputes. The government may not 'lend its

practices to different religious faiths, and in varying circumstances by the same faith . . . would tend inevitably to entangle the State with religion in a manner forbidden by our cases."[168]

Transposing these admonitions to the legislative context, the question of doctrinal entanglement appears to implicate at least two issues: first, the degree to which the legislature *translates* the religious sources in the process of deriving statutory premises, and second, the degree to which the legislature necessarily or actually *relies* upon these premises. Generally speaking, the less there is translation of religious sources and the more there is necessary or actual reliance on religious premises, the greater the likelihood that a court might discern entanglement. The ultimate concern for present purposes is whether a court would ever conclude that this entanglement is unconstitutionally excessive and, if so, what levels of nontranslation and reliance would yield that conclusion.

Of course, noting these issues theoretically is one thing; actually analyzing them doctrinally is quite another. In relation to the legislative process, their doctrinal analysis is particularly hindered because for many years they have been the domain, almost exclusively, of academic philosophical examination.[169] The judiciary, for its part, has largely declined to address them directly, whether due to their logical complexity or to the legal sufficiency of other nonestablishment doctrines. Whatever the reason, there is as a consequence very little doctrine or case law from which to draw and, as the following discussion will reveal, it is not even clear where they fit within the Establishment Clause's existing analytical framework. Nevertheless, it is this author's contention that these issues — being "question[s] of kind and degree"[170] which "depend[ ] on all the circumstances of a particular relationship"[171] — may properly be viewed as two facets of doctrinal entanglement and that they should (and will) be analyzed as such.

a. The Degree of Legislative Translation

The Establishment Clause's prohibition on excessive doctrinal entanglement may have something to say, first of all, about the degree to which, and manner in which, religious values and premises have been legislatively translated in the process of statutory formulation and enactment. To what extent, in other words, has the legislature essentially "disentangled" these values and premises from their original religious

---

power to one or the other side in controversies over religious authority or dogma.'" (quoting Employment Div. v. Smith, 494 U.S. 872, 877 (1990)), *cert. denied*, 507 U.S. 952 (1993).

168 Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981).

169 *See, e.g.*, AUDI, *supra* note 32; GREENAWALT, *supra* note 32; PERRY, *supra* note 32.

170 Lynch v. Donnelly, 465 U.S. 668,e684 (1984).

171 Lemon v. Kurtzman, 403 U.S. 602,e614 (1971).

sources? In making this determination, at least two factors can be considered: first, the degree of residual specificity, denominational or otherwise, of any given religiously-derived statutory premise or value (particularly in relation to the religious sources or authorities from which it was derived), and second, the degree to which the statute's interpretation or enforcement necessitates subsequent reference to these religious sources or authorities.

The question of specificity (or generality) is probably the more relative and nebulous of the two, though it is not unbounded. Arguably *not* relevant to this inquiry should be the specificity, denominational or otherwise, of the *original* religious source or authority — whether, for example, it is a literal scriptural edict from just one religion or instead a traditional norm shared by several. After all, many widely accepted moral positions have very specific points of origination or crystallization, from Jesus of Nazareth to John Stuart Mill, and the inquiry into translation should not be predetermined by the specificity of the norms *before* they have even been translated. Rather, the analysis should focus on the actual output of the legislature.[172] Once properly focused, however, courts may then consider a variety of factors, such as how closely a law parallels a particular religious edict, including its comparative specificity in relation to original sources, as well as the extent to which the law embodies premises or norms that are denominationally, as opposed to broadly, held. In general, the greater the parallelism and denominationality, the more that the law may essentially be a governmental pronouncement of unmediated religious doctrine, and, in the final analysis, the easier it may be to conclude both that there is entanglement and that this entanglement is excessive.

The second and more determinate aspect of translation is the degree to which interpretation or enforcement of a statute, because of the religious premises that it reflects, effectively requires ongoing reference to religious sources or authorities. To the extent that it does, one may fairly conclude that the legislative task of disentanglement has not fully been accomplished. Importantly, fidelity to this ideal does not mean that statutes must be devoid of religious language or concepts. Indeed, even if the legislative adoption of a particular premise, one ultimately rooted in religious sources, could be considered a legislative declaration of the premise's truth — as might explicitly occur in a preambulary finding, for example — arguably such adoption would still not pose an entanglement

---

172 *See* Cordes, *supra* note 35, at 167–74 (discussing similar issues in terms of "inputs" and "outputs" (citing Douglas Laycock, *Freedom of Speech is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 795 (1996))).

problem as long as the gleaned premise is adequately severed from its religious foundations.[173]

This severance or doctrinal disentanglement requires, at the very least, that the legislature employ standards or terminology which do not purport to be expounding religious doctrine and which can be comprehended, interpreted, and enforced without regard to religious authority.[174] As the Fourth Circuit explained in upholding an Easter holiday against a challenge that the yearly determination of Easter created excessive entanglement, the government "showed that it consults commercially printed calendars to determine the date of Easter each year. This task certainly causes the [government] to interact with religion, but it does not constitute an excessive entanglement. The [government] does not have to consult with the Catholic or Protestant Churches to determine the date of Easter each year."[175] By contrast, if a statute expressly provided that a certain concept should be defined in accordance with religious law or clerical interpretations, as may occur with kosher labeling laws, then excessive entanglement would presumably result from the ju-

---

[173] *See, e.g.*, Commack Self-Serv. Kosher Meats, Inc. v. Rubin, 106 F. Supp. 2d 445, 456 (E.D.N.Y. 2000) (explaining that a state's kosher labeling laws "do not create excessive entanglement simply because they use a word of religious significance" but rather because "they require the State to affirmatively assume ongoing obligations of enforcement of purely religious laws, inevitably requiring the State to rely on religious authority and interpretation to properly enforce them"), *aff'd*, 294 F.3d 415 (2d Cir. 2002); *cf.* Jane L. v. Bangerter, 794 F. Supp. 1537, 1542–43 (D. Utah 1992) (holding that a state statutory preamble declaring that "unborn children have inherent and inalienable rights" — despite plaintiffs' allegation that the preamble "embodies a 'religious viewpoint'" — does not violate the Establishment Clause, but instead "can be read simply to express th[e] . . . value judgment" favoring childbirth over abortion (quoting Webster v. Reprod. Health Servs., 492 U.S. 490, 506 (1989))).

[174] *See* Granzeier v. Middleton, 173 F.3d 568, 574 (6th Cir. 1999) (finding no excessive entanglement in the holiday context where "public officials are not required to make religious determinations at all, much less on an ongoing basis"); ACLU of N.J. v. Schundler, 104 F.3d 1435, 1449–50 (3d Cir. 1997) (finding excessive entanglement in the religious display context where implementation of a municipal plan would, on an ongoing basis, "necessitate judgments regarding which religious and cultural holidays to celebrate, which religious and cultural symbols appropriately conveyed the proper non-sectarian message, and decisions regarding the relative importance and cultural components of different religions" and where the rendering of such judgments would potentially require consultation with religious authorities), *cert. denied*, 520 U.S. 1265 (1997); Bonham v. D.C. Library Admin., 989 F.2d 1242, 1244 (D.C. Cir. 1993) ("If the District of Columbia were choosing to close the library on Easter *based on the religious significance of the holiday*, it would be faced with selecting one of the days on which different Christian churches celebrate Easter. Thus, the District would be forced to decide matters of 'deep religious significance,' and to 'lend its power to one or the other side in controversies over religious authority or dogma.'" (emphasis added) (citation omitted) (quoting Aguilar v. Felton, 473 U.S. 402,i414 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); Employment Div. v. Smith, 494 U.S. 872, 877 (1990))).

[175] Koenick v. Felton, 190 F.3d 259, 268 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000).

dicial or administrative effort to discern and declare the concept's meaning.[176]

In light of this overview of legislative translation, it should be clear that merely borrowing a moral stance or premise from one or more religious traditions would likely not, much less categorically, create excessive entanglement. This in fact appears to be the conclusion reached by the nation's courts,[177] notwithstanding certain academic contentions to the contrary.[178] After all, when a legislature employs religious premises but

---

176 *See, e.g.*, *Commack Self-Serv. Kosher Meats*, 106 F. Supp. 2d at 455 (holding that state kosher labeling laws create excessive entanglement because "they necessarily require state officials to refer to and rely upon religious doctrines"); Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353, 1360, 1364 (N.J. 1992) (holding that a state kosher labeling law creates excessive entanglement in part because "Jewish law prescribing religious ritual and practice is inextricably intertwined with the secular law of the State"; "the State itself takes on the traditional religious supervisory role, thereby partially supplanting the Jewish organizations and institutions that historically have stood as final judges of religious matter"; and "[t]he State itself invariably would be one of the disputants, seeking to impose and enforce its own interpretation of Orthodox Jewish doctrine, and any adjudication by a court of such disputes inevitably would entail the application and interpretation of Jewish law"), *cert. denied*, 507 U.S. 952 (1993). *See generally* Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 COLUM. J.L. & SOC. PROBS. 1 (1992); Stephen F. Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEO. WASH. L. REV. 951 (1997); Jared Jacobson, Comment, Commack Self-Service Kosher Meats, Inc. v. Rubin*: Are Kosher Food Consumers No Longer Entitled to Protection from Fraud and Misrepresentation in the Marketplace?*, 75 ST. JOHN'S L. REV. 485 (2001); Karen Ruth Lavy Lindsay, Comment, *Can Kosher Fraud Statutes Pass the* Lemon *Test?: The Constitutionality of Current and Proposed Statutes*, 23 U. DAYTON L. REV. 337 (1998); Gerald F. Masoudi, Comment, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667 (1993).

177 *See* Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1344 n.13 (4th Cir. 1995) (explicitly "not hold[ing] that the mere incorporation of a religious standard in a statute automatically violates the Establishment Clause"); DePriest v. Commonwealth, 537 S.E.2d 1, 6 (Va. Ct. App. 2000) (holding that a prohibition against sodomy, even if it "ha[s] a basis in religious values," does not foster excessive entanglement); Dean v. District of Columbia, No. Civ. A.90-13892, 1992 WL 685364, at *8 (D.C. Super. Ct. June 2, 1992) (holding that a same-sex marriage prohibition, even if based upon legislators' religious beliefs, "fosters no excessive governmental entanglement with religion"), *aff'd*, 653 A.2d 307 (D.C. 1995) (per curiam). *Cf.* Cathy's Tap, Inc. v. Vill. of Mapleton, 65 F. Supp. 2d 874, 892 (C.D. Ill. 1999) (holding in regard to a prohibition on nude dancing and attendant liquor sales, which possibly reflects religious influences, that "no plausible argument can be made that the Ordinances foster an excessive entanglement with religion").

178 *See, e.g.*, Michaelson, *supra* note 15, at 310–11 ("[L]aws [prohibiting same-sex marriage] create an unconstitutional entanglement of government with religion. Clearly, neither the federal government nor any state could today set up a system of ecclesiastical courts charged with the responsibility of formulating marriage and divorce law based on the doctrines of a particular church. Yet the uncritical acceptance of the marriage definition supplied by just such courts merely perpetuates in one area of our law the religious entanglement that characterized a former era." (footnote omitted)). This critique is far too broad, however. Contemporary marriage and divorce law, with innovations such as prenuptial agreements and no-fault divorce, can hardly be characterized in their fullness as reflecting "the doctrines of a particular church." To the extent that there is correspondence, moreover, it is likely because the particular church has conformed to legal and cultural trends, rather than vice versa.

is otherwise enacting a temporally oriented and generally applicable statute, ordinarily it is not purporting to capture the "correct" Jewish or Catholic position, for example. Nor is it attempting to tether the statute's interpretation or enforcement to explicitly theological sources, such as the teachings of the Halakhah or the *Catechism of the Catholic Church.* Rather, it is looking to religious traditions, just as it might look to a variety of sources, for the moral insight that they can provide, extracting from them their temporal, contemporary value or significance.[179] In a sense, the bar on excessive entanglement may be conceived as a structural limitation, much like the separation of powers, preventing one institution from unduly trespassing upon or usurping the jurisdictional or substantive domain of another.[180] Yet no one would consider it a violation of the separation of powers for the Congress to look to an existing judicial rule of decision when crafting legislation. It is only when the Congress actually attempts to exercise the judicial power itself, by rendering judgment in a given case through imposition of the rule of decision that it deems appropriate, that the separation of powers becomes meaningfully threatened.[181] Likewise, a legislature does not run afoul of *Lemon*'s third prong merely because it looks to ambient religious moral norms when crafting laws, as long as these laws ultimately purport to speak for the state and its interests, and not for the churches and theirs.

Before turning to the issue of reliance, there is one other matter of legislative methodology that warrants consideration. This is the question of explicitness: to what extent does the Establishment Clause, whether as a matter of doctrinal entanglement or otherwise, restrict the ability of a

---

[179] *See* Perry, *supra* note 31, at 680 (distinguishing between legislators' "determin[ing] 'the authoritative sources of theological guidance' for you, or for me, or indeed for anyone, as we or they struggle to discern the correct answer to one or another controversial moral question" and legislators', "in deciding whether to disfavor conduct (at least partly) on the ground that the conduct is immoral, . . . answer[ing] the question of whether the conduct is in fact immoral on the ground or grounds in which *they* have the most confidence" and "do[ing] so whether or not the ground(s) is religious — and, so, even if it *is* religious" (citing an e-mail message from Andrew Koppelman to Michael Perry (June 27, 2000) (on file with author))).

[180] *See* Lemon v. Kurtzman, 403 U.S. 602,i614 (1971) ("The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other."); Malyon v. Pierce County, 935 P.2d 1272, 1288 (Wash. 1997) ("Excessive entanglement occurs when the distinction between the state and the church functions becomes blurred and such functions noticeably overlap."); *see generally* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998). To be sure, courts encountering potential doctrinal entanglement have sometimes invoked the concept of justiciability, which one normally associates with structural concerns such as institutional competence and the separation of powers. *See, e.g.*, Najafi v. INS, 104 F.3d 943, 949 (7th Cir. 1997); Nayak v. MCA, Inc., 911 F.2d 1082, 1083 (5th Cir. 1990), *cert. denied*, 498 U.S. 1087 (1991); Stansfield v. Starkey, 269 Cal. Rptr. 337, 345 (Cal. Ct. App. 1990); Baumgartner v. First Church of Christ, Scientist, 490 N.E.2d 1319, 1326 (Ill. Ct. App. 1986), *cert. denied*, 479 U.S. 915 (1986).

[181] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995); United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872).

legislature to *expressly* invoke religious premises in a statute or its preamble?[182] As noted at the outset of the article, at least a few scholars believe that there are such restrictions and that they may be substantial.[183] It is the position of this article, by comparison, that such explicitness may logically be analyzed under either doctrinal entanglement or endorsement, and that at least under doctrinal entanglement it should ordinarily be deemed probative but not fatal.[184]

If the legislature has succeeded in its disentanglement efforts, then *explicit and specific* religious references ought to be unnecessary if not inapposite, and their inclusion may justifiably cast doubt upon whether those efforts have actually been successful.[185] In fact, the more explicit and specific the references, the more they may be (or appear to be) official governmental declarations of particular religious doctrine, which is precisely what the prohibition on excessive doctrinal entanglement is designed to preclude. A rule rendering such references per se invalid, however, would be far too broad. A more reasoned analysis would examine both the extent to which a particular express reference has been adequately translated (looking, for example, at its residual specificity and its independent interpretability) and the extent to which it is truly vital, or has any actual legal significance, to the statute's interpretation and operation.

b. The Degree of Legislative Reliance

The other facet of doctrinal entanglement concerns the degree of legislative reliance. As with translation, this issue can also be divided into two elements. The first, which may be called justificatory necessity, measures the extent to which a law can be logically or conceptually justified apart from its religious premises, that is, whether *at least in theory* there is an adequate secular basis for the law. The second, which may be called actual causality, measures the extent to which the law would not have been enacted in the absence of these premises, that is, whether *as a matter of fact* the religious premises effected the law's enactment. Needless to say, these elements can converge, which is one reason for catego-

---

182 Whether such invocations occur in the deliberative process should arguably be of no independent constitutional significance, though they may be scrutinized after-the-fact to assess a statute's purpose. *See supra* note 87 and accompanying text. In addition, extraconstitutional norms of prudence and inclusivity may very well counsel against them.

183 *See supra* note 21 and accompanying text.

184 The relationship between the endorsement test and the excessive entanglement prohibition has received relatively little attention, even though the most recognized advocate of endorsement analysis on the Supreme Court, Justice O'Connor, has noted their commonality. *See* Lynch v. Donnelly, 465 U.S. 668, 687–88 (1989) (O'Connor, J., concurring).

185 By comparison, general preambulatory references — such as "The legislature finds that many religious traditions believe in the equality of persons" — should be largely unproblematic, though also (like many preambulatory findings) largely unnecessary.

rizing them together under the issue of reliance. In particular, as the justificatory necessity of the religious grounds reaches one hundred percent, so also must their actual causality, although the converse does not necessarily hold true.

While scholars often address these elements either as aspects of the secular purpose requirement or as extradoctrinal nonestablishment limitations, the contention here is that they can, in fact, be analyzed within the prohibition on excessive doctrinal entanglement. The logic of this contention is as follows. If a statute cannot be justified apart from religious premises — if there is no potential secular justification for the law — then the government has arguably eliminated the distinction between civil law and religious doctrine, thereby converting its statutory code, executive branch, and judicial tribunals into instrumentalities for the respective promulgation, enforcement, and interpretation of what is, in effect, religious law.[186] Likewise, if a statute would not have been enacted apart from religious premises, then the government has arguably allowed religious doctrine to dictate, rather than simply inform, the content of law — a scenario which, if an identifiable religious institution were involved, could very well be considered an impermissible delegation of civil authority amounting to excessive *political* entanglement.

Having stated the potential relevance of these elements, it is important to note that the practical scope of their application is, in all likelihood, quite modest. Assuming that both justificatory necessity and actual causality can be graded on continuums, only at the extreme end of each continuum — where there is no secular justification, for example, or where the religious grounds are singularly and absolutely causal — does there appear to be a strong case for excessive doctrinal entanglement under the model presented here. As long as there is a potential secular justification, and as long as the statute was apparently passed for secular reasons as well, then one can no longer say that the state is clearly promulgating religious or religiously-dictated law, or, to phrase it in doctrinal terms, one can no longer conclude with confidence that the doctrinal entanglement is excessive.

The limited applicable scope of these elements is, first and foremost, a function of their low probability of occurrence. For one thing, potential secular justifications can be conceived for virtually any type of law, although it is true that the relative plausibility of these justifications

---

[186] *See* Maylon v. Pierce County, 935 P.2d 1272, 1288 (Wash. 1997) ("Excessive entanglement occurs when the distinction between the state and the church functions becomes blurred and such functions noticeably overlap." (citing Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982))).

may vary greatly.[187] For another thing, statutes that are not intrinsically religious (and most morality regulations are not) rarely are enacted singularly and unquestionably because of underlying religious premises. "Indeed, a legislator may well be uncertain whether she would have supported the law in the absence of the religious premises."[188] Though periodically and understandably caricatured for purposes of judicial analysis, the legislative process (like much human decisionmaking) is notoriously multicausal and multimotivational, including many nonsubstantive influences such as party loyalty, concerns over reelection, and even the swapping of votes on entirely different bills.[189] In turn, the likelihood that there actually is a singularly necessary causal premise, religious or otherwise, is commonsensically rather remote.

Over and above their infrequency of occurrence, the impact of these elements is further constrained by the difficulty of their legally satisfactory demonstration or, in the alternative, of their meaningful judicial detection. That is, even if it could be known in the abstract that religious premises played a singularly necessary causal role, it is unlikely that this fact could be adequately proven before a court of law, particularly given that legislative majorities are comprised of many (sometimes hundreds) of members and that each member may have multiple justificatory bases for his or her vote.[190] All of this, moreover, assumes the ability of judges to differentiate between religious and secular grounds, even as to only a single legislator. However, as one scholar has correctly noted, "[t]he purity of separation of religious and secular motivations within individuals is simply an actual and analytical impossibility."[191]

Finally, the inquiries into both legislative reliance and legislative translation as a practical matter are likely limited by self-reflective judicial concerns about relative institutional competence, the separation of

---

187 *See* Perry, *supra* note 31, at 672 ("For virtually every moral belief on which a legislature might be tempted to rely in disfavoring conduct — for example, the belief that abortion, or homosexual sexual conduct, is immoral — it is the case that although for many persons the belief is religiously grounded (grounded on a religious premise or premises), for many others the belief is not religiously grounded but, instead, is grounded wholly on secular (nonreligious) premises."). Accordingly, a requirement of independent secular justification, without more, would be "so weak as to be inconsequential . . . ." *Id.* at 673. It should also be noted, however, that certain political disputes, to which legislatures must in some way respond, may in fact have *no* rational secular basis of resolution, thereby inviting (and potentially legitimating) recourse to religious grounds. *See* KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

188 Perry, *supra* note 31, at 672.

189 *See* Jones, *supra* note 33, at 365–66 (addressing this point in terms of motivations).

190 *See* Underkuffler-Freund, *supra* note 31, at 861 (noting that various Supreme Court Justices have acknowledged that "a statute may be motivated by both secular and religious considerations, or that what motivated one legislator may not have motivated another" (footnote omitted)).

191 *Id.* at 865.

powers, and the very real prospect that such inquiries may themselves create problems of entanglement. Just as the judiciary in the free exercise context, for example, has been troubled on institutional competence grounds by the inquiry into the substantive dimensions of an individual claimant's religion-related assertions,[192] so also might the judiciary be troubled by an inquiry into the substantive and methodological aspects of religiously informed legislative decisionmaking. More generally, such an inquiry is by nature extremely intrusive and, even apart from issues of religion, could very well be seen as a judicial usurpation of the core deliberative function of the legislature,[193] particularly in the realm of moral judgment.[194] Lastly, the judiciary is surely not unaware that its own efforts to discern the role of religion in the legislative process — especially the task of distinguishing religious from nonreligious premises — could very well create entanglement that is far more serious or excessive than the alleged legislative entanglement that it is attempting to identify and assess.[195]

Of course, none of this is to suggest that the elements of justificatory necessity and actual causality are entirely beyond scrutiny, and that the reliance (or translation) component of doctrinal entanglement is therefore effectively unusable. To the contrary, certain laws appear quite susceptible to their application. Blasphemy laws, for example, arguably fail both elements of reliance,[196] while kosher labeling laws can easily

---

[192] *See* Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion) ("It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs." (citing Employment Div. v. Smith, 494 U.S. 872, 887 (1990))); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 954–59 (1989) (discussing the judicial inquiries into sincerity, religiosity, and centrality).

[193] *See* Esbeck, *supra* note 84, at 599 n.67 (noting that "[a] motive analysis would have implications . . . for violating separation of powers"); *cf. also* Van Zandt v. Thompson, 839 F.2d 1215, 1219 (7th Cir. 1988) (reading the doctrine of Marsh v. Chambers, 463 U.S. 783 (1983), addressed *infra* at Part II.A, as deriving "partly from a degree of deference to the internal spiritual practices of another branch of government or of a branch of the government of another sovereign").

[194] *See* Perry, *supra* note 31, at 674 (explaining that nondeferential judiciary inquiry into whether a religiously informed statute can be justified on a plausible secular basis is problematic because, insofar as "[t]he secular bases of widely controversial moral beliefs are typically both contestable and contested," such inquiry "comes perilously close to inviting judges to substitute their moral judgment for the moral judgment of legislators and other policymakers," which "is scarcely a desirable state of affairs in a democracy").

[195] *Cf.* Hall v. Bradshaw, 630 F.2d 1018, 1022 (4th Cir. 1980) (explaining in regard to the doctrine of political divisiveness that "[j]udges can no more be entrusted with the task of assessing theological significance and hence the specific threat of divisiveness by a particular form of prayer than can other officials of the state be entrusted with the task of original composition" and that "judicial determinations of innocuousness would themselves necessarily constitute new theological expressions by the state having their own potentialities for creating divisiveness"), *cert. denied*, 450 U.S. 965 (1981); *see also infra* note 198 and accompanying text.

[196] *Cf.* State v. West, 263 A.2d 602, 604–05 (Md. Ct. App. 1970).

suffer from the deficiency of undertranslation.[197] Most morality regulations, however, do not possess these same kinds of overt defects, and it is likely that the judicial assessment of such regulations — whether in terms of translation, reliance, or any other facet of doctrinal entanglement — will therefore encounter many of the analytical problems and impediments identified here. In turn, because laws enjoy a presumption of constitutionality and the burden is on the challenger to demonstrate excessive entanglement, these analytical impediments, unless clearly overcome, ordinarily ought to preclude a court from finding against the government on (at the very least) the elements of justificatory necessity and actual causality.

2. *Political Entanglement*

The analysis of political entanglement is related to that of doctrinal entanglement, but with a different focus. Under this analysis, the concern is not that the government will be interpreting and expounding religious doctrine, but that the government, perhaps in an effort to prevent doctrinal entanglement, may delegate its interpretive or enforcement authority to religious institutions or officials. The case law makes clear, however, that this is impermissible. Although the government cannot preclude clergy in their general capacity as citizens from holding political office and thereby exercising governmental power,[198] its relationship to clergy in their specific capacity as clergy is more restricted. In particular, while it may select them because of their status as clergy to serve in a nonbinding advisory role,[199] it may not vest them because of that status with actual civil authority.[200] In the words of the Supreme Court, "[t]he Framers did not set up a system of government in which important, dis-

---

197 *See supra* note 176.

198 *See* McDaniel v. Paty, 435 U.S. 618, 626–29 (1978) (plurality opinion) (holding that the Free Exercise Clause prohibits the exclusion of clergy from political office).

199 *See* N.Y. State Sch. Bds. Ass'n v. Sobol, 591 N.E.2d 1146, 1148–52 (N.Y. 1992) (upholding a state regulation providing that an AIDS "advisory council shall consist of parents, school board members, appropriate school personnel, and community representatives, including representatives from religious organizations"), *cert. denied*, 506 U.S. 909 (1992).

200 *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126–27 (1982) (invalidating a state law vesting in the governing bodies of churches and schools the power to veto applications for liquor licenses within 500 feet of the church or school); Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1342–43 (4th Cir. 1995) (holding that a state kosher labeling statute was "on its face unconstitutional in that it fosters excessive entanglement of religious and secular authority by vesting significant investigative, interpretive, and enforcement power in a group of individuals based on their membership in a specific religious sect"); Voswinkel v. City of Charlotte, 495 F. Supp. 588, 598 (W.D.N.C. 1980) (invalidating a police chaplaincy as excessive entanglement, in part because "[t]he chaplain is either a church employee who must answer in his employment to the police chief; or he is a police employee in some respect answerable to the Church; or he is in some way responsible to both in the performance of what purports to be a public function").

cretionary governmental powers would be delegated to or shared with religious institutions."[201]

As with doctrinal entanglement, then, the critical issue is one of sufficient detachment or severance. When relying on religious premises, the legislature must make certain not only that the law's interpretation and enforcement will not require governmental reference to religious sources (doctrinal entanglement), but that the law's interpretation and enforcement will not entail the use of religious officials or authorities because of their official or authoritative religious status (political entanglement).[202]

In summary, what emerges from the foregoing analysis is that the excessive entanglement prohibition imposes no categorical bar on the legislative use of religious premises, and that such use is permissible as long as the interpretation and enforcement of the statute are sufficiently severed or disentangled from religious sources and authorities. To be sure, at least one federal district court has suggested (and earlier it was noted) that any more restrictive a rule could itself create entanglement problems for the judiciary, which would potentially be forced to assess the variable permissibility of religious influences in the lawmaking process.[203] In particular, the court rejected the notion that merely because an advocate before an administrative agency is religiously motivated, a favorable agency ruling should then be deemed excessive entanglement.[204] More generally, it is difficult to imagine what type of substantive analysis a more restrictive rule would necessitate, and that the judiciary would find such an analysis to be institutionally or jurisprudentially acceptable.

D. THE PROSCRIPTION AGAINST RELIGIOUS COERCION

The *Lemon* test's limitations on purpose, effect, and entanglement by no means exhaust the Establishment Clause's doctrinal expanse.[205]

---

201 *Larkin*, 459 U.S. at 127.

202 *See Barghout*, 66 F.3d at 1344 & n.13 (explaining that "the mere incorporation of a religious standard in a statute [does not] automatically violate[i] the Establishment Clause" but holding that a kosher labeling law "creates excessive entanglement of church and state authorities" when it uses an Orthodox standard and the law, even with the most problematic portions removed, "inevitably requires the intimate involvement of members of that faith, and the leaders of that faith, in discerning the applicable standard").

203 *See* Associated Contract Loggers, Inc. v. United States Forest Serv., 84 F. Supp. 2d 1029, 1037–38 (D. Minn. 2000), *aff'd*, No. 00-1730, 2001 WL 605010 (8th Cir. June 5, 2001) (per curiam).

204 *See id.* at 1038 ("If the Court were to rule that the [advocates'] religion barred them from participating in the [agency's] activities, the Court would necessarily become excessively entangled in deciding which religious believers could — and could not — advocate to influence governmental policy.").

205 They are, in the Court's words, "no more than helpful signposts . . . ." Hunt v. McNair, 413 U.S. 734, 741 (1973).

Also proscribed are laws that are actually or effectively coercive in some religiously significant manner. Under this prohibition, the government may not require or restrict conduct that either is intrinsically religious or is regulated by the government because of its potential religious meaning.[206] More specifically, the government may not compel participation in religious programs,[207] much less compel religious profession or observance outright,[208] and it may not impose legal penalties upon persons because they claim adherence to a particular religion or to no religion at all.[209] The Supreme Court has in turn declared that the government, at

---

206 *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) ("[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984))); Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (declaring that under the Establishment Clause "[n]either a state nor the Federal Government . . . can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion" and "[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance"). This prohibition is duplicated and to some extent complemented by the requirements of the Free Exercise Clause. *See* Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (explaining that under the Free Exercise Clause "[t]he government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, [or] impose special disabilities on the basis of religious views or religious status" (citations omitted)); Venters v. City of Delphi, 123 F.3d 956,i970 (7th Cir. 1997) ("[C]oercing a person to conform her beliefs or her conduct to a particular set of religious tenets can run afoul of both the establishment as well as the free exercise clauses."); Nicholson v. Bd. of Comm'rs, 338 F. Supp. 48, 57–79 (M.D. Ala. 1972) (invalidating under the Free Exercise Clause a theistic oath requirement for state bar admission).

207 *See, e.g.*, Warner v. Orange County Dep't of Prob., 115 F.3d 1068, 1075 (2d Cir. 1996) (holding that the Establishment Clause was violated by a probation requirement of participation in a religiously-based alcohol treatment program, where failure to participate would constitute a probation violation); Kerr v. Farrey, 95 F.3d 472, 476–80 (7th Cir. 1996) (similarly holding that the Clause is violated where a prison policy required certain inmates to attend a substance abuse program that had religious dimensions, and where nonattendance could indirectly decrease the possibility of parole); Griffen v. Coughlin, 673 N.E.2d 98 (N.Y. 1996) (also holding that the Clause is violated where nonattendance could jeopardize eligibility for an expanded family visitation program), *cert. denied*, 519 U.S. 1054 (1997).

208 *See* Torcaso v. Watkins, 367 U.S. 488, 492–96 (1961) (invalidating a state constitutional requirement of theistic profession for holding office); Anderson v. Laird, 466 F.2d 283, 283–84 (D.C. Cir. 1972) (per curiam) (holding in effect that the federal military academies' requirement of chapel attendance was inconsistent with the First Amendment), *cert. denied*, 409 U.S. 1076 (1972); O'Hair v. White, No. Civ.A-78-CA-220, 1984 WL 251621, at *1 (W.D. Tex. July 27, 1984) (recognizing the invalidity of a state constitutional requirement of theistic profession for holding office). *See generally* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12 (2000); *Lee*, 505 U.S. at 591–98; Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963). "The government . . . may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction." Zorach v. Clauson, 343 U.S. 306, 314 (1952).

209 *See Venters*, 123 F.3d at 970; Moore v. Gaston County Bd. of Educ., 357 F. Supp. 1037, 1043 (W.D.N.C. 1973). Speculating about government unrestrained by the Establishment Clause, one federal district judge has explained that "a county government could pass an ordinance requiring all county residents to adhere to a certain religious sect or practice or to abstain from all religious acts. For example, the government could require all citizens to con-

least in the financing context, "may not place its . . . coercive authority . . . behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations . . . ."[210]

The argument that religiously informed laws might violate the coercion prohibition proceeds as follows. Because laws — whether regulatory or criminal — are by nature coercive, when they are religiously informed, they become in a sense religiously coercive, even if the regulated or prohibited conduct itself is not intrinsically religious.[211] Thus, for example, a religiously informed prohibition on public nudity essentially requires citizens to dress in accordance with standards dictated by one or more religious belief systems, while a religiously informed prohibition on sodomy essentially requires citizens to conform their sexual conduct to religious norms of appropriate sexuality. In short, the legislative process, even if otherwise secular, effectively becomes a conduit for the coercive implementation of religious moral precepts.

From a logical standpoint, this is not a trivial argument and may even find some support in the case law.[212] From a legal standpoint, however, it likely suffers from the administrability-based problem of attenuation. Specifically problematic is that the actual coercion is not directly related to a religious belief or practice itself — abstaining from fornication, for example, is not intrinsically religious — but rather inheres in the essential nature of positive law.[213] This is no minor point of distinction. Normally, "[t]o satisfy the coercion test, a plaintiff must show that she was forced to participate in a religious activity"[214] such as prayer or the-

---

vert to Islam on threat of imprisonment or could heavily fine anyone who entered a church." Doe v. Harlan County Sch. Dist., 96 F. Supp. 2d 667, 679 (E.D. Ky. 2000).

210 Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 9 (1989). For commentary, see Matthew A. Peterson, Note, *The Supreme Court's Coercion Test: Insufficient Constitutional Protection for America's Religious Minorities*, 11 CORNELL J.L. & PUB. POL'Y 245 (2001).

211 *Cf.* Welch, *supra* note 80, at 103 ("The distance between moral belief and religious conviction is often a very short one: potentially, enforcing morality could become, in effect, enforcing religion.").

212 *See, e.g.*, Griswold Inn, Inc. v. State, 441 A.2d 16, 21 (Conn. 1981) (finding that a state law prohibiting alcohol sales exclusively on Good Friday "imposes the[i] observance [of Christian Good Friday rites] on Connecticut citizens, Christian and non-Christian alike" and that "[p]ermittees . . . are subject to revocation of their liquor licenses, a fine or imprisonment if liquor is served on that day").

213 *See* Dean v. District of Columbia, No. Civ. A.90-13892, 1992 WL 685364, at *7 (D.C. Super. Ct. June 2, 1992) (upholding rejection of same-sex marriage in part because "said refusal applies equally to same-sex applicants who are atheists, agnostics or believers, and no one thereby is coerced in the slightest to alter his or her convictions"), *aff'd*, 653 A.2d 307 (D.C. 1995).

214 Chaudhuri v. Tennessee, 886 F. Supp. 1374, 1383 (M.D. Tenn. 1995), *aff'd*, 130 F.3d 232 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998). An exception is apparently made in the taxation context, where the coerced activity (the required payment of taxes) is not itself religious, but the government then spends the revenue generated by the coerced activity in the

istic profession. "The essence of the Establishment Clause is its prohibition of coercion by governmental power applied for the benefit of religion. Such coercion may consist in compulsion to participate in religious activities or ceremonies, or in compulsion to pay taxes for the support of religious activities or programs."[215]

Here, however, the citizen is not coerced to undertake or avoid religious activity as such, but rather nonreligious activity that the legislature, informed by religious premises but legitimately within the exercise of its police power, has judged to be immoral, indecent, or otherwise harmful to the welfare of society. As Mark Cordes explains:

> [T]he mere fact a law was influenced by, or reflects religious values, should not in and of itself be a disqualifying feature. Certainly, to the extent a law mandates religious practices or observances, . . . it may violate the Establishment Clause. For example, school prayer, Bible reading, mandated instruction in religious dogma, . . . and other similar activities can be seen as violating the Constitution, not because of their religious motivation, but rather because they force involuntary religious observances. The coercive religious act itself, rather than the motivation behind it, creates an Establishment Clause problem.[216]

This, in fact, appears to be the predominant judicial view[217] and is in many ways congruent with modern free exercise doctrine, which pro-

---

direct pursuit of religious ends. *See* DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 407 (2d Cir. 2001) ("Although the presence or absence of . . . [compelled participation in a religious program] is an important part of the analysis, the Establishment Clause prohibits the expenditure of funds to aid in the establishment of religion even if the only coercion involved is in the collection of taxes to be used for that purpose.").

215 Donovan v. Tony & Susan Alamo Found., 722 F.2d 397,i403 (8th Cir. 1983), *aff'd sub nom.* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985).

216 Cordes, *supra* note 35, at 177–78.

217 *See, e.g.*, Cathy's Tap, Inc. v. Vill. of Mapleton, 65 F. Supp. 2d 874, 892 (C.D. Ill. 1999) (upholding ordinances prohibiting nude dancing and attendant liquor sales and, while acknowledging potential religious influence in their enactment, noting that the ordinances do not "say anything about the religious beliefs of any business, employee, or patron" and "do not require any person to believe or not believe in a religion"); *Dean*, 1992 WL 685364, at *7 ("No 'religion' is advanced by a refusal to [recognize same-sex marriages], since said refusal applies equally to same-sex applicants who are atheists, agnostics or believers, and no one thereby is coerced in the slightest to alter his or her convictions."); State v. Rhinehart, 424 P.2d 906, 910 (Wash. 1967) (upholding a state anti-sodomy statute and "see[ing] no merit to th[e] contention" that "the sodomy statute violates the establishment clause . . . in that, those persons who hold a majority belief have imposed their ethics on others who follow homosexual practices"), *cert. denied*, 389 U.S. 832 (1967). Likewise, in the statutory context of Title VII, an employer's enforcement of religiously-based employment prohibitions does not constitute cognizable religious discrimination, absent proof that the employee's own religious practices are implicated. *See, e.g.*, Hall v. Baptist Mem. Health Care Corp., 215 F.3d 618,i627 (6th Cir.

vides that the First Amendment generally does not protect citizens from the coercive operation of neutral and generally applicable laws, even if the laws impose substantial burdens on their religious practices.è[18] In short, the coercion prohibition of the Establishment Clause appears to erect no barrier to religiously informed laws, except (as with any other law) those which attempt to dictate religious observance or nonobservance. All of which is to say that this doctrine, like the others thus far analyzed, creates no categorical or presumptive bar on the legislative adoption of religious premises.

E. THE PRESUMPTIVE BAR ON INTERRELIGIOUS DISCRIMINATION

The final doctrine that might be triggered by religiously informed legislation is the general bar on discrimination among individual religions or among their respective beliefs and practices. In actuality, the Establishment Clause contains two anti-discrimination proscriptions, one regarding discrimination among religions[219] and the other regarding discrimination between religion and nonreligion.[220] Because of its greater relevance to the context of legislative moral judgments, only the former — prohibiting interreligious discrimination or what might be called denominational preferentialism — will be addressed here. It is certainly worth noting, however, that a straightforward reading of the latter prohibition would seem not only to allow, but indeed to require, a legislature to employ religious premises just as it employs nonreligious premises.

The specific concern about denominational preferentialism is longstanding,[221] and some consider its prohibition to be one of the Establishment Clause's few historically legitimate objectives.[222] Perhaps its most distinctive contemporary feature is that unlike the other doctrines, which function within their reach as total prohibitions, this doctrine renders facial religious discrimination presumptively, but not conclusively, unconstitutional. Converging with the balancing methodology of equal protection, it subjects such discrimination instead to judicial "strict scru-

---

2000); Pedreira v. Ky. Baptist Homes for Children, Inc., 186 F. Supp. 2d 757, 760–62 (W.D. Ky. 2001).

218 *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

219 *See* Bd. of Educ. v. Grumet, 512 U.S. 687,i 703 (1994); Larson v. Valente, 456 U.S. 228, 244–46 (1982); Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947); Sasnett v. Litscher, 197 F.3d 290, 292–93 (7th Cir. 1999).

220 *See Grumet*, 512 U.S. at 703; *Epperson*, 393 U.S. at 103–04.

221 *See Larson*, 456 U.S. at 244–45.

222 *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (contending that the Clause was intended "to prohibit the designation of any church as a 'national' one" and "to stop the Federal Government from asserting a preference for one religious denomination or sect over others"); Robert L. Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129 (1986) (similar).

tiny" and assesses the legal and logical necessity of the government's action.[223] More precisely, it requires the government to demonstrate that the discrimination "is justified by a compelling governmental interest . . . and . . . is closely fitted to further that interest."[224] Strict scrutiny will apply, however, only if the denominational preference is facial — that is, evident from the text or design of the statute apart from its application to any specific set of facts.[225] "If no such facial preference exists, [the court] proceed[s] to apply the customary three-pronged Establishment Clause inquiry derived from [*Lemon*]."[226]

The most immediate issue here, of course, is not one of analytical methodology, but of threshold applicability: could a legislature's advertence to certain religious premises, and not to other available religious premises, trigger this general prohibition on denominational discrimination? What makes this an especially salient inquiry is that denominational specificity appears to be precisely the type of exacerbating factor that might cause an otherwise valid, religiously informed law to run afoul of all three prongs — purpose, effect, and entanglement — of the *Lemon* test.[227] At least one federal circuit court, in fact, has specifically stated that "explicit statutory incorporation of a particular religion's belief may violate the Establishment Clause"[228] and that, when a "law track[s] al-

---

223 *See Larson*, 456 U.S. at 246–47; Koenick v. Felton, 190 F.3d 259,i264 (4th Cir. 1999) ("Strict scrutiny in the Establishment Clause context is to be used to evaluate only those statutes that facially discriminate between religious denominations or between religion and nonreligion." (citing Hernandez v. Comm'r, 490 U.S. 680, 695 (1989))), *cert. denied*, 528 U.S. 1118 (2000); Adair v. England, 183 F. Supp. 2d 31, 47–48 (D.D.C. 2002) (same). In fact, the relationship to equal protection is less one of convergence than of redundancy, given that religious discrimination (including presumably denominational discrimination) is apparently subject to heightened or strict scrutiny directly under the guarantee of equal protection. *See* Miller v. Johnson, 515 U.S. 900,i911 (1995); Burlington N. R.R. Co. v. Ford, 504 U.S. 648, 651 (1992); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Peter v. Wedl, 155 F.3d 992, 997 (8th Cir. 1998); Tolchin v. Supreme Court of N.J., 111 F.3d 1099, 1113–14 (3d Cir. 1997).

224 *Larson*, 456 U.S. at 247 (citation omitted).

225 "To facially discriminate among religions, a law need not expressly distinguish between religions by sect name. Such discrimination can be evidenced by objective factors such as the law's legislative history and its practical effect while in operation." Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle, 212 F.3d 1084, 1090 (8th Cir. 2000) (citation omitted), *cert. denied*, 532 U.S. 957 (2001).

226 *Hernandez*, 490 U.S. at 695.

227 *Cf., e.g.*, Epperson v. Arkansas, 393 U.S. 97, 103 (1968) (invalidating an education law, the sole purpose of which is to protect or advance "a particular interpretation of the Book of Genesis by a particular religious group"); Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 346 (5th Cir. 1999) (invalidating an education law, "the primary effect of [which] is to protect and maintain a particular religious viewpoint"), *cert. denied*, 530 U.S. 1251 (2000); Bogen v. Doty, 598 F.2d 1110, 1114 (8th Cir. 1979) (upholding a county board's practice of beginning meetings with a clerical invocation, but admonishing that the board may become "excessively entangled in religion by giving public approval to some groups while denying it to others").

228 Jane L. v. Bangerter, 61 F.3d 1505, 1516 (10th Cir. 1995).

most verbatim [a particular denomination's] official position[,] . . . a case-by-case, fact-specific inquiry would arguably be in order to determine whether the law does more than merely coincide with general 'religious tenets' of the [denomination]:"[229] Even more striking is a federal district court's recent declaration that the government "cannot favor one religion without disfavoring another" and that "[o]ne belief system cannot be supported and extolled without prejudicing another."[230]

The key, once again, is almost certainly the concept of detachment or severance, which featured prominently in (and thus to some extent duplicates) the earlier analysis of excessive doctrinal entanglement. Accordingly, not only must a law be interpretively and adminstratively disentangled from formal religious doctrines and authorities, the value judgments that it embodies must also be compositionally detached from the discernibly distinct views of any particular religious denomination, a mandate that very much parallels the translational concern about denominational specificity under the entanglement prohibition. Needless to say, this is a rather abstract mandate, and it is not surprising that courts appear to prefer addressing the issue of interreligious discrimination under one of *Lemon*'s three prongs rather than as a freestanding analysis.[231] After all, it is generally much easier (on a variety of levels) to hold that a law's preeminent purpose or primary effect is or is not religious in a generic sense than to hold that a law's value judgments are or are not sufficiently detached from the beliefs or positions of a particular religion or denomination. Moreover, a law which transgresses one of these standards under *Lemon* would be conclusively invalid, while under the anti-discrimination doctrine, the law, though presumptively invalid, would further have to be subjected to strict scrutiny.

To the extent that a court would undertake an independent analysis of denominational preferentialism, however, that analysis would likely involve the following questions. First, does the law expressly invoke denominationally specific terminology, concepts, or positions, or is it of a more interdenominational character in the manner of so-called civil

---

[229] *Id.* at 1516 n.10. At issue in *Jane L.* was a Utah abortion statute which allegedly mirrored the position of the Church of Jesus Christ of Latter-Day Saints.

[230] Adland v. Russ, 107 F. Supp. 2d 782, 787 (E.D. Ky. 2000), *aff'd*, No. 00-6139, 2002 WL 31250744 (6th Cir. Oct. 9, 2002).

[231] *See, e.g.*, Jabr v. Rapides Parish Sch. Bd., 171 F. Supp. 2d 653, 663–64 (W.D. La. 2001) (using the endorsement formulation of *Lemon*'s second prong to assess, and hold invalid, the distribution of the New Testament in public schools). This also appears to be true regarding discrimination between religion and nonreligion. *See, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 15–17 (1989) (finding no secular objective because a sales tax exemption applied only to religious organizations); Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 279 (5th Cir. 1996) (finding that a "statute's effect is to advance religion over irreligion because it gives a preferential, exceptional benefit to religion that it does not extend to anything else"), *cert. denied*, 519 U.S. 965 (1996).

religion?[232] What this initial stage basically assesses are the existence and degree of the alleged denominational specificity. Second, even if there is an apparent degree of facial denominational specificity, is there nevertheless reason to believe that the law was enacted apart from this specificity, whether on secular or on broader religious grounds?[233] What this second stage assesses, in other words, is whether the denominational specificity is actually meaningful or whether it is merely coincidental or nonoperative. Third, if there is meaningful facial denominational specificity, is it justified by a compelling governmental interest and is it closely fitted to further that interest?[234] What this final stage obviously assesses is whether such specificity, under the weight of strict scrutiny, can be constitutionally sustained.

For present purposes, the most significant aspect of this analysis is simply that it does not contemplate, much less require, the categorical preclusion of religiously informed legislation. Rather, as with the other Establishment Clause doctrines, the effect of the bar on interreligious discrimination must be assessed on a statute-by-statute or ordinance-by-ordinance basis. This assessment, moreover, does not consist of mechanically-applied criteria, bright lines, or black-and-white classifications, but instead depends on careful judicial scrutiny of a law's language and content, both on their own and in comparison to accepted ambient levels of religious cultural and legal influence, followed by a judicial assessment of any facial discrimination that is identified. As further suggested, however, this is a relatively complicated undertaking which may itself pose a risk of doctrinal entanglement, and it is not surprising that courts appear to prefer the relatively more confined and sanitized analysis offered by the three prongs of *Lemon*.

---

232 *See Jane L.*, 61 F.3d at 1516 & n.10; Stein v. Plainwell Cmty. Schs., 822 F.2d 1406, 1408–10 (6th Cir. 1987) (embracing a "civil religion" standard for ceremonial invocations and benedictions, and invalidating two high school commencement ceremonies specifically because "they employ the language of Christian theology and prayer" and "some expressly invoke the name of Jesus as the Savior"). To be denominationally nonspecific, the law need not, however, be congruent with the terminology, concepts, or positions of all religions. *See* Civic Awareness of Am., Ltd. v. Richardson, 343 F. Supp. 1358, 1360 (E.D. Wis. 1972) ("[F]or temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation."). In fact, it is hard to imagine that any law could survive such a standard of universality.

233 *Cf.* Marsh v. Chambers, 463 U.S. 783, 793 (1983) (upholding not only a state-sponsored legislative chaplaincy, but also the reappointment of the same chaplain — and thus of the same denomination — for sixteen years, because the Court could not "perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church" but instead found that "the evidence indicates that [the chaplain] was reappointed because his performance and personal qualities were acceptable to the body appointing him").

234 *See* Hernandez v. Comm'r, 490 U.S. 680, 695 (1989); Larson v. Valente, 456 U.S. 228, 246–47 (1982); Koenick v. Felton, 190 F.3d 259,i264 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000).

It should be noted, in closing, that one of the factors that should *not* materially affect the Establishment Clause analysis of a religiously informed statute is whether the legislature's consideration or enactment of the statute — or more generally its contemplation of religious premises in these processes — involves or is accompanied by interdenominational bickering or so-called political divisiveness. Traditionally, the concern about divisiveness has arisen under the excessive entanglement prong of *Lemon*.[235] It is raised at this juncture precisely because of the relatively heightened risk for such bickering or divisiveness that perceived interdenominational preferentialism might create.

However real this risk may be — and however unseemly may be the fruits of its realization — at least three factors suggest that it should not affect the constitutional assessment of religiously informed legislation.[236] First, the Supreme Court itself has indicated that such divisiveness does not have the independent constitutional significance that some of its earlier cases had potentially indicated,[237] and further that it is largely inapplicable outside of the school funding context.[238] As the Sixth Circuit, reflecting on the more recent case law, has explained: "Political divisiveness may be some evidence of excessive entanglement, but divisiveness alone, in the absence of administrative entanglement, is not enough to

---

235 *See* Bogen v. Doty, 598 F.2d 1110, 1114 (8th Cir. 1979) (describing "political divisiveness as one element of entanglement").

236 For an extended and spirited critique of the political divisiveness criterion, see Edward McGlynn Gaffney, Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 25 ST. LOUIS U. L.J. 205 (1980). Of particular relevance, especially in light of the analysis in Part III, are Professor Gaffney's observations that the political divisiveness doctrine contravenes "the right of all citizens to participate fully in the process of political decision making in our democracy," *id.* at 232, and that it "not only espouses a quietist view that religion has little, if anything, to do with involvement in the social order, but also exerts pressure on religious groups in America to adopt this view of life." *Id.* at 235.

237 *See* Agostini v. Felton, 521 U.S. 203, 233–34 (1997) ("Under [the Court's] current understanding of the Establishment Clause," the consideration of political divisiveness is "insufficient by [itself] to create an 'excessive entanglement.'"); Lynch v. Donnelly, 465 U.S. 668, 684 (1984) ("[T]his Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct."); Teitel, *supra* note 102, at 773 (explaining that "the Court has retreated" from its analysis of political divisiveness under the entanglement prong).

238 *See* Bowen v. Kendrick, 487 U.S. 589,i617 n.14 (1988) (explaining — in a case where the challenged legislation, concerning sexuality education, was likely religiously informed — that even if a statute involves subject matter over which "there may be a division of opinion along religious lines . . . the question of 'political divisiveness' should be 'regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools'" (quoting Mueller v. Allen, 463 U.S. 388, 404 n.11 (1983))); Vernon v. City of L.A., 27 F.3d 1385, 1401 (9th Cir. 1994) (noting that the divisiveness "inquiry seems to be applied mainly in cases involving direct financial subsidies paid to parochial schools or to teachers in parochial schools"), *cert. denied*, 513 U.S. 1000 (1994).

render a practice unconstitutional."[239] Second, unlike the educational funding context, where political divisiveness is arguably generated by the very phenomenon of governmental aid,[240] the nonfiscal regulatory context — from abortion to zoning — is inherently laden with divisiveness that cannot directly be attributed to the government itself, notwithstanding the libertarian ideal of a minimalist state.[241] Accordingly, several courts have refused to find an Establishment Clause problem where the plaintiff has failed to demonstrate such a causal or attributory relationship,[242] a position which complements the Supreme Court's refusal to attribute to the government any divisiveness that may arise because of the plaintiff's own lawsuit.[243]

Third and finally, with some exceptions, it might be difficult today to demonstrate true interdenominational divisiveness, given both the prospect of interdenominational cooperation (conservative evangelical Protestants and conservative Roman Catholics, for example) and the probability of intradenominational disagreement (liberal Presbyterians

---

239 Brooks v. City of Oak Ridge, 222 F.3d 259, 266 (6th Cir. 2000) (citations omitted), *cert. denied*, 531 U.S. 1152 (2001).

240 *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794–96 (1973) (noting that such "assistance . . . carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion" and emphasizing "the potentially divisive political effect of an aid program"); *Bogen*, 598 F.2d at 1114 (explaining that the "divisive potential" attending the practice of beginning county board meetings with clerical invocations is not "of the same caliber as the annual appropriation of public funds anticipated but forbidden in *Lemon*").

241 *See* Am. Family Ass'n, Inc. v. City & County of S.F., 277 F.3d 1114, 1123 (9th Cir. 2002) (explaining that if the emotional explosiveness of a particular issue "were enough to create an Establishment Clause violation . . ., government bodies would be at risk any time they took an action that affected potentially religious issues, including abortion, alcohol use, [and] other sexual issues"). As Professor Choper notes, "political strife often occurs along religious lines, even on what many regard as secular issues such as abortion, prostitution, gambling, obscenity, and so on. The mere fact that opponents and proponents of a law line up according to their religious beliefs cannot make the law itself unconstitutional." Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709, 1720 (2000). Moreover, it is arguably the case that "political divisions along the lines of race, economic status, even perhaps gender, are actually and potentially more divisive than religious divisions." James Hitchcock, *Church, State, and Moral Values: The Limits of American Pluralism*, 44 LAW & CONTEMP. PROBS. 3, 8 (1981).

242 *See* Cammack v. Waihee, 932 F.2d 765, 781 (9th Cir. 1991) (refusing to find entanglement where the political divisiveness is not shown to have been caused by the governmental action), *cert. denied*, 505 U.S. 1219 (1992); Southside Fair Hous. Comm. v. City of N.Y., 928 F.2d 1336, 1351 (2d Cir. 1991) (noting that interdenominational "friction . . . is an unfortunate political reality" but holding that "the fact that [a particular governmental action] . . . has been politically divisive is not alone sufficient evidence of entanglement"); Pruey v. Dep't of Alcoholic Beverage Control of N.M., 715 P.2d 458, 461 (N.M. 1986) (finding no excessive entanglement where "[t]here is no divisive political potential *enhanced by* th[e] statute" (emphasis added)).

243 *See* Lynch v. Donnelly, 465 U.S. 668, 684–85 (1984) ("A litigant cannot, by the very act of commencing a lawsuit, . . . create the appearance of divisiveness and then exploit it as evidence of entanglement.").

versus conservative Presbyterians, for example).[244] Yet "the Establishment Clause is not concerned with divisiveness generally, but only political divisiveness along religious lines"[245] — that is, among distinct denominations. Only the latter type of divisiveness poses "a threat to the normal political process"[246] and only the latter "was one of the principal evils against which the First Amendment was intended to protect . . . ."[247] Absent this particular type of divisiveness, "political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government . . . ."[248] In turn, heated disagreement over the regulation of public morality, even if heavily influenced by religious participants or positions, should likewise be viewed as nothing more than functional self-government and, in the final analysis, should not render the resulting legislation suspect under the Establishment Clause.[249]

II. JUDICIAL AFFIRMATIONS OF TRADITIONAL STATE AUTHORITY

The parameters of Establishment Clause jurisprudence are defined not only by the holdings of prior cases, and by the doctrines which they announce, but also by various dimensions of legal and cultural tradition. Examined here will be two manifestations of tradition within this jurisprudence. The first, addressed in Section A, operates as a formal exception to several of the tests articulated in Part I. In essence, it creates a safe harbor for certain longstanding and pervasive practices that might otherwise be deemed unconstitutional under these tests. The second, ad-

---

244 *See* Gaffney, *supra* note 236, at 235 (pointing out that the political divisiveness doctrine "fails to respect the profound differences which exist among and within religious communities over many issues of public policy"); Hitchcock, *supra* note 241, at 4 (noting the importance of "[t]he division, within each denomination, between what are often called . . . 'liberal' and 'conservative' elements" to understanding American religion since the 1960s); Michael J. Perry, *Christians, the Bible, and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 WAKE FOREST L. REV. 449, 456 (2001) (explaining in regard to homosexual sexual conduct that "disagreement among Christians . . . is less interdenominational than intradenominational; it is less a disagreement that divides some Christian denominations from other Christian denominations than one that divides many members of several denominations from many other members of the same denominations").

245 Members of Jamestown Sch. Comm. v. Schmidt, 699 F.2d 1, 12 (1st Cir. 1983), *cert. denied*, 464 U.S. 851 (1983).

246 Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

247 *Id.*

248 *Id.*

249 In addition, and congruent with the discussion *infra* Part III.A, Michael McConnell has criticized the political divisiveness criterion as being "a powerful deterrent to religious participation in politics." McConnell, *supra* note 20, at 216. For similar views, see Mark J. Beutler, *Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications*, 2 GEO. MASON L. REV. 7, 60–61 (1993); David E. Steinberg, *Alternatives to Entanglement*, 80 KY. L.J. 691, 707–14 (1992).

dressed in Section B, has not been similarly formalized but nevertheless is so inseparable from American law that it necessarily informs the interpretation of constitutional provisions, including the Establishment Clause. This is the judiciary's historical and continuing recognition that the government, using the police power, may regulate or criminalize conduct on the basis of qualitative moral judgments, some of which invariably implicate religious premises.

A. THE VALIDATION OF LONGSTANDING PRACTICES UNDER THE ESTABLISHMENT CLAUSE

The possibility that one of the doctrines examined in Part I might by its normal application restrict legislative utilization of religious premises does not conclude the Establishment Clause analysis, much less doom the practice. In fact, the Supreme Court effectively recognized in *Marsh v. Chambers*[250] an exception for traditional governmental practices, especially those condoned by the First Amendment's framers,[251] which largely immunizes such practices from the full force of these doctrines.[252] There appear to be three requirements that a practice must satisfy in order to come within the *Marsh* exception: (1) *antiquity*, the existence of the practice in some form at the nation's founding,[253] (2) *continuity*, its continuation to the present,[254] and (3) *ubiquity*, its wide-

---

250 463 U.S. 783 (1983).

251 *See id.* at 790–91. "It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable." *Id.* at 790.

252 *See* Allen v. Consol. City of Jacksonville, 719 F. Supp. 1532, 1538 (M.D. Fla. 1989) ("Under the *Marsh* method, historical circumstances contemporaneous with the passage of the establishment clause by the First Congress may insulate a practice from attack under that clause."), *aff'd*, 880 F.2d 420 (11th Cir. 1989) (per curiam). A second circumstance in which the doctrines do not appear to apply with full force is when the government is attempting to accommodate religious practices. *See, e.g.*, Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc., 224 F.3d 283, 287 (4th Cir. 2000) (explaining that "the government is entitled to accommodate religion without violating the Establishment Clause, and at times the government must do so" and that "[t]his authorized . . . accommodation of religion is a necessary aspect of the Establishment Clause jurisprudence because, without it, government would find itself effectively and unconstitutionally promoting the absence of religion over its practice"); Montano v. Hedgepeth, 120 F.3d 844,i850 n.10 (8th Cir. 1997) ("[S]tates might commit a technical violation of the Establishment Clause by even hiring prison chaplains. Nonetheless, this is condoned as a permissible accommodation for persons whose free exercise rights would otherwise suffer.").

253 *See Marsh*, 463 U.S. at 786–89, 795 (two centuries nationally; one century for the state); *accord* Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997) (155 years old), *cert. denied*, 522 U.S. 814 (1997).

254 *See Marsh*, 463 U.S. at 786, 788, 792, 795.

spread use or observance.[255] So, for example, in *Marsh* the Court upheld the practice of legislative prayer by a state-sponsored chaplain because it "is deeply embedded in the history and tradition of this country"[256]; "has continued without interruption ever since [an] early session of Congress . . . [and has] been followed consistently in most of the states"[257]; and, through an "unambiguous and unbroken history of more than 200 years, . . . has become part of the fabric of our society."[258] The Justices further noted, however, that even a longstanding practice with these attributes could be unconstitutional if undertaken with an impermissible motive such as religious discrimination[259] or if "exploited to proselytize or advance any one, or to disparage any other, faith or belief."[260]

The Supreme Court has fully applied the exception only once, in *Marsh* itself, although it has similarly weighed the importance of tradition in decisions upholding a municipality's display of a nativity scene[261] and a state-authorized property tax exemption for religious organizations.[262] Lower courts, for their part, have employed the exception to

---

255 *See id.* at 788–89, 795; *accord Tanford*, 104 F.3d at 986. Professor Steven Smith has suggested that if *Marsh* is to be doctrinally conceptualized as an exception — a conception with which he takes issue, see Steven D. Smith, *Separation as a Tradition*, J.L. & POL. (forthcoming 2002) — then perhaps it should also include a fourth criterion of *specificity*, and that a general practice such as religiously premised lawmaking would likely not satisfy such a criterion. *See* e-mails from Steven D. Smith, Professor, Notre Dame Law School, to Scott C. Idleman, Associate Professor, Marquette University Law School (Oct. 29 & 31, 2001) (on file with author). Even if adopted, however, this criterion would not render religiously informed laws completely beyond the cognizance of *Marsh*. While the practice of religiously informed lawmaking *in its entirety* may no longer qualify, it is quite likely that more specific instances of the practice, such as religiously informed sodomy or marriage laws, for example — and legal challenges will necessarily be leveled at this level of specificity — could still qualify insofar as sodomy or marriage laws, among others, have traditionally been informed at least in part by religious premises and values.

256 *Marsh*, 463 U.S. at 786.

257 *Id.* at 788–89.

258 *Id.* at 792.

259 *See id.* at 793–94; *accord* Snyder v. Murray City Corp., 159 F.3d 1227, 1234 (10th Cir. 1998) (en banc).

260 *Marsh*, 463 U.S. at 794–95; *accord Snyder*, 159 F.3d at 1233–34 n.10; Stein v. Plainwell Cmty. Schs., 822 F.2d 1406, 1410 (6th Cir. 1987) ("The invocations and benedictions delivered at these occasions should not be framed in language that is unacceptable under *Marsh*, language that says to some parents and students: we do not recognize your religious beliefs, our beliefs are superior to yours."). "[T]he kind of legislative prayer that will run afoul of the Constitution is one that proselytizes a particular religious tenet or belief, or that aggressively advocates a specific religious creed, or that derogates another religious faith or doctrine." *Snyder*, 159 F.3d at 1234.

261 Lynch v. Donnelly, 465 U.S. 668, 673–77 (1984) (upholding such a display partly because it fell within a widely observed and unbroken tradition of "official acknowledgment . . . of the role of religion in American life").

262 Walz v. Tax Comm'n, 397 U.S. 664, 676–78 (1970) (noting that all fifty states have such exemptions, that religious organizations have been exempt from federal income taxes for over seventy-five years, and "that Congress, from its earliest days, has viewed the Religion Clauses . . . as authorizing statutory real estate tax exemption to religious bodies").

uphold a variety of practices, including the creation of a legislative prayer room within a state capitol building,[263] the provision and financing of a military chaplaincy program,[264] the commencement of school board meetings with prayer,[265] the selection of opening prayers at a city council meeting,[266] and the use of an invocation and benediction at a state university graduation.[267] The only clear categorical limitation on the test's applicability, in fact, is "in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted."[268]

With regard to religiously informed legislation, the relevance of the *Marsh* exception is obviously contingent on the extent to which the legislative use of religious premises has been a discernible aspect of the nation's legal tradition, from the founding to the present era. The general answer to that inquiry, of course, is that such use has very much been a part of the fabric of American law.[269] As Daniel Conkle has observed, "[m]any of our laws, even our basic system of constitutional government and individual rights, rest to a significant degree on religious understand-

---

263 Van Zandt v. Thompson, 839 F.2d 1215, 1218–20 (7th Cir. 1988).

264 Katcoff v. Marsh, 755 F.2d 223, 232–33 (2d Cir. 1985).

265 Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ., 11 F. Supp. 2d 1192, 1196–98 (C.D. Cal. 1998). *But cf.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 376–77 (6th Cir. 1999) (holding that the *Marsh* analysis does not apply to school board meetings).

266 Snyder v. Murray City Corp., 159 F.3d 1227, 1233–36 (10th Cir. 1998) (en banc), *cert. denied*, 526 U.S. 1039 (1999).

267 Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997) (upholding the practice because it "has prevailed for 155 years and is widespread throughout the nation"), *cert. denied*, 522 U.S. 814 (1997).

268 Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987); *see also* Lee v. Weisman, 505 U.S. 577, 596–97 (1992) (refusing to apply *Marsh* to middle school graduation). In addition, some lower courts have expressed reluctance to extend *Marsh* beyond the particular domain of legislative prayer. *See, e.g.*, Cammack v. Waihee, 932 F.2d 765, 772 (9th Cir. 1991) (finding it inapplicable to an assessment of a state Good Friday holiday), *cert. denied*, 505 U.S. 1219 (1992); Graham v. Cent. Cmty. Sch. Dist., 608 F. Supp. 531, 535 (S.D. Iowa 1985) ("The *Marsh* decision is a singular Establishment Clause decision that rests on the 'unique history' of legislative prayer, and the holding of that case is clearly limited to the legislative setting.").

269 *See* Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) (noting "the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings"); Cordes, *supra* note 35, at 113 ("[The constitutional] separation of church and state has never been understood as prohibiting religious convictions from entering the public square and informing the body politic on an equal basis with other belief systems. Rather, since this country's founding, religious convictions have frequently played an important role in American politics."); Dean M. Kelley, *The Rationale for the Involvement of Religion in the Body Politic*, *in* THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY 159, 167 (James E. Wood, Jr. & Derek Davis eds., 1991) (noting the pervasive role of religion in the American political tradition); Smith, *supra* note 100, at 988–89 (same); *see also Edwards*, 482 U.S. at 615 (Scalia, J., dissenting) ("Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. . . . [P]olitical activism by the religiously motivated is part of our heritage.").

ings of the world, of human beings, and of social relationships."[270] Even those who advocate the reformist argument must to some extent concede this point, given that one of the key elements of their position is that certain laws, especially older laws, *do* have an undeniably religious basis (and it is precisely this basis that renders them constitutionally problematic).[271]

If there is a critical disjunction, then, between the practice of religiously informed legislation and the doctrinal exception for traditional practices, it would likely not involve the requirement of antiquity, even under the more rigorous criterion of original understanding.[272] Nor is there any reason to believe that there would be an issue under the third requirement, that of ubiquity, given both the pervasiveness of religious belief and the relative homogeneity of the legal system nationwide. One could argue, however, that there may be a problem with continuity, or the requirement that the practice "has continued without interruption ever since [the founding era]"[273] with an "unambiguous and unbroken history of more than 200 years . . . ."[274] In particular, recent generations have almost certainly witnessed a decline in the explicit invocation of manifestly religious norms or authorities in the legal system as a whole, corre-

---

270 Conkle, *supra* note 151, at 7; *see also* Gedicks & Hendrix, *supra* note 141, at 1618–19 ("Virtually all of the conceptual pillars of liberal democracy — impartial adjudication, judicial review, liability for negligence, the presumption of innocence, habeas corpus, equal protection of the laws, good faith — have an origin or justification in the Judeo-Christian tradition as reflected in the Bible. Indeed, the very concept of equal respect for persons — perhaps the dominant theme of modern American constitutionalism — grew out of ancient Israel's projection of its captivity in Egypt onto the revealed rules of social coexistence in the promised land." (footnotes omitted)). Even the Establishment Clause "was substantially informed by religious values and beliefs about the nature of human beings and the state," Scott C. Idleman, Note, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433, 460 (1993), thus rendering "counterintuitive if not somewhat bizarre" the notion that the clause itself disfavors, let alone precludes, laws which incorporate religious premises or moral norms. *Id.*; *see also* Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 645–47 (recounting the original religious bases for the First Amendment religion clauses); Smith, *supra* note 100, at 978 (noting the inversion of original and contemporary thinking on this issue).

271 As one such advocate argues, "most morality legislation is 'a relic in the law of our religious heritage.'" Michaelson, *supra* note 15, at 306 (quoting Henkin, *supra* note 5, at 402).

272 *See* Underkuffler-Freund, *supra* note 31, at 979–81 (explaining that an historical approach reveals that "the Establishment Clause does not prohibit the existence of religious values, beliefs, or ideals in the workings of government" and that "the existence of religious motivations of lawmakers . . . presents no violation of the Establishment Clause" but, rather, that "the scope of the Clause [is restricted] to the protection of freedom of conscience through prohibition of the merger of governmental and religious institutional power"). The influence of identifiable religious norms was, if anything, more significant during the founding era than during modern times. *See* HENRY P. MAY, THE ENLIGHTENMENT IN AMERICA xiii–xiv (1976); Smith, *supra* note 100, at 966–71.

273 Marsh v. Chambers, 463 U.S. 783, 788 (1983).

274 *Id.* at 792.

sponding to a more general trend towards the secularization of law and politics.[275]

Importantly, however, it appears to be only the *explicitness* of legislative religious invocations — and the *manifestness* of their religious character — that have declined. In fact, what has likely happened is that merely the language and visage of the lawmaking process have undergone secularization, and that the content of legislation continues to be informed by religious premises and values, whether of legislators themselves or of those whom they represent. "[T]he transformation," in other words, "has been largely cosmetic, one in which religion has simply been removed from sight."[276] As described by one scholar of secularization, "although [religious] mores may not rise to the surface as overt arguments or principles in the deliberations of a political assembly, they are very apt to be present and pervasive in the presuppositions, sentiments, and objectives that motivate and direct such deliberations."[277]

This thesis, though not readily field-tested, is highly credible as a matter of ordinary experience and common sense. Consider, first of all, that "over 90 percent of the members [of Congress] say that they consult their religious beliefs before voting on important matters,"[278] which

---

275 *See* Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 789 (1986) (observing that "[w]ithin the past two generations the public philosophy of America has shifted radically from a religious to a secular theory of law, from a moral to a political or instrumental theory"); Gedicks & Hendrix, *supra* note 141, at 1612 (contending that "[u]ntil forty years ago, th[e] language and imagery [of religion] was unself-consciously reflected in our laws and legal traditions"); Smith, *supra* note 100, at 977 (noting the secularization of modern conceptions of rights, especially religious freedom, and commenting that "[t]he present generation justifies rights on purely nonreligious grounds: rights are the products of utilitarian considerations, or of purely human concerns for equality and dignity"). For a discussion of the intellectual and philosophical traditions that have contributed to this apparent estrangement of law and religion, see R. Randall Rainey, *Law and Religion: Is Reconciliation Still Possible?*, 27 LOY. L.A. L. REV. 147, 151–59 (1993).

276 Idleman, *supra* note 270, at 477. *See also* Cordes, *supra* note 35, at 114 (commenting that "religious groups have continued to assert political influence throughout th[e] [twentieth] century" but that this influence has been "less overt"); Gedicks & Hendrix, *supra* note 141, at 1598 ("American law does not suffer the full effects of a final divorce between law and morality because only religious modes of moral argument are prohibited. The effects arguably are further mitigated by the fact that much religious morality is consistent with secular morality, so that the exclusion is in many cases only formal."); Lynne Marie Kohm, *Marriage and the Intact Family: The Significance of* Michael H. v. Gerald D., 22 WHITTIER L. REV. 327, 378–79 (2000) (discerning an underlying religious ontology in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)).

277 Bernard E. Meland, The Secularization of Modern Cultures 25 (1966).

278 Stephen L. Carter, The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion 111 (1993). Thanks to Dr. David E. Guinn for directing me to this reference. *See also* Gedicks & Hendrix, *supra* note 141, at 1582 & n.14 (noting that "American politicians seem to be as broadly and deeply influenced by religion as other Americans" and, moreover, that "members of Congress are . . . by some measurements more religious . . . than the American public" (citing PETER L. BENSON & DOROTHY L. WILLIAMS, RELIGION ON CAPITOL HILL: MYTHS AND REALITIES 74–84 (1986))).

roughly corresponds to the 80–90 percent of Americans who consider religion to be fairly or very important in their own lives.[279] Consider further why such high percentages are to be expected, particularly given the nature of religion. "Religious faith," as Stephen Carter explains, "is not something that can be shrugged off like an unattractive article of clothing. The very idea of devotion suggests a way of ordering all life and all knowledge, including, although not exclusively, moral knowledge."[280] Or, in the words of Michael Perry, "For the large majority of Americans who are religious believers, . . . their most fundamental moral judgments are *inextricably* rooted in their religious faith; moreover, they are skeptical that those judgments can stand — can be warranted — independently of religious faith, whether their own religious faith or some religious faith."[281] Finally, consider the nature of some of the moral issues upon which legislators must render judgment — the beginning, ending, and uniqueness of human life, the meaning of marriage, the significance of the body and of human sexuality, and the relationship of human beings to the environment and to other species — issues that have an almost intrinsically religious character to them.[282] Even if such judgments could in theory be rendered without resort to religious beliefs, it flies in the face of reason to assume that a rational legislator who holds such beliefs would, at the moment of perhaps their greatest relevance, choose to ignore them.[283]

In light of these considerations, it would be difficult to maintain that a decline in visibility of religious rhetoric in the lawmaking process corresponds to a comparable decline in the actual role of religious values or

---

279 *See Gallup Poll Topic: Religion*, *at* http://www.gallup.com/poll/indicators/ indreligion.asp (last visited Sept. 27, 2001) (providing yearly data from 1980 to the present). In turn, "[t]he pervasive American belief in God . . . and the continued commitment of the majority of Americans to religion suggest that many Americans measure and judge their own behavior and that of others against the reality created by their religious beliefs." Gedicks & Hendrix, *supra* note 141, at 1589 (footnote omitted).

280 Carter, *supra* note 36, at 940. Accordingly, the insistence that "government officials place religious conviction entirely to one side plainly misconceives the nature of faith." *Id.*

281 Perry, *supra* note 31, at 678–79 (emphasis added); *see also* Smith, *supra* note 100, at 997 ("For many religious persons, religious and secular beliefs and values are not nicely compartmentalized. Rather, . . . religious beliefs and values may permeate a religious person's world view by underlying, reinforcing, and interacting with other 'secular' convictions.").

282 *Cf.* Idleman, *supra* note 23, at 1022–23 (contending, with regard to the question of whether a fetus is a constitutional person, that "[w]hatever else it may be, this is a foundational moral determination that, if not in fact irreducibly religious in nature, absolutely cannot be made without substantial resort to an ethical system located outside the Constitution itself" (footnote omitted)).

283 *See* McConnell, *supra* note 20, at 216-17 (commenting with regard to "the argument that otherwise constitutional legislation must be struck down if it is predicated on religious teachings" that "it is difficult to see how — in a democratic polity in which many of the citizens look to religious sources for guidance about questions of public justice — it could ever be employed systematically as a legal principle").

premises in that process. Rather, it would be more reasonable to infer that religious values and premises have simply gone underground, whether out of conformity to the ways of legal positivism, out of genuine respect for the beliefs or sensibilities of others, or out of concern that expressly invoking religious language will brand one as intolerant or theocratic. In turn, it would also seem reasonable to conclude that the legislative practice of utilizing religious values *does* have the degree of continuity, as it does antiquity and ubiquity, that the *Marsh* exception requires.

Of course, even if these requirements are satisfied, *Marsh* might still disallow a practice if undertaken with an impermissible motive (to discriminate interdenominationally, for example) or if exploited to proselytize, advance, or disparage any one faith or belief.[284] Given the contingent nature of these limitations, perhaps it is best at this point simply to offer two observations. First, and specifically with regard to religiously informed legislation, the relevance of these limitations seems not only contingent but also unlikely. General regulations of conduct, unlike the legislative prayers of *Marsh*, are not intrinsically religious in their orientation; even if religiously informed, they are fundamentally oriented towards the health, welfare, safety, or morals of the community. Moreover, to the extent that such a regulation is in fact tainted by a discriminatory motive or a disparaging character, it will likely not satisfy the threshold tests of antiquity, continuity, and ubiquity.[285] Second, and more generally, the concerns embodied in the *Marsh* limitations appear largely to mirror the limitations noted under the purpose, endorsement, and entanglement prongs of *Lemon* and culminating in the presumptive bar on interreligious discrimination. Accordingly, just as their existence in those contexts does not give rise to a categorical prohibition on religiously informed legislation, neither does their existence categorically place such legislation outside of the *Marsh* exception. Instead, an assessment of the exception's applicability must proceed, as it does with all of the Establishment Clause's doctrines, on a statute-by-statute and ordinance-by-ordinance basis.

B. THE RECOGNITION OF MORALITY REGULATION UNDER THE POLICE POWER

The *Marsh* exception for longstanding historical practices is the most prominent means by which the Constitution, through the Establish-

---

284 *See supra* notes 259–60 and accompanying text.

285 *Cf., e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (invalidating newly-enacted animal slaughter regulations, otherwise within the police power, in part because their unique nature and legislative history revealed that they were aimed at suppressing religious conduct).

ment Clause, respects traditional interactions between government and religion. But it is not the only means. Less conspicuous but equally significant is the continued recognition of the government's police power, particularly the authority of the state to regulate on behalf of public morality. Though noted in the earlier discussion of *Lemon*'s purpose test, the police power warrants closer examination at this point because of its broader importance within American constitutionalism and thus the broader implications that would result from its abrogation, which is partially but effectively what the reformist argument, if taken seriously, would achieve.

In essence, the police power is the legitimate authority of government to define, and ultimately to regulate for, the common good of the people.[286] Today, this common good is most often described in terms of health, safety, welfare, and morals,[287] although courts have also spoken in terms of "comfort, domestic peace, private happiness,"[288] "peace and quiet,"[289] "good order,"[290] "temperance,"[291] and "prosperity."[292] While not explicitly mentioned in the Constitution, the police power neverthe-

---

286 *See* Manigault v. Springs, 199 U.S. 473,i480 (1905) ("[T]he state . . . exercis[es] such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public . . . . This power, which . . . is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people . . . .").

287 *See, e.g.*, Johnson v. Collins Entm't Co., 199 F.3d 710, 720 (4th Cir. 1999) ("Formulations of [the police] power underscore the state's paramount interest in the health, welfare, safety, and morals of its citizens."); State v. Brenan, 772 So. 2d 64, 73 (La. 2000) ("The traditional description of state police power does embrace the regulation of morals as well as the health, safety, and general welfare of the citizenry."); Christensen v. State, 468 S.E.2d 188, 190 (Ga. 1996) ("In the exercise of its police power the state has a right to enact laws to promote the public health, safety, morals, and welfare of its citizens."); Rothman v. Rothman, 320 A.2d 496, 499 (N.J. 1974) ("A state may, in the exercise of the police power, enact a statute to promote the public health, safety, morals or general welfare."); Smith v. State Hwy. Comm'n, 346 P.2d 259, 267 (Kan. 1959) ("The police power is the power of government to act in furtherance of the public good, . . . in the promotion of the public health, safety, morals and general welfare . . . .").

288 McKesson & Robbins, Inc. v. Gov't Employees Dep't Store, 365 S.W.2d 890, 892 (Tenn. 1963); *accord Manigault*, 199 U.S. at 480 ("comfort"); Escanaba & Lake Mich. Transp. Co. v. City of Chicago, 107 U.S. 678, 683 (1883) ("peace, comfort, convenience").

289 Berman v. Parker, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.").

290 Crowley v. Christensen, 137 U.S. 86, 89 (1890).

291 Morgan v. Tex. Alcoholic Beverage Comm'n, 519 S.W.2d 250, 253 (Tex. Civ. App. 1975) (explaining that the legislature "may provide for the exercise of the State's police power as it deems best in the regulation and protection of the welfare, health, peace, temperance and safety of the people of the State").

292 *Escanaba & Lake Mich. Transp. Co.*, 107 U.S. at 683; *accord* Bacon v. Walker, 204 U.S. 311, 317 (1907) (explaining that the police power "embraces regulations designed to promote the public convenience or the general prosperity"); Brannon v. City of Tulsa, 932 P.2d 44, 46 (Okla. 1996) ("Police power . . . comprehends the power to make and enforce all

less occupies a distinct and definite place within the American constitutional order. Most importantly, it is widely understood that the states "did not surrender [the police power] when becoming . . . member[s] of the Union under the Constitution."[293] Rather, to use the words of the Tenth Amendment, because this power was neither "delegated to the United States by the Constitution, nor prohibited by [the Constitution] to the States, [it was] reserved to the States respectively, or to the people."[294] In turn, because by the framing of the Constitution "the police power . . . [was] denied [to] the National Government and reposed in the States,"[295] the "[s]tates still bear primary responsibility in our system for the protection of public health, welfare, safety, and morals."[296]

In light of this context, courts necessarily begin with the understanding that the police power is full or plenary,[297] which is effectively reinforced by the presumption that any given exercise of state power is valid unless affirmatively demonstrated to be in conflict with a specific constitutional limitation.[298] Accordingly, the police power has been described as "very broad and far-reaching, . . . embrac[ing] the whole sum of inherent sovereign power which the state possesses,"[299] and as "the inherent plenary power possessed by the state not only to prevent its

---

reasonable laws and regulations necessary . . . to protect and promote public morals, health, safety and prosperity.").

293 Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905). "In respect to the Constitution of the United States, it is a matter of general recognition that, 'the police power of the state is not granted by or derived from but exists independently of the federal Constitution' . . . ." Vincent v. Elyria Bd. of Educ., 218 N.E.2d 764, 766 (Ohio Ct. App. 1966) (quoting 10 OHIO JUR. 2d 421, CONST. LAWe§ 346).

294 U.S. Const. amend. X; *see* Hoke v. United States, 227 U.S. 308, 322 (1913) ("[T]he powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral."). Regarding the nonconferral of a general police power upon the federal government, see United States v. Lopez, 514 U.S. 549, 566 (1995) (noting that "[t]he Constitution . . . withhold[s] from Congress a plenary police power"); Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 903 (4th Cir. 1999) (Niemeyer, J., concurring) ("[T]he general police power of the States rests at the core of their sovereignty."), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000).

295 *Morrison*, 529 U.S. at 618.

296 Doe v. Duling, 782 F.2d 1202, 1207 (4th Cir. 1986).

297 *See, e.g.*, *Escanaba & Lake Mich. Transp. Co.*, 107 U.S. at 683 (noting that "the States have full power to regulate within their limits matters of internal police"); Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001) (noting "the States' plenary police power"); Lavin v. Cal. Horse Racing Bd., 66 Cal. Rptr. 2d 843, 847 (Cal. Ct. App. 1997) (noting "the state's plenary police power"); Colo. Ass'n of Pub. Employees v. Bd. of Regents, 804 P.2d 138, 155 (Colo. 1990) (noting the state legislature's "plenary police power").

298 *See* Gravert v. Nebergall, 539 N.W.2d 184, 186 (Iowa 1995) (stating together the principles that "[p]olice power refers to the legislature's broad, inherent power to pass laws that promote the public health, safety, and welfare" and that "[l]aws enacted by the exercise of a state's police power are presumed to be constitutional"); City Council v. Harrell, 372 S.E.2d 139, 141 (Va. 1988) (similar); Rothman v. Rothman, 320 A.2d 496,e500 (N.J. 1974) (similar).

299 Bowden v. Davis, 289 P.2d 1100, 1106 (Or. 1955).

citizens from harming one another, but to promote all aspects of public welfare."[300] In the words of one state supreme court, "[i]t is the broadest power possessed by governments and rests fundamentally on the ancient maxim 'salus populi est suprema lex.'"[301]

Of particular interest here are two specific facets of this power — the extent to which it encompasses morality-oriented laws and the extent to which the legislature, when enacting such laws, may advert to religious premises. The first of these requires little analysis. It is beyond dispute that the police power includes the authority to enact regulatory or criminal laws that enforce or protect the legislature's conception of morality, as long as this conception is rationally related to the public interest. It is, after all, "[o]ne fundamental purpose of government . . . 'to conserve the moral forces of society,'"[302] and "[t]he crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate."[303] Thus, there is possessed by every state "the inherent police power . . . to regulate to promote public decency"[304] and the states have "a substantial . . e interest in protecting order and morality."[305] So settled and longstanding is this principle, in fact, that the only difficulty one encounters when substantiating it is an excess of authority.[306] As the Supreme Court has observed, "[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due

---

300 Michael v. Hertzler, 900 P.2d 1144, 1149 (Wyo. 1995).

301 State *ex rel.* Hughes v. Cleveland, 141 P.2d 192, 200 (N.M. 1943) (quoting State v. Mtn. Timber Co., 135 P. 645,i648 (Wash. 1913), *aff'd*, 243 U.S. 219 (1917)). The maxim has been translated as "[t]he welfare of the people is the supreme law." BLACK'S LAW DICTIONARY 1202 (5th ed. 1979). For an overview of its exercise in the United States and Great Britain, see ALAN HUNT, GOVERNING MORALS: A SOCIAL HISTORY OF MORAL REGULATION (1999).

302 Lawrence v. State, 41 S.W.3d 349, 354 (Tex. Ct. App. 2001) (quoting Grigsby v. Reib, 153 S. W. 1124, 1129 (Tex. 1913)), *review denied* (Tex. Apr. 17, 2002), *petition for cert. filed*, 70 U.S.L.W. 3116 (U.S. July 16, 2002) (No. 02-102).

303 Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001).

304 Flanigan's Enters., Inc. of Ga. v. Fulton County, Ga., 242 F.3d 976, 983 n.9 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 2356 (2002).

305 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991).

306 *See id.*; Bowers v. Hardwick, 478 U.S. 186, 196 (1986); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59–60 (1973); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); Stone v. Mississippi, 101 U.S. 814,i818 (1880); Dronenburg v. Zech, 741 F.2d 1388, 1397 & n.6 (D.C. Cir. 1984); Roe v. Butterworth, 958 F. Supp. 1569, 1582 (S.D. Fla. 1997), *aff'd*, 129 F.3d 1221 (11th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998); Oliverson v. W. Valley City, 875 F. Supp. 1465, 1483 n.34 (D. Utah 1995); Doe v. Commonwealth's Att'y, 403 F. Supp. 1199, 1202 (E.D. Va. 1975) (three-judge court), *aff'd without opinion*, 425 U.S. 901 (1976); Christensen v. State, 468 S.E.2d 188, 190 (Ga. 1996); State v. Brenan, 772 So. 2d 64, 73 (La. 2000); State v. Walsh, 713 S.W.2d 508,i511 (Mo. 1986); *Lawrence*, 41 S.W.3d at 354; Commonwealth v. Paris, Nos. K96062 & K96063, 1999 WL 1499542, at *4 (Va. Cir. Ct. Dec. 16, 1999), *aff'd*, 545 S.E.2d 557 (Va. Ct. App. 2001).

Process Clause, the courts will be very busy indeed."[307] "[T]he judiciary would be no less busy if all such laws are to be invalidated under the 'Establishment of Religion' Clause."[308]

The remaining issue — the permissibility of invoking religious values in the legislative determination of morality — is also fairly straightforward, although it requires a somewhat more extended exposition. In particular, the validity of such invocations can be generally confirmed by considering together at least three doctrinal or empirical realities — the permissibility of legislative purposes that "coincide . . . with the tenets of some or all religions,"[309] the permissibility of legislative value judgments the correctness of which need not be quantitatively verified, and the actual use of religious premises by courts when reviewing the constitutionality of statutes.

The first of these has already been noted and need not be redeveloped at this juncture.[310] The second — that a legislature may permissibly enact qualitative value judgments that do not readily lend themselves to verification or falsification — finds strong support in both the case law and the formulation of the police power itself, the latter of which categorically differentiates between material goods such as health and safety and nonmaterial goods such as morality and decency, but makes no distinction between categories in terms of regulatory authority. According to the Supreme Court, "[f]rom the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions . . . . The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional."[311] So, for example, in the abortion context a legislature may find that human life begins at conception[312] or, in the regulation of certain sexual conduct, a legislature may conclude that the conduct "is likely to end in a contribution to moral delinquency" even if it cannot "prove the actuality of such a consequence . . . ."[313] The third and final

---

307 *Bowers*, 478 U.S. at 196.

308 Dean v. District of Columbia, Civ. A. No. 90-13892, 1992 WL 685364, at *8 (D.C. Super. Ct. June 2, 1992), *aff'd*, 653 A.2d 307 (D.C. 1995) (per curiam).

309 McGowan v. Maryland, 366 U.S. 420, 442 (1961).

310 *See supra* notes 71, 99, 136–37 and accompanying text.

311 *Paris Adult Theatre I*, 413 U.S. at 61–62; *see also* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values.").

312 *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 504–06 (1989); *accord* Jane L. v. Bangerter, 794 F. Supp. 1537, 1542–43 (D. Utah 1992) (upholding against an Establishment Clause challenge a Utah statute with a preambulary declaration that "unborn children have inherent and inalienable rights that are entitled to protection by the State of Utah pursuant to the provisions of the Utah Constitution").

313 Doe v. Commonwealth's Att'y, 403 F. Supp. 1199, 1202 (E.D. Va. 1975) (three-judge court), *aff'd without opinion*, 425 U.S. 901 (1976).

reality, which is more empirical than doctrinal, is the simple fact that courts themselves periodically refer to religious values when upholding laws against constitutional challenges,[314] just as they periodically refer to such values more generally in the exercise of judicial power.[315]

What this analysis ultimately signals is not only that the traditional police power includes the legislative prerogative to enact laws on behalf of morality, but also that the legislature may look to religious premises to determine the content and parameters of such laws.[316] Of course, under the Supremacy Clause,[317] the police power of the states cannot transgress a provision of the Constitution.[318] In turn, one might object that these conclusions simply beg the question of whether such legislative ad-

---

314 *See, e.g.*, Adams v. Howerton, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) (construing the definition of marriage under federal immigration law as limited to heterosexual couples, in part because of religious law), *aff'd*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982); *Doe*, 403 F. Supp. at 1202 & n.2 (upholding a Virginia anti-sodomy statute in part because "it has ancestry going back to Judaic and Christian law" and citing scriptural admonitions); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (upholding a heterosexual marriage definition, noting that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis"), *appeal dismissed*, 409 U.S. 810 (1972); Lawrence v. State, 41 S.W.3d 349, 361 & n.34 (Tex. Ct. App. 2001) (upholding a ban on deviate sexual intercourse as applied to homosexual sexual conduct, noting that "[i]n addition to an American tradition of statutory proscription, homosexual conduct has historically been repudiated by many religious faiths" and then specifically citing Judaism, Christianity, and Islam), *review denied* (Tex. Apr. 17, 2002), *petition for cert. filed*, 70 U.S.L.W. 3116 (U.S. July 16, 2002) (No. 02-102); *see also* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) (joining the majority in upholding a state anti-sodomy law, adding that "[c]ondemnation of [homosexual sexual] practices is firmly rooted in Judaeo-Christian moral and ethical standards"). In an earlier piece, this author criticized Chief Justice Burger's concurrence in *Bowers* as "an improper use of religious values" in part because "Burger ignores the fact that sexual acts between men were openly tolerated by the Christian church during the early Middle Ages." Idleman, *supra* note 270, at 480. To the extent that this criticism rested on incorrect historical claims and faulty secondary sources, it was erroneously and negligently lodged.

315 Regarding more generally the judicial use of religious sources, see Daniel G. Ashburn, *Appealing to a Higher Authority?: Jewish Law in American Judicial Opinions*, 71 U. DET. MERCY L. REV. 295 (1994); J. Michael Medina, *The Bible Annotated: Use of the Bible in Reported American Decisions*, 12 N. ILL. U. L. REV. 187 (1991); Idleman, *supra* note 270, at 475–77 & nn.145–56.

316 *See* Wallace v. Jaffree, 472 U.S. 38, 69–70 (1985) (O'Connor, J., concurring in the judgment) ("In this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause.").

317 U.S. Const. art. VI ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

318 Panhandle E. Pipe Line Co. v. State Hwy. Comm'n, 294 U.S. 613, 619, 622 (1935); Buchanan v. Warley, 245 U.S. 60, 74 (1917); Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905); Bowden v. Davis, 289 P.2d 1100, 1106 (Or. 1955).

vertence does, in fact, violate the Establishment Clause. This objection would be misplaced, however. That such advertence does not categorically violate the Establishment Clause has already been demonstrated in Part I. The analysis here merely confirms the correctness of that analysis in light of the traditional understanding of the police power, which the Establishment Clause neither purports nor appears to abrogate.

III. NORMATIVE PRINCIPLES OF DEMOCRATIC LEGITIMACY

When formulating or applying a constitutional doctrine, including the various establishment tests canvassed in Part I, it is important to verify that the doctrine is consistent not only with internal methodological norms such as intelligibility, coherence, and predictability, but also with the normative principles of American constitutional democracy such as self-governance and the political equality of citizens. Although contemplating and debating the doctrinal plausibility of precluding the legislative use of religious premises can be a necessary and engaging exercise in legal reasoning, the risks of logical reductionism and doctrinal reification can easily lead one to lose sight of these constitutional first principles. Accordingly, if the analytical process of legal reasoning should happen to yield a seemingly well-formulated doctrine that calls for the preclusion of religiously informed legislation, but if such preclusion would effectively result in the disenfranchisement of religiously devout citizens or the disparagement of their worldviews — and if, as a consequence, the government would become from their reasonable perspective illegitimate — then it is very likely that the doctrine is unacceptable and should be rejected, notwithstanding its superficially sound construction.

The purpose of this final part is to further examine the notion of precluding legislative recourse to religious premises in light of two particular principles of democratic legitimacy — participatory equality among citizens and the moral resonance of law vis-à-vis the citizenry. These principles have been chosen because they arguably go to the very heart of what democratic legitimacy means. Participatory equality, which is largely a matter of procedural fairness, embodies the expectation that all otherwise eligible citizens should be treated equally before the legal and political system. Moral resonance, which is largely a matter of substantive correspondence, embodies the expectation that laws should roughly reflect the values and views of (shifting) majorities of citizens absent a clear disqualification of those values or views by the Constitution or another anterior legal commitment.

Importantly, the invocation of these principles is intended neither to duplicate the legal analysis of Parts I and II nor to demonstrate as an absolute matter that limits on religiously informed lawmaking are always misguided. Rather, it is to confirm from a more theoretical standpoint

the reasonableness of this legal analysis and to illustrate why, at the very least, such limits ought *presumptively* to be considered inappropriate, thereby effectively shifting the burden of persuasion to those who might seek to impose constraints on the operation of religious premises in the legislative process. In so doing, moreover, the article does not purport to undertake an exhaustive review of constitutional democratic theory or to engage every potential counterargument, but endeavors merely to discern and explicate the general thrust of two principles that are fundamental to representative democratic lawmaking as it is actually conceived and practiced in the United States.[319]

A. THE PARTICIPATORY EQUALITY OF CITIZENS

Central to American constitutional law and theory are two postulates: first, that citizens should engage in self-governance, both by elected representatives and to some extent directly,[320] and second, that citizens should be treated equally before the legal and political processes.[321] In combination, these two postulates form the principle of participatory equality, which holds that all eligible citizens should enjoy equal opportunity to participate in self-governance, whether in terms of voting,[322] access to the political processes on equal terms with other citi-

---

319 There are, of course, other components to democratic legitimacy — most notably the condition of consent, the opportunities to speak, assemble, and petition, and the guarantee of due process — and the focus here on participatory equality and moral resonance is not intended to marginalize the importance of these other legitimating factors. In fact, some of them, such as free speech, could very well also be implicated by the preclusion of legislative reliance on religious values. *See infra* note 339 and accompanying text.

320 Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1278 (7th Cir. 1993) ("The Founding Fathers recognized that a republic cannot endure without a virtuous citizenry. Successful self-government requires that citizens willingly participate in public affairs, make sacrifices for the common good, curb their selfishness, and join in taking responsibility for themselves and others."), *cert. denied*, 510 U.S. 1012 (1993).

321 *See* Romer v. Evans, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 39 (1994) (noting that the principle "that similarly situated litigants are treated equally . . . is considered a hallmark of fairness in a regime committed to the rule of law"); Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 5–24 (2000) (discussing the constitutional value of equality).

322 *See* Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — one person, one vote."). There is no constitutional right to vote per se, *see* Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 (1982), but once a state "has provided that its representatives be elected, 'a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.'" *Id.* at 10 (quoting Dunn v. Blumstein, 405 U.S. 330,i336 (1972)). "The idea that one group can be granted greater voting strength than another is hostile to the

zens and groups,[323] the expression of one's views free from content- or viewpoint-based censorship,[324] or the opportunity to compete for public office free from invidious discrimination.[325] There are, as there always are, some exceptions — felons may be disenfranchised, for example[326] — but there is no exception that cannot be incontrovertibly justified by tradition, by reason, or by the text of the Constitution itself.

There can be little doubt that precluding the legislative use of religious premises would contravene the principle of participatory equality and effectively impede the process of democratic self-governance. Such a rule would not only nullify certain political and legal efforts of religiously devout citizens (thus abridging participation),[327] but would nullify the efforts of *only* these citizens (thus creating inequality). In the words of Michael Perry, "deprivileging religious grounds for moral belief relative to secular grounds . . . would discriminate against religious grounds for moral belief, thereby subverting the equal citizenship of religious believers who, unlike citizens who are not religious believers, would be

---

one man, one vote basis of our representative government." Moore v. Ogilvie, 394 U.S. 814, 819 (1969).

323 *See* Evans v. Romer, 854 P.2d 1270, 1276 (Colo. 1993) ("The right of citizens to participate in the process of government is a core democratic value which has been recognized from the very inception of our Republic up to the present time."), *cert. denied*, 510 U.S. 959 (1993).

324 *See* Burson v. Freeman, 504 U.S. 191, 197 n.3 (1992) (plurality opinion) (explaining that the general prohibition on content- or viewpoint-based discrimination of speech can be invoked under either the Free Speech Clause or the Equal Protection Clause).

325 Although "[c]andidates do not have a fundamental right to run for public office," NAACP, L.A. Branch v. Jones, 131 F.3d 1317, 1324 (9th Cir. 1997), *cert. denied*, 525 U.S. 813 (1998), candidates of particular classes "do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." Turner v. Fouche, 396 U.S. 346, 362–63 (1970) (footnote omitted).

326 *See* Richardson v. Ramirez, 418 U.S. 24, 41–56 (1974) (holding that state disenfranchisement of convicted felons who complete their sentences and paroles does not violate the Equal Protection Clause, especially in light of U.S. CONST. amend. XIV, § 2, which recognizes that the right to vote may be "abridged . . . for participation in rebellion, or other crime"); United States v. Mercurris, 192 F.3d 290, 293 (2d Cir. 1999) (noting that "convicted criminals often face certain 'civil disabilities' as a result of their conviction" and that "[e]xamples of such disabilities include being 'barred from holding certain offices, voting in state elections, and serving as a juror'" (quoting Lane v. Williams, 455 U.S. 624,i632 n.13 (1982))).

327 *See* Edwards v. Aguillard, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting) ("[To] presume that the sole purpose of a law is to advance religion merely because it was supported strongly by organized religions or by adherents of particular faiths . . . would deprive religious men and women of their right to participate in the political process."); Laycock, *supra* note 58, at 23 (noting that, if the religious affiliation and religious arguments of proponents are used as evidence of impermissible legislative motive, "then religious citizens are effectively deprived of their right to participate in the political process"); Smith, *supra* note 100, at 999 ("Because citizens who hold deeply religious world views that pervade their value systems and underlie their political perspectives would be incapable of complying with the secularism requirement, courts might effectively exclude them from participating in the political process altogether.").

prevented from having their most important moral beliefs transformed into law . . e ."[328] Or, as Steven Carter has argued, "[i]f the religious conviction of proponents is seriously to become a ground for invalidating legislation, then tens of millions of Americans will be prohibited from demanding government action in accord with their consciences, not because the dictates of their consciences are wrong on the merits, but because their consciences have been formed in the wrong way."[329]

This is not merely the theoretical speculation of constitutional scholars. The Eighth Circuit, for example, has explicitly rejected "the proposition that a rule, which otherwise conforms with *Lemon*, becomes unconstitutional due only to its harmony with the religious preferences of constituents or with the personal preferences of the officials taking action."[330] Calling "unrealistic" the notion that "elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling *Lemon* standards,"[331] the court specifically noted that "this approach to constitutional analysis would have the effect of disenfranchising religious groups when they succeed in influencing secular decisions."[332] Likewise, when confronted with the contention that the First Amendment right to petition precluded religiously motivated petitioners from actually succeeding before an administrative agency, a federal district court deemed the contention "stunning" and "so clearly wrong as to beggar conventional legal analysis."[333] Find-

---

328 Perry, *supra* note 31, at 682; *see also id.* at 675 (noting that a concern "about the equal citizenship of religious believers" is one "about first principles and is therefore the most fundamental reason of all to reject a construal of the nonestablishment norm according to which government may not disfavor conduct on the basis of a moral belief that, though religiously grounded, lacks plausible, independent secular grounding").

329 Carter, *supra* note 36, at 938; *see also* McConnell, *supra* note 270, at 655–57 (explaining that the exclusion of religious arguments in the legislative process "degrades religious persons from the status as equal citizens" and "would disenfranchise religious persons as full participating members of the political community").

330 Clayton by Clayton v. Place, 884 F.2d 376, 380 (8th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990).

331 *Id.*

332 *Id.*; *see also* Crowley v. Smithsonian Inst., 636 F.2d 738, 742 (D.C. Cir. 1980) (noting that "[m]any religious leaders have vigorously opposed government support of the teaching and practice of birth control and government support, or even toleration, of abortion" but that "[n]o court . . . has finally held that government advocacy of or opposition to either birth control or abortion violates the establishment clause"); Cathy's Tap, Inc. v. Vill. of Mapleton, 65 F. Supp. 2d 874, 892 (C.D. Ill. 1999) (commenting that it "has not found any case in which the successful lobbying efforts of religious organizations or individuals invalidates a legislative enactment under the Establishment Clause" and that such a doctrine "would be a severe infringement on the free speech rights of those persons or groups with religious views to forbid them from lobbying their local government or, if allowed to lobby, to require them to leave their religious beliefs and convictions at the steps of city hall").

333 Associated Contract Loggers, Inc. v. U.S. Forest Serv., 84 F. Supp. 2d 1029, 1034 (D. Minn. 2000), *aff'd*, No. 00-1730, 2001 WL 605010 (8th Cir. June 5, 2001) (per curiam).

ing that there is "[n]o such restriction . . . in the words of the Constitution" and that its proponents "have cited no authority . . e because none exists,"[334] the court then explained why such a contention is fundamentally contrary to the very notion of democratic political participation. "Freedom of belief," the court explained, "is not a passive right: citizens are not limited to merely sitting idly thinking about their political, moral, and religious beliefs; democracy is founded upon them acting upon those beliefs in efforts to effect change."[335]

Even former Supreme Court Justice William Brennan, whose opinions evinced a fairly separationist view of the Establishment Clause,[336] nevertheless understood quite clearly the basic unjustness and constitutional untenability of abridging the political participation of religious citizens under the banner of disestablishment. According to Justice Brennan:

> 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, . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.[337]

As these judges and scholars recognize, the mere harm to participatory equality that would result from a rule precluding the legislative use of religious premises is by itself sufficient to discredit such a rule outright. Were further evidence of its unacceptability necessary, one

---

334 *Id.*

335 *Id.*

336 *See* Ira C. Lupu, *The Religion Clauses and Justice Brennan in Full*, 87 CAL. L. REV. 1105, 1109–13 (1999).

337 McDaniel v. Paty, 435 U.S. 618,e641 (1978) (Brennan, J., concurring in the judgment) (citations omitted) (footnote omitted).

might also take note of the many collateral harms that it would inflict. Among the more obvious, of course, are the indirect abridgments of both the freedom of belief[338] and the freedom of speech.[339] To these injuries one could also add the insult to religious citizens that necessarily attends an effective disabling of their worldviews from the political and legal processes — what Stephen Carter has described as "a sweeping and tragic rejection of the deepest beliefs of tens of millions of Americans, who are being told, in effect, that their views do not matter."[340] In turn, "[t]he knowledge that the political system rejects an individual's personal religious experiences as being wholly subjective and irrelevant makes her feel separated, illegitimate, and inferior."[341]

Ultimately, the consequences of such delegitimation and alienation among religious citizens could very well include a diminished respect for the law and a marginal (though not insignificant) destabilization of the legal and political order.[342] After all, "[t]he stability of any liberal democracy depends on a perception of the people that their law treats everyone more or less equally and does not affirmatively dictate different results based upon the status of those that it governs."[343] However, "[i]f the religious people who constitute the majority of Americans come to believe . . . that the law making process does not respect their religious beliefs (at least to the extent that it respects secular beliefs), then they themselves will respect neither the process nor the laws that it gener-

---

338 *See* Smith, *supra* note 100, at 996 ("[P]rotection for belief is largely illusory if the law purports to guarantee devoutly religious (or, for that matter, irreligious) citizens the right to serve in the legislature or other public office but then invalidates the products of their service on the ground that these citizens were religiously motivated. Ultimately, there is little practical difference between denying a person the right to be a legislator and depriving a sitting lawmaker of the power to pass valid legislation.").

339 *See* Cathy's Tap, Inc. v. Vill. of Mapleton, 65 F. Supp. 2d 874, 892 (C.D. Ill. 1999) ("It would be a severe infringement on the free speech rights of those persons or groups with religious views to forbid them from lobbying their local government or, if allowed to lobby, to require them to leave their religious beliefs and convictions at the steps of city hall."); Laycock, *supra* note 58, at 27 ("[T]he separation metaphor has been the basis of repeated efforts to censor religiously motivated speech . . . . When conservative ministers support Ronald Reagan and speak out on their social agenda; when Catholic bishops speak out on abortion, nuclear weapons, economic redistribution, and peace in Central America; or when rabbis speak out on behalf of Israel, someone on the other side of the political issue is sure to charge that these attempts to influence public policy violate separation of church and state. A moment's reflection on free speech and free exercise reveals the absurdity of that charge . . . ."); Smith, *supra* note 100, at 993–95 (discussing adverse free speech implications). *But see* Feldman, *supra* note 10, at 972 (contending that the Establishment Clause itself, by differentiating between religion and nonreligion, may justify differential treatment of religious and nonreligious speech).

340 Carter, *supra* note 36, at 937.

341 Gedicks & Hendrix, *supra* note 141, at 1599.

342 *See generally* STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY (1998).

343 Gedicks & Hendrix, *supra* note 141, at 1599.

ates."[344] At the very least, as one federal court has commented, "the political vitality of our nation would be diminished if the right of these groups to argue their views in the legislative chambers were constricted."[345]

That the potential preclusion of legislative reliance on religious premises would be taken seriously at all is itself, of course, both tragic and ironic when viewed against the larger history of political and legal equality in America. Two aspects of this historical trajectory — one extended, one recent — are particularly salient. First, the course of political and legal equality in the United States has been overwhelmingly marked by an expansion, rather than a constriction, both of the franchise[346] and of the rights of access, participation, and expression.[347] It is nothing short of retrogressive, therefore, to now entertain the possibility that some values or worldviews, which are inextricably tied to the identities of many citizens, are in fact constitutionally unfit for legislative consideration. Second, there is an undeniable parallel between the question of religiously informed legislation and the Supreme Court's recent exposition of political equality in *Romer v. Evans*,[348] which struck down a state constitutional provision nullifying and precluding state and local laws providing distinct protection on the basis of nonheterosexual orientation. Though interpreted by many as hostile to religious values and political involvement,[349] in actuality *Romer*'s central principle — that the systematic exclusion of entire classes of citizens from seeking redress before the political and legal processes is, with few exceptions, constitutionally unacceptable — arguably deals a powerful blow to the attempted

---

344 *Id.* at 1600.

345 Kosydar v. Wolman, 353 F. Supp. 744, 767 (S.D. Ohio 1972), *aff'd sub nom.* Grit v. Wolman, 413 U.S. 901 (1973) (per curiam). On the potential ill-effects of the legal privatization of religion, and particularly its normative internalization by religious citizens, see Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 796–801 (2001).

346 *See* Thomas B. McAffee, *Constitutional Limits on Regulating Private Militia Groups*, 58 MONT. L. REV. 45, 49 n.14 (1997) ("During the course of more than 200 years of American democracy, the steady course of development has been toward an ever-expanding franchise.").

347 *See* Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305, 308–09 (1999) (noting that "[t]he United States Supreme Court has expanded the scope of First Amendment guarantees of freedom of speech through its decisions in a large family of cases th[e] [last] century").

348 517 U.S. 620 (1996).

349 *See* George W. Dent, Jr., *Secularism and the Supreme Court*, 1999 BYU L. REV. 1, 65 ("The insult to religion did not escape notice. As one major organization noted, the opinion '[i]n effect . . . called more than 800,000 Coloradans "hate-filled bigots."' Even secularists should worry when America's millions of traditional religionists feel scorned by the Supreme Court." (footnote omitted) (quoting *Tyranny in Robes*, WASH. WATCH, June 21, 1996, at 1 (Fam. Res. Council, Wash., D.C.))); Robert F. Nagel, *Privacy and Celebrity: An Essay on the Nationalization of Intimacy*, 33 U. RICH. L. REV. 1121, 1135 n.33 (2000) (noting several such interpretations).

delegitimation of legislative reliance on religious premises. Under this reading of *Romer*, neither homosexual persons nor religious persons — by virtue of their psychology or ontology or moral views, or because of their disapproval by others — can be surgically disabled from influencing the legislative process. Rather, they are both entitled to enjoy the rights of participatory equality, as long as they are willing to subject their arguments to the scrutiny of political debate and to accept defeat along with victory as the price of such participation.[350]

B. THE MORAL RESONANCE OF LAW

Democratic legitimacy depends not only on the opportunity to participate equally in the political process, but also on the prerogative of various majorities of citizens, through their representatives and possibly directly, to create by law a social and economic environment that meaningfully resonates with their collective moral beliefs. As the Supreme Court has recognized, "there is a 'right of the Nation and of the States to maintain a decent society . . . ."[351] This is not so much a core constitutional principle as it is an inference about the necessary meaning of democratic self-government. Indeed, it is virtually tautological that a true democracy, even one that operates by representation and by the diffusion of power, should generally reflect the will of the people.[352] The only formal limits on this prerogative, accordingly, are those embodied in hierarchically superior law, such as a provision in the federal Bill of Rights or, at the state and local level, a state constitutional provision.[353]

---

350 *See* McDaniel v. Paty, 435 U.S. 618,i642 (1978) (Brennan, J., concurring in the judgment) ("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."); Cordes, *supra* note 35, at 178–79 ("[T]he most fundamental and significant control on religious activity was anticipated by Madison in Federalist Number 10. Madison notes that religious factions, similar to other factions that might exist, are subject to the controls inherent in our republican form of government. This position subjects political ideas, religious or otherwise, to a deliberative decision-making process in which advocates of any position must convince others to join their position in order to effect change. This process involves both compromise and an assessment of the merits of any proposal, with the result being moderation of extreme positions and pursuit of common ground."); Idleman, *supra* note 23, at 1014–15, 1030–31.

351 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59 (1973) (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

352 *See* De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (noting that the purpose of "maintain[ing] the opportunity for free political discussion" is so "that government may be responsive to the will of the people").

353 *Cf.* Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (noting that majoritarian legislative choices are presumptively valid as a matter of constitutional democratic theory but that "this deference to democratic choice does not apply where the Constitution removes the choice from majorities"); Alan J. Howard, *When Can the Moral Majority Rule?: The Real Dilemma at the Core of the Nude Dancing Cases*, 44 ST. LOUIS U. L.J. 897, 898 (2000) (contending that there is a "well-established constitutional principle[ ] . . . that

Importantly, this is a precept that is neither conservative nor liberal, as those terms are used in their contemporary partisan sense. It just as much allows one community to punish hate crimes or to promote the normalcy of homosexuality as it does another to prohibit prostitution or to exalt the traditional family.[354] Nor is it merely an abstraction of political or constitutional theory. The morally resonant nature of law gives citizens confidence in the justness of their legal system, fosters compliance with its mandates, and breeds respect for the democratic process. As one scholar of both law and religion has explained:

> Democratic governance assumes the interiorization of the rule of law as the habit of law observance whereby the citizen accepts and respects the authority of the law partly because of its rationality and nonarbitrariness and partly because of the manner of its democratic formation. However, more importantly, the very possibility of the rule of law as law observance exists primarily if not necessarily because the substantive content of the law corresponds to the considered moral judgments and religious sensibilities of the governed.[355]

At the same time, the morally resonant nature of law allows people to believe in the law not simply as the threat of state-monopolized force, but instead as an expression or approximation, however crude, of higher truth and meaning.[356] And, as Harold Berman has so eloquently stated, "unless people believe in the law, unless they attach a universal and ultimate meaning to it, unless they see it and judge it in terms of a transcen-

---

moral judgment alone is never sufficient to justify a state regulation of conduct that is constitutionally protected").

354 *Cf.* Edwards v. Aguillard, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting) ("Today's religious activism may give us [a state law regulating the teaching of creationism in public schools], but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims."); Rainey, *supra* note 275, at 172 n.87 ("The correspondence of the content of law with the substantive moral and religious horizons of the community tells us nothing about the moral quality of any such regime.").

355 Rainey, *supra* note 275, at 172; *see also* Greenawalt, *supra* note 91, at 254 ("[A] claim may be made that the general moral tone of the community will deteriorate if acts that most people regard as morally obnoxious are not illegal. . . . The concern is that people will be so dismayed or alienated by the state's failure to enforce powerful sexual mores that they will be less inclined to respect the liberty and property of their fellows and to contribute to the common purposes of all society.").

356 *See* Gedicks & Hendrix, *supra* note 141, at 1596 ("The respect that law requires can come in important measure from transcendent religious ideals that citizens see reflected in the implicit morality of their laws. . . . While the aggression and arbitrariness of 'we have the votes and this is the way we want it' may force the desired objective, it does not win hearts and minds. . . . Moral passion, and especially religious passion, is usually more persuasive than power.").

dent truth, nothing will happen. The law will not work — it will be dead."[357]

The systematic preclusion of legislative reliance on religious premises would weaken the law's moral resonance precisely because it would restrict legislative judgments to those capable of justification by nonreligious norms, divorcing the law from the conceptual framework through which most citizens ultimately comprehend morality and the common good.[358] Even more fundamentally, by essentially requiring legislators (and, in effect, citizens) to advance only those positions which are grounded in secular premises, the law would be "cut[ ] off from religion . . . and the most meaningful aspect of the religious experience — its link to the transcendent."[359] Whether the resulting legislative judgments (and hence the resulting statutes) would truly be "neutral," or whether they would in fact create an establishment of secularism or material rationalism, is a difficult and contested issue that need not be resolved in this venue. The critical point is that these resulting legislative judgments and statutes would likely not be deeply resonant with many citizens, which may in turn cause these citizens to question the legitimacy of the legislation, if not the legitimacy of the legislative process itself.[360]

It is important to reiterate that this principle of moral resonance is not so much a constitutional command as it is a necessary consequence of democratic self-governance. As between moral resonance and participatory equality, in fact, the latter is almost certainly the more essential. The right to partake in democratic self-governance does not give rise to a corollary right to prevail before the legislature,[361] and all citizens to some extent must tolerate laws that deviate from their perceived ideals. When, however, the lack of moral resonance is coupled with and results from a perceived denial of participatory equality — as would be

---

357 Harold J. Berman, The Interaction of Law and Religion 74 (1974).

358 *See* McConnell, *supra* note 87, at 46 (noting that "many Americans take their bearings from religious values on issues of justice and the common good (from welfare policy to defense policy to family law)").

359 Gedicks & Hendrix, *supra* note 141, at 1609.

360 The judiciary, as well, has an institutional interest in maintaining the element of moral resonance in its exercise of constitutional review. *See* Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 380 (1995) ("If the courts were consistently to invalidate policies predicated upon religious judgments, people who think religious judgments essential to justice would have a very strong motive to change the composition of the judiciary. The Supreme Court may be able to strike a 'scientific creationism' statute without precipitating the kind of storm that has swirled around its abortion jurisprudence. But it is doubtful that the Court could avoid a backlash if it went after the broad range of laws resting on religious convictions — by, for example, mandating sex education classes, authorizing polygamy, and legalizing prostitution, all on Establishment Clause grounds." (footnote omitted)).

361 *See* Idleman, *supra* note 23, at 1015 (noting that "the Constitution guarantees no right to political success").

the case with a restriction on religiously informed legislation — then this lack of moral resonance may very well become the determinative factor, the proverbial last straw, in the religious citizen's assessment of the law's legitimacy.

Of course, one might object that the foregoing analysis is entirely too sympathetic to religious citizens, particularly those comprising political majorities, and not sufficiently solicitous of their nonreligious or nonmainstream counterparts. In particular, while it might be problematic for religious citizens not to be able to shape the law according to their normative understandings, it might be equally or more problematic for other citizens to be subjected to laws reflecting beliefs and premises which they, as nonbelievers or adherents of other faiths, do not hold.[362] Perhaps the most obvious response to this objection is simply to point out that this is the nature of an epistemically unregulated liberal democracy, which necessarily recognizes one's freedom to adhere to nonmainstream beliefs but does not further guarantee that one's views will always or even generally correspond to the majoritarian representative determination of the common good.[363] It also bears noting that the harms in question are not truly comparable. Losing at the polls or on the legislative floor because one's views are nonmajoritarian is much less problematic in principle than losing in these venues because one's views have been deemed categorically inappropriate for consideration. The nonmainstream citizen at least has an opportunity to succeed on the merits *as she defines them* and, if her views are cogent and she is willing to undertake the arduous but laudable journey of legislative persuasion, she may in fact prevail. The religious citizen, by contrast, has no opportunity to succeed unless he is willing and able to disregard his understanding of moral truth and to approximate or mask his beliefs by using the language of secular or material interest, a strategy that itself may very well subvert

---

362 *See, e.g.*, Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, *in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 69, 77 (Stephen M. Feldman ed., 2000) (arguing that "the use of secular reason must in general be the main basis of sociopolitical decision" because "[i]f I am coerced on grounds that cannot motivate me, as a rational informed person, to do the thing in question, I cannot come to identify with the deed and will tend to resent having to do it"); Feldman, *supra* note 10, at 975 (noting "the resentment felt by those who are burdened by a law passed because of religious beliefs that are not universally held").

363 *See* Gundaker Cent. Motors, Inc. v. Gassert, 127 A.2d 566, 570 (N.J. 1956) (explaining that "[t]he State has the power, in the interests of the common good, to enact all manner of laws reasonably designed for the protection of the public health, welfare, safety and morals" and that, "so long as there is some degree of reasonable necessity to protect the legitimate interests of the public, and the regulation resulting from the use of the power is not arbitrary or oppressive, the greater good for the greater number must prevail and individual inconveniences must be suffered as the price to be paid for living in a well-ordered society"), *appeal dismissed*, 354 U.S. 933 (1957).

his religious obligation to bear honest witness to these beliefs in the public sphere.[364]

CONCLUSION

As judges and scholars are well aware, the validity of any given constitutional argument may be ascertained in many — perhaps too many — ways. Among other things, the argument can be measured against the words of the Constitution, their context, their original or historical understanding, their contemporary doctrinal expression, or the principles or theories that provide their vitality. So numerous are the interpretive options, in fact, that rendering a determination with confidence can often be a difficult if not impossible task. When several of these factors appear simultaneously to contradict the argument, however, one may then conclude that it is almost certainly incorrect.

The contention that a legislature's use of religious premises categorically or presumptively violates the Establishment Clause is one such argument. A survey of the clause's principal doctrines reveals that the contention far exceeds their prohibitory scope, while ignoring many of their more subtle or specific parameters. An examination of judicial deference to tradition — the validation of certain longstanding practices under the Establishment Clause and the recognition of morality regulation under the police power — further reveals the unlikelihood that legislative reliance on religious premises, in and of itself, would be deemed unconstitutional. Finally, the contention that such reliance should in fact be invalidated cannot be squared with two of the basic principles of democratic legitimacy — that citizens should be able to participate equally in the political and legal spheres and that citizens should be able to expect that laws will generally reflect majoritarian values.

One important objective of this article is obviously to demonstrate and to expose the doctrinal incorrectness of this contention. To some extent, this exposure is intended simply to set the record straight within the academic, judicial, and practicing legal communities. To an even larger extent, however, this exposure is intended to forestall various forms of collateral or extralegal damage. After all, the harm of advancing erroneous constitutional arguments that entail the restriction of other citizens' political rights can extend well beyond offense to the abstract ideal of truth. Such arguments can secondarily affect public opinion and popular culture, giving illegitimate credence to analogous nonacademic

---

364 *See* STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS 31 (2000) (discussing the notion of bearing religious witness); Gaffney, *supra* note 236, at 235–36 (noting "the deep strain within contemporary religious groups which rejects a privatized, individualistic view of religious experience and insists on active, even radical, involvement in politics").

views while either chilling the activities or stirring the anger of those citizens who may come to believe that their rights are threatened if not actually restricted.

Ultimately, it is in the best interest of all citizens not to urge or impose formal disabilities on the political participation of others — if not out of fairness or out of regard for the values of governmental legitimacy and social stability, then at least out of concern that such disabilities may eventually be visited upon their original proponents.[365] Although the disabling of religious influences on legislation may crudely serve the short-term objective of invalidating laws reflecting traditional morality, and "[a]lthough the rise of the religious right has been perhaps the most conspicuous example of religion's political influence in [recent years], religion strongly influences issues and attitudes *at all points* on the political spectrum."[366] As Justice Scalia has astutely noted, "[t]oday's religious activism may give us [a law concerning creationism in public school curricula], but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims."[367]

This is not to say, and the article has not suggested, that the legislative use of religious premises can never transgress the Establishment Clause. To the contrary, a violation may occur if, among other things, a legislature invokes religious beliefs or premises that are denominationally over-specific, fails to disentangle statutory terms or concepts from their religious sources, or delegates interpretive authority to religious institutions or officials. But these are statute-by-statute and ordinance-by-ordinance potentialities that seldom arise, and they certainly do not create a presumptive or categorical prohibition. At the same time, it is important to remember that untempered legislative reliance on religious values can also be problematic in other ways. That such reliance may in general be constitutional neither dictates its frequency, guarantees its suitability, nor liberates it from the constraints of institutional norms such as civility, prudence, or collegiality. But the First Amendment to the United States Constitution does not itself impose a categorical restriction to that effect, and it is both inappropriate and injurious to perpetuate the myth that it does.

---

365 *Cf.* Perry, *supra* note 244, app. at 481 ("[One] consideration counseling against pursuit of coercive political strategies is simple self-interest. . . . We may be members of the politically dominant coalition today, but there is no guarantee we will be tomorrow.").

366 Smith, *supra* note 100, at 989 (emphasis added).

367 Edwards v. Aguillard, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting).