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The Devil Made Me Do It: Legislator Motive and the Establishment Clause

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THE DEVIL MADE ME DO IT: THE IRRELEVANCE OF LEGISLATIVE MOTIVATION UNDER THE ESTABLISHMENT CLAUSE

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I. INTRODUCTION

Imagine the following scenario: Congress passes a law increasing federal spending for NASA's extended-range space exploration program. From the myriad of reasons to fund this particular program, some legislators reason that searching for life on other planets will lead to important scientific discoveries we could not find otherwise. Others feel the program could lead to an alternative habitat to support population growth. Finally, some of these same optimistic legislators believe that the expense involved in the program is justified by the high likelihood of finding extra-terrestrial life. In this hypothetical, an observer might find the law either wise or foolish; also, one might conclude the supporting rationale relies on truth or fiction. In either event, it is difficult to see any governmental establishment of religion.

A little digging, though, reveals that the belief, held by many of those members of Congress who voted for the bill, that life exists on other planets stems from so-called religious beliefs. More specifically, some Jewish, Muslim, and Christian members of Congress interpret their authoritative religious texts to reveal that such life exists. Furthermore, at least one member of Congress had a dream (before she voted for the bill) in which it was revealed to her by an angel that the government would find extra-terrestrial life if it would earnestly search. Armed with this new information concerning the "motivation" of the legislators, one could successfully argue that the space exploration law, which earlier seemed innocuous enough, is now an unconstitutional establishment of religion. The Establishment Clause jurisprudence that permits such an argument implicitly rejects religion as a legitimate source of truth, and it is wrong.

"Congress shall make no law that many members of Congress voted for because of their religious beliefs" is a clause with which any constitutional scholar should be familiar; this is the perversion\(^1\) of the Establishment Clause\(^2\) that the United States Supreme Court has essentially created in

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\(^1\)Or, the "tortured and unsatisfactory reading." Stephen L. Carter, The Culture of Disbelief 112 (1993).

\(^2\)The real Establishment Clause and the Free Exercise Clause collectively constitute the Religion Clauses, which read as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. Const. amend. I.
several well-known decisions. Four of these decisions held federal and state government action unconstitutional, solely, because the court perceived a religious motivation of the government decision-makers. Given the Court’s interpretation of the first prong of the Lemon test—the requirement that a statute have a secular legislative purpose—an inquiry into motivation now seems clearly established as an appropriate consideration in Establishment Clause cases.

Although the Court has not used Lemon in a number of years, relying instead on the “coercion” test articulated in Lee v. Weisman and the “endorsement” test penned by Justice O’Connor, Lemon remains alive and

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3 See generally Edwards v. Aguillard, 482 U.S. 578 (1987) (invalidating a Louisiana law requiring public school teachers to present the scientific evidence for creation if the evidence for evolution was also presented); Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating an Alabama statute authorizing a one-minute period of silence in all public schools); Stone v. Graham, 449 U.S. 39 (1980) (invalidating a Kentucky statute requiring that a copy of the Ten Commandments be posted in every public school classroom); Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating an Arkansas statute prohibiting a public school teacher from teaching evolution).

4 The doctrine of incorporation subjects state government action to First Amendment scrutiny by way of the Fourteenth Amendment. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943). Although it is surely much too late in the day to argue that the Establishment Clause should not be incorporated, such an argument would be well supported by history. Many scholars agree that the Framers intended the Establishment Clause to preserve for the states the privilege of establishing religions. See Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1157 (1991); Edward Dumbauld, The Bill of Rights and What It Means Today 104-105 & n.5 (1957); Michael A. Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 NOTRE DAME L. REV. 311, 321-23 (1986); William K. Lietzau, Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation, 39 DEPAUL L. REV. 1191, 1191 (1990). This theory, however, need not be explored for purposes of this Article.

5 See supra note 3.

6 The Court, in Lemon v. Kurtzman, synthesized earlier cases and outlined three requirements for statutes challenged as violating the Constitution: “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 governmental entanglement with religion.’” 403 U.S. 602, 612-13 (1971) (citations omitted). Thus, the Lemon test makes unconstitutional any statute without “a secular legislative purpose.” Id. at 612. Since Lemon, however, the Court has at least suggested that more than just “a” secular purpose is required. See McGowan v. Maryland, 366 U.S. 420, 453 (1961).


kicking.\(^9\) This Article suggests that the courts’ interpretation of the secular purpose prong is wrong. Despite the courts’ emphasis on motivation, only the \textit{effect} of a law and the objective governmental interest in that law should be considered in determining whether it violates Establishment Clause prohibitions. The motivation of the decision maker should be irrelevant, except to the extent that it might illuminate the actual or potential effect of the law.\(^{10}\) Although this narrow exception to the motivation-is-irrelevant argument suggests one explanation for the courts’ resort to motivation analysis, this explanation inherently accuses these courts of being intellectually lazy (and not only in the context of the Religion Clauses)—lazy for not requiring or evaluating evidence of a law’s actual effect and for not pinpointing exactly what sort of effect violates the Constitution. Instead, under \textit{Lemon}, the courts rely on the simpler motivation analysis. In Establishment Clause cases, the stakes are simply too high to settle for such dangerous shortcuts.

At the outset of this analysis, a preliminary wrinkle must be ironed out: What is the relationship between legislative intent, purpose, and motivation? The \textit{Lemon} test, after all, does not even speak of motivation; it simply discusses a secular purpose.\(^{11}\) Still, this ‘secular purpose’ prong

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\(^{9}\)Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, \textit{Lemon} stalks our Establishment Clause jurisprudence. \ldots It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely. \ldots Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

\(^{10}\)At least one scholar has made the opposite argument—that the effect of a law, while relevant to the question of legislative motivation, “should not trigger intervention in the absence” of a finding of improper motivation. John Hart Ely, \textit{Legislative and Administrative Motivation in Constitutional Law}, 79 \textit{YALE L.J.} 1205, 1316 (1970) [hereinafter Ely, \textit{Motivation}]. Apparently, the experience of the next ten years revealed to Ely the error in his reasoning. \textit{See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW} 145 (1980) [hereinafter Ely, \textit{Democracy}] (“It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of motivation into the thoroughly mistaken notion that a denial of a constitutional right doesn’t count as such unless it was intentional.”).

\(^{11}\)\textit{See supra} note 10.
of the test tempts courts to consider motivation, assuming there is a relevant motivation/purpose distinction. A Michigan court recognized such a distinction, although motivation/intent have different connotations. . . . [Motive] may be defined as the impelling force of reason which induces action and precedes it . . . . [Intent] signifies the . . . meaning of the enactment, the purpose it seeks to accomplish, [and] its construction."12 If 'legislative purpose' is defined as the construction or meaning of a statute, then this Article does not mean to address 'purpose,' only 'motivation.' Clearly, a true purpose analysis is consistent with the argument that the effect of a statute should be a court's focus; before a court can understand the effect of a law, must it not construe or determine the meaning of the law?13 And when the words of a statute are at all ambiguous, evidence of the legislature's purpose can sometimes clarify the statute's meaning. Yet, when 'purpose' is confused with 'motivation,' the courts essentially abandon the effect test and begin to tread into the minds of the legislators. This Article argues that the shift in this analysis is the very problem with the Lemon test interpretation in place today.

In any event, the purpose/motivation distinction may prove unhelpful here, for the two words are constantly interchanged in many court opinions. As one commentator wrote in 1970, "By and large the term 'purpose' has served as nothing more useful than a signal that the court is willing to look at motivation, 'motive' as a signal that it is not."14 The Supreme Court has never adopted the motivation/purpose distinction,15 but in the 1989 case of Board of Education v. Mergens, Justice O'Connor, in a portion of her opinion that was joined by three other justices, approvingly referred to it:

Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy

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13 Although construing a law by investigating legislative history and other aspects of the law's background can present many of the same practical difficulties as investigating motivation, important differences do exist. These differences provide a strong basis for encouraging judicial inquiries into legislative intent to aid with statutory interpretation, while also discouraging inquiries to legislative motivation for the purpose of holding statutes unconstitutional. See infra Part III.

14 See Ely, Motivation, supra note 10, at 1217.

15 See id.
of protection, that alone would not invalidate the Act, because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law. Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act’s purpose was not to “endorse or disapprove of religion.”

Thus, the Supreme Court was only one vote shy of adopting the purpose/motivation distinction, which certainly would have helped to move the emphasis back onto a law’s effect. Additionally, it would have returned a more appropriate respect for legislatures and legislators when the Court undertook a legislative review. Earlier in the same paragraph, O’Connor recalled that the “Court is ‘reluctan[t] to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State’s program may be discerned from the face of the statute.’” Hers was not the majority opinion, however, and the more realistic picture of the Supreme Court’s position on the purpose/motivation distinction probably is that no significant distinction exists and that the words may, therefore, be used interchangeably. In fact, some cases have specifically recognized the interchangeability: for example, in one dissent, Scalia stated that “regardless of what ‘legislative purpose’ may mean in other contexts, for the purpose of the Lemon test it means the ‘actual’ motives of those responsible for the challenged action.” Whatever distinction there is or should be, however, this Article attempts to focus on the analysis a court actually uses more than its choice of the words “purpose,” “motivation,” or “intent.”

Part II presents examples of courts using motivation analysis, both in general and in Establishment Clause cases. Additionally, Part II also outlines the arguments in favor of considering motivation and questions whether some of the motivation analysis is not simply a shortcut to examining the actual effect of a law. Part III addresses practical problems courts face when they try to determine legislator motivation, and briefly discusses some of the differences between the constitutional scrutiny and

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18For examples of various courts using these terms interchangeably outside of the Religion Clauses context, see Alan E. Brownstein, Illicit Legislative Motive in the Municipal Land Use Regulation Process, 57 U. CIN. L. REV. 1, 2-3 n.3 (1988).
the legislative interpretation contexts. Part IV argues that even if a court is capable of determining the motivation of a large decision-making body, it is improper to do so in Establishment Clause cases. Alternatively, assuming a court does consider motivation relevant, this Part also demonstrates the need, if religion is to be respected as a source of actual truth in our society, to re-evaluate and clarify what motivations violate the Establishment Clause. Part V sketches an alternative approach to the issue, and concludes that in light of the difficulties and impropriety of examining legislative motivation, such motivation should be considered irrelevant in Establishment Clause analysis.

II. THE HISTORY OF LEGISLATIVE MOTIVATION'S ROLE IN CONSTITUTIONAL REVIEW

A. In General

1. The Cases

The Supreme Court rejected judicial inquiries into motivation early in our republic’s history. In Fletcher v. Peck, for example, the Supreme Court found that the impure financial motives of some legislators did not invalidate a law concerning a deed in which some legislators had allegedly been promised an interest. While acknowledging the deplorable nature of such motivation, the Court focused on practical difficulties, stating that if it did inquire into legislative motivation, there “still would...be much difficulty in saying to what extent those [improper] means must be applied to produce this effect.” In other words, the reality of attempting to dissect the motive of legislators would be far too difficult to apply in statutory analysis. A century later, this principle seemed to be just as well settled: “The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.” In 1930, this doctrine remained alive. Since the 1960s, however, courts have exhibited a greater willingness to explore

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20 10 U.S. (6 Cranch) 87, 131 (1810).
21 Id. at 130.
22 McCray v. United States, 195 U.S. 27, 56 (1904).
23 E.g., Arizona v. California, 283 U.S. 423, 455 n.7 (1931) (stating that the Court could not inquire into the motives of the federal or state legislatures and citing twelve cases in support).
motivation as a factor in legislative decision-making.24 Such exploration has led to a body of case law that is confusing, at best.25

*Kennedy v. Mendoza-Martinez*26 and *Epperson v. Arkansas*27 are two of the first landmarks in the history of motivation analysis. While earlier cases suggested that improper legislative motivation or purpose could suffice to invalidate a statute,28 these were two of the first cases to actually act on the idea. In *Kennedy*, the Court found that certain federal sanctions against alleged draft evaders were punitive in nature, and thus, the absence of traditional safeguards required by the Due Process Clause rendered the statutes unconstitutional.29 Although the punitive character of a statute should have been apparent from its effect, the Court chose to rely on congressional motivation for its holding.30 This reliance enabled the Court to avoid "a detailed examination" guided by traditional tests (focusing on a law's effects) for determining whether a statute is penal or regulatory in character. Previous cases applying the tests had found the problem "extremely difficult and elusive of solution."31 Thus, this case suggests that motivation can serve as a shortcut to determining the effect or function of a statute. The Court actually stated this premise almost explicitly: "A study of the history of [the law], which 'is worth a volume of logic,' . . . coupled with a reading of Congress' reasons for enacting [the law], compels a conclusion that the statute's primary function is to serve as an


25 See id. at 880 ("In determining the constitutionality of official acts, the judicial significance of the motives of government decisionmakers has had a tortured history."); see also Ely, *Motivation, supra* note 10, at 1207 (stating that the Supreme Court's confusion over the relevance of motivation has "achieved disaster proportions").


27 393 U.S. 97 (1968).


29 372 U.S. at 186.

30 Id. at 169 (finding the statutes invalid "because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive"); id. at 170 n.30 (stating that the Court was basing its decision "on the unmistakable penal intent underlying the statutes").

31 Id. at 168.
additional penalty for a special category of draft evader.” In effect, motivation analysis replaced the effect test.

Epperson, on the other hand, involved a challenge to an Arkansas “anti-evolution” statute making it unlawful for a public school teacher to teach evolution principles or use a textbook that stated that man evolved from a lower form of life. The Court’s reasoning in this case was far more focused on motivation than it was in Kennedy. While, arguably, the motivation analysis in Kennedy ultimately went to the function and effect of the statute, little room exists for a similar interpretation of Epperson’s analysis. The Court could have decided the case simply on whether a state may prohibit the teaching of a valid scientific theory; however, it did not. Instead, the Court ruled that a state cannot bar such teachings if the legislative decision-makers have particularly bad motives: “The State’s undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit . . . the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment.” Expert opinion and evidence of events leading to the passage of the statute persuaded the Court that the Arkansas legislature was improperly motivated. As a result, the statute was held to violate the Establishment Clause for lack of religious neutrality. Unfortunately, however, the Court did not explain why the question of neutrality should not be answered solely on the basis of the statute’s effect. It also failed to explain why this particular suspected motivation violated the Establishment Clause. Finding motivation relevant, the Court should have, at the very least, distinguished between a motivation to convert children to a religious belief and a motivation to exclude incorrect scientific theories from a school’s curriculum. Arguably, the latter motivation is constitutionally legitimate, whether the belief that the theories are incorrect

\[32\textit{Id.} at 169-70 (emphasis added).\]
\[33\textit{Epperson} v. Arkansas, 393 U.S. 97, 98-99 (1968).\]
\[34\textit{Id.} at 107 (emphasis added).\]
\[35\textit{Id.} at 107-09 & nn.15-18 (describing the opinion of a legal scholar, the role of the public in getting the anti-evolution statute passed, and the relationship between the statute and the Tennessee statute struck down by that state’s supreme court in the famous case of Scopes v. State, 289 S.W. 363 (1927)).\]
\[36\textit{Id.} at 107 (finding undoubtedly that the reason for the prohibition on teaching evolution was that “it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man”); \textit{Id.} at 109 (“[T]here is no doubt that the motivation for the law was . . . to suppress the teaching of a theory which, it was thought, ‘denied’ the divine creation of man.”).\]
\[37\textit{Id.} at 109.\]
stems from other scientific evidence, the Bible, one’s general life experience, or even direct revelation from God. Yet, even in the face of these holdings, *Kennedy* and *Epperson* did not go so far as to establish beyond question the relevance of motivation. On the contrary, later cases indicated that the motivation issue was still undecided.

*United States v. O’Brien* and *Palmer v. Thompson*, for instance, are cases from the same period, but in which the Court found legislative motivation irrelevant to challenges under the Equal Protection and Free Speech Clauses, respectively. The *O’Brien* opinion proposed that legislative purpose or motivation is relevant only for statutory interpretation and the limited function of determining whether a statute is punitive in nature—a remarkable conclusion considering that the *Epperson* holding was released just six months later. The Court in *O’Brien* held that Congress’s alleged purpose, to suppress freedom of speech by amending a statute to prohibit destruction of Selective Service registration certificates, even if true, was not relevant to whether the amendment violated the Free Speech Clause. Though evidence of the views of some congressmen was available in the congressional record, the Court supported its decision to ignore legislative motivation by pointing to the difficulty of proving (1) what motivated a large number of legislators and (2) the futility of relying on a small number of comments concerning a comprehensive statute. Thus, the Court refused to interpret exactly what went on in the minds of the legislators, even when it had a small amount of evidence to consider. Even here, however, the issue was still not truly decided. Later that same year, when a different clause of the First Amendment was at issue, and the motivations of state legislators were being criticized, the Court (in *Epperson*) changed its tune. The question remained: How long would the new song last?

Like *O’Brien*, *Palmer* tackled the relevance of motivation, but in the Equal Protection arena. In *Palmer*, the city elected to shut down public swimming pools, presumably rather than open them to African-American

38391 U.S. 367 (1968).
41Id. at 382-83.
42Id. at 384, 385 (“What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . . . We decline to void . . . legislation . . . which could be reenacted in its exact form if the same or another legislator made a ‘wiser’ speech about it.”).
43*Palmer*, 403 U.S. at 219.
swimmers. Instead of stating its opposition to pure integration, the city cited financial burdens and public safety as its motive for closing the pools. The Court again held motivation was irrelevant, citing reasons of futility and difficulty to prove. Justice Black, in his majority opinion, made a very important point that, in hindsight, explains how legislative motivation "gradually" became relevant: Black acknowledged the language in two cases interpreting the Fourteenth and Fifteenth Amendments, Griffin v. County School Board and Gomillion v. Lightfoot, which both suggested that motivation or purpose were relevant to a statute's constitutionality. But, he argued, upon closer examination, "the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did." In light of the subsequent history of Equal Protection cases, Black's observation revealed the possibility that, although early opinions actually focused on a statute's effects, the "motivation" language used in these same opinions provided the foundation in later cases to focus on motivation instead of effects. These later cases bolstered the position that discriminatory motives would suffice to invalidate state action.

\[\text{See id. Some evidence in the case suggested that, although the city cited health considerations, the reason the City of Jackson closed its public pools was to avoid integration. See id. at 224-25.}\]

\[\text{Id. at 219.}\]

\[\text{See id. at 224-25 (stressing the difficulty of ascertaining a dominant motivation behind the choices of a group of legislators and the presumption that an invalidated statute could be re-passed without being altered if the legislature developed different reasons).}\]

\[\text{U.S. 218 (1964).}\]

\[\text{364 U.S. 339 (1960).}\]

\[\text{See, e.g., Griffin, 377 U.S. at 231 ("Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional."); Gomillion, 364 U.S. at 347 (explaining that a state's exercise of otherwise legitimate power is subject to judicial review when the power "is used as an instrument for circumventing a federally protected right").}\]

\[\text{Palmer, 403 U.S. at 225. Justice Black went on to detail the bad effects in those cases: "In Griffin, the State was in fact perpetuating a segregated public school system by financing segregated 'private' academies. And in Gomillion the Alabama Legislature's gerrymander of the boundaries of Tuskegee excluded virtually all Negroes from voting in town elections." Id.}\]

\[\text{See, e.g., Washington v. Davis, 426 U.S. 229, 239-48 (1976) (finding that a violation of the Equal Protection component of the Fifth Amendment Due Process Clause requires the government decision-maker to have a discriminatory purpose, even if a racially disproportionate impact is present); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 207-13 (1973) (holding that a school board guilty of intentional segregation in some portions of the school system must prove,}\]
of Black's opinion, however, is that it failed even to address the *Epperson*
holding, admittedly not an Equal Protection case, but still highly relevant
for its motivation analysis. Thus, Black's opinion myopically failed to
differentiate between why a desire on the part of legislators to avoid racial
integration in an Equal Protection case should be ignored, but a desire to
avoid teaching evolution in public schools in an Establishment Clause case
is not only relevant, but determinative. Perhaps, this explanation was not
included, because he recognized that the opinions were based simply on
judicial whim.

Throughout the 1970s and 1980s, application of the motivation analysis
became even more common. Still, despite this growing trend, interspersed
with the opinions that found motivation relevant were other cases holding
exactly the opposite, even when the same constitutional provisions were at
issue.\textsuperscript{52} The common law result was uncertainty as to the role of legislative
motivation in a variety of contexts. One fact remained clear, however:
legislator motivation continued to be a deciding factor in Establishment
Clause jurisprudence.

2. The Arguments in Support of Motivation Analysis

The cases in which the Court considered legislative motivation as a
basis for its holding do have intuitive appeal. Few would disagree with the
notion that a legislator should not vote a certain way with the hope that it
will degrade a race of people or punish a specific group of people *ex post
facto* (in the bill of attainder context). But why is it not enough to ask
whether the statute *actually* functions in an improper way, and if so,
whether the government has a sufficient legitimate interest in exercising its
power?

Cass R. Sunstein, in his law review article "*Interest Groups in
American Public Law,*" presented many arguments for why the actual
motivation of a government decision-maker is important and should be
considered.\textsuperscript{53} Central to his first argument was a statement by Justice
Holmes that "even a dog distinguishes between being stumped over and
being kicked."\textsuperscript{54} That is, in those cases where a person disadvantaged by a

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\textsuperscript{52}See Brownstein, *supra* note 18, at 5-7 (discussing how federal and state courts have blown
both hot and cold on the issue of the relevance of motivation).

\textsuperscript{53}See Cass R. Sunstein, *Interest Groups in American Public Law,* 38 Stan. L. Rev. 29, 79-

\textsuperscript{54}Id. at 80 (citing OLIVER W. HOLMES, THE COMMON LAW 3 (1881)).
statute is aware of the legislature’s actual improper motivation, the person’s injury will be “of a different nature” than it would be in the case of a mere unconstitutional effect.\textsuperscript{55} Thus, if the Court in the Palmer case had decided the city cited financial and safety reasons merely as a cover for its true motive of avoiding integration, a stigma would have attached to the city’s actions, and the minority would have suffered, regardless of the actual effect.\textsuperscript{56}

This argument really goes to the effect or stigma of a statute, and like any other constitutional consideration, should not be exclusively relied upon. Disgruntled constituents might mistake a legislature’s motivation, for example, just as a court could. The argument can also be attacked at its over-simplified core: When one kicks a dog, one kicks either intentionally or accidentally; there is no significant middle ground. When a legislator votes for a bill, on the other hand, she is surely often motivated by more than one consideration. True, religion or racial bias might play a role, but so too might education, voter pressure, scientific data, or plain good sense. Thus, narrowing a decision to one particular factor necessarily ignores all other aspects of that legislator’s personality and background. In other words, unlike a kick or a stumble, which are black and white, legislative decision-making encompasses multiple considerations and is essentially a shade of gray. Finally, the “kicked dog” analogy simply does not apply in many Establishment Clause contexts. Specifically, where a legislator votes a certain way because she believes a particular fact is true, and even if this belief stems largely from a religious source – such as a dream in which an angel told her to look for extra-terrestrial life—it would be nearly impossible to tell whether she “kicked the dog” or simply stumbled. Mere religious influence does not necessarily equate to pure religious motivation. Instead, the kicked dog analogy is better relegated to the Equal Protection and bill of attainder contexts.

A second argument is more persuasive because it analogizes the legislative motive analysis to a jury’s determination of a \textit{mens rea} standard. In both instances, the fact-finder must see into the mind of the person accused. This argument holds that, where the Constitution encourages legislative responsibility in addition to protecting certain fundamental rights, legislative motivation would seem to be of “central

\textsuperscript{55}Sunstein, \textit{supra} note 53, at 80-81; \textit{see also infra} note 134 and accompanying text (discussing Justice O’Connor’s endorsement test and its tendency to blur the line between motivation and effect).

\textsuperscript{56}See Brownstein, \textit{supra} note 18, at 41.
Importantly, this theory hints at a distinction between the Establishment Clause and the Free Exercise Clause. Arguably, the Free Exercise Clause protects and encourages individual fundamental rights, while the Establishment Clause merely limits governmental power. This dichotomy of effect is the result of the very different interests the clauses protect. Still, a statute’s impact on the individual’s right to freedom is ultimately the focus of both clauses. As the Court noted in Wallace v. Jaffree, “the individual’s freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority.” On the other hand, the Court has also said that the “Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.” Still, the distinction between the two clauses does not answer the question of whether a law can “establish an official religion” without causing some unconstitutional effect.

Another commentator suggests two additional reasons for considering motivation in the context of the Religion Clauses. First, to avoid the “whipsaw effect” of the clauses, the arguably inherent conflict between free exercise and the prohibition of establishment, he would require that legislators not “go out of their way . . . to favor or disfavor a religion or religion generally.” This means that a legislator can vote for a bill that favors religion only if he or she is motivated by a desire to accommodate free exercise. Second, he argues that if a statute’s effect is the only focus of legislative review, most regulations would fail because they ultimately aid religion in some way. Thus, a test that distinguished between different types and degrees of impact would be too difficult or inappropriate to implement.

57See Sunstein, supra note 53, at 81. He was referring specifically to the legislative responsibility called for by the Equal Protection Clause. Id.
60By some interpretations, the Establishment Clause and the Free Exercise Clause conflict; when, for example, the government must favor and thus “respect an establishment of” religion by making some accommodation required to avoid “prohibiting the free exercise” of religion. See, e.g., Abington Sch. Dist. v. Schempp, 374 U.S. 203, 296, 309 (1963) (Brennan, J., concurring).
61Ely, Motivation, supra note 10, at 1314.
62Id. at 1316.
63See id.
court to decide whether a large group of legislators have "gone out of their way" in enacting a certain law? Regardless, the Lemon test itself already includes an inquiry into a particular degree of impact—specifically, the "primary effect" prong. For this reason, ignoring the appeal of motivation analysis in favor of a pure effect test would do away with the three-pronged Lemon analysis and boil Establishment Clause jurisprudence down to two discreet issues: (1) neutral effect, and (2) excessive entanglement. The better-balanced approach combines effect and purpose, as the Court recognized under Lemon. Yet, even in light of these well-reasoned arguments in support of motivational analysis, the Court has continued to blindly apply all variations of the Lemon test without any concrete distinction between purpose and motive.

B. In Establishment Clause Cases

1. The Cases

The history of motivation analysis in the context of the Establishment Clause is, in large part, an example of the Supreme Court "smelling" something wrong with a statute, but then failing to identify an improper effect, if one even existed. The language of the legislative "purpose" analysis began well before Lemon established its "secular purpose" prong. Justice Frankfurter, for instance, casually mentioned in a 1943 dissenting opinion that "[i]f the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions." 64 While this language appeared only in the hypothetical of a dissent, and arguably referred to "purpose" simply as it relates to a statute's construction, 65 no such analytical weaknesses carry over to the 1961 Sunday-closing-laws cases. 66

In McGowan v. Maryland, the Court evaluated a Maryland Sunday-closing statute, including such factors as the statute's operative effect, its legislative history, and other historical background, to determine that the purpose of the law was "not to aid religion but to set aside a day of rest and recreation." 67 It seems unlikely that these factors would shed light on an apparently unambiguous statute. Thus, the purpose the Court was looking

65See supra notes 12-13 and text accompanying.
67366 U.S. at 449.
for in McGowan was probably more similar to the motivation discussed here. The Court implied that a statute would violate the Establishment Clause "if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion." Thus, the motivation analysis was clearly in place as early as the 1960s.

By 1968, it became apparent that purpose was relevant in Establishment Clause cases, despite the growing confusion of its application in other contexts. A mere two weeks after deciding in United States v. O'Brien that a motivation to restrict speech was irrelevant in a Free Speech Clause case, the Court reiterated in Board of Education v. Allen that, under the Establishment Clause doctrine, a purpose to advance or inhibit religion is sufficient to invalidate a statute. Thus, the Establishment Clause's prohibition justified a more stringent analysis—specifically, one that investigated the motives of the lawmakers. Still, even with this more strenuous test, the Supreme Court had yet to actually invalidate a statute due to improper religious motive. Five months later, however, the Court decided Epperson.

Later cases arguably made the purpose prong of the Lemon test more difficult to understand, and the Court eventually ruled that state action violated that prong three times in the 1980s. First, the Court, in the per curiam and rather summary Stone v. Graham opinion, held that a Kentucky statute requiring public schools to post a copy of the Ten Commandments in every classroom had no secular legislative purpose and, therefore, violated the Establishment Clause. The Court easily dismissed the state's "avowed" secular purpose, represented by a notation at the bottom of each copy of the Ten Commandments, stressing that they secularly taught important legal codes. Instead, the "pre-eminent purpose," the Court found, was "plainly religious in nature" due to the sacred nature of the

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68 Id. at 453.
69 391 U.S. 367, 385-86 (1968); see supra notes 41-42 and accompanying text.
70 392 U.S. 236, 243 (1968) (following the test stated in School Dist. v. Schempp, 374 U.S. 203, 222 (1963)).
71 See supra notes 33-37 and accompanying text.
72 See Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (finding the purpose prong of Lemon was not satisfied because the "primary purpose" of the statute was to advance a religious belief, but also failing to mention whether "a" secular purpose existed); id. at 599 (Powell, J., concurring) (suggesting the purpose prong is violated if a religious purpose "predominate[s]"). See also Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (requiring a purpose that is "clearly secular").
74 See id.
Jewish and Christian text. Importantly, however, unless the effect of the law was constitutional and the Court wanted it struck down anyway, it is unclear why the Court did not choose to rely on the effects test for its analysis—particularly when the effects of the law were explicitly recognized: "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." Instead, the Court cited only the legislator's intent as the basis for its holding. Justice Rehnquist dissented from the "cavalier summary reversal," stating that the combination of the lower courts' finding of a secular purpose, the secular impact the Ten Commandments have had in other areas, and the secular purpose avowed by the state together deserved at least oral argument and briefs on the merits. His suggestion, however, was summarily ignored.

The next opinion relying on legislative motivation to invalidate a statute came in the 1984 case of Wallace v. Jaffree, where the Court addressed an Alabama statute authorizing a one-minute period of silence in all public schools "for meditation or voluntary prayer." The Court chose to focus on the religious motivation of the legislature, because the "secular purpose" prong of Lemon was the "most plainly implicated" by the case. The sequence and history of related statutes formed the basis for the Court's opinion. Essentially, three statutes creating a "moment of silence" in public schools were challenged at the trial court level, but only the second two were held unconstitutional. The attentive reader might

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Footnotes:

75 Id. at 41. The Court noted that "the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." Id. at 42 (citing Exodus 20:1-11 and Deuteronomy 5:6-15).

76 Id.

77 Id. at 47, 43-47 (Rehnquist, J., dissenting).


79 Id. at 56.

80 See id. at 58-60. The challenged statute was the second in a string of three statutes passed in 1978, 1981, and 1982, all of which were simultaneously challenged at the trial court level. The first, which was found unconstitutional, required a teacher to announce that a period of silence "shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in." Id. at 40 & n.1. The third, which was found unconstitutional, authorized a teacher to lead "willing students" in a particular prayer to "Almighty God." Id. at 40-41 & n.3. A significant element of the Court's reasoning centered on the change in wording from the first to the second statute. Because the second statute did not significantly change the first, except for the addition of the words "or voluntary prayer," the Court found "the statute was enacted to convey a message of state endorsement and promotion of prayer." Id. at 59.

81 Id. at 59-61.
question why only the first statute met the Establishment Clause test when all three statutes were part of a common scheme to return prayer to public schools. Even if the effect of the first statute was less coercive than the latter two, that fact should be irrelevant when the Court's only concern was the motivation of the legislators. Under its own analysis, a moment of pure silence is just as coercive as a moment of silence for prayer when the intent behind the laws is the same. The Supreme Court should not be charged with inconsistency, however, because no party questioned the court of appeals' or the district court's holding that the first statute was constitutional.\footnote{Id. at 41. In contrast, the court of appeals did apply Lemon's first prong to hold the first statute constitutional and the second and third statutes unconstitutional under Lemon's first prong. Id. at 47.} A statement by the law's sponsor inserted into the record\footnote{The sponsor of the statute inserted into the record "a statement indicating that the legislation was an 'effort to return voluntary prayer' to the public schools." Id. at 56-57.} and his testimony at trial\footnote{The sponsor of the bill confirmed to the district court that he had no purpose in mind other than "returning voluntary prayer to public schools." Id. at 57.} persuaded the Court that not only did the government intend to endorse religion, but that no secular purpose existed at all.\footnote{See id.} On this basis, the Court held the statute unconstitutional.

Once again, the dissent pointed out the inconsistency in the majority's opinion. Chief Justice Burger's dissent addressed problems with the majority's motivation analysis. He first noted that all of the sponsor statements that the Court relied upon, besides coming from only one senator, were made after the legislature had passed the statute.\footnote{Id. at 86 (Burger, C.J., dissenting).} Furthermore, that sponsor also testified, which the majority failed to mention, that the moment of silence "was to clear up a widespread misunderstanding that a schoolchild is legally prohibited from engaging in silent, individual prayer once he steps inside a public school building."\footnote{Id. at 87 (Burger, C.J., dissenting).} Finally, Burger argued that the Court should have focused on the second statute as a whole, rather than focusing on the words "or voluntary prayer," to find a permissible purpose and uphold the legislation.\footnote{Id. at 88 (Burger, C.J., dissenting).}

More recently, in the 1987 case of Edwards v. Aguillard, the Court extended its Epperson holding to invalidate a Louisiana law that (1) required public school teachers to present the scientific evidence for creationism if the evidence for evolution was also presented, and (2) called
for certain procedures to develop a creation science curriculum.\textsuperscript{89} The secular purpose claimed by the state was to protect academic freedom.\textsuperscript{90} Interestingly, the Court rejected this stated secular purpose because the statute, the Court believed, did not further that purpose.\textsuperscript{91} The majority reasoned that outlawing the teaching of evolution did not advance the goal of providing a more comprehensive science curriculum, and requiring that creationism be taught in addition to evolution did not give teachers "a flexibility that they did not already possess."\textsuperscript{92} The Court appeared to entirely miss the point raised by Justice Scalia in dissent. Scalia highlighted evidence in the legislative history that the "academic freedom" to which the state was referring was that of the students.\textsuperscript{93} From this evidence, he argued that finding the secular purpose a sham was baseless: "The legislature did not care \textit{whether} the topic of origins was taught; it simply wished to ensure that \textit{when} the topic was taught, students would receive 'all of the evidence.'"\textsuperscript{94} The majority, however, found that instead of promoting academic freedom, the statute demonstrated a "discriminatory preference for the teaching of creation science[,]" because it provided safeguards for this theory that were not in place for the theory of evolution.\textsuperscript{95} Scalia's dissent explained, however, that the secular purpose was very real in light of the barriers already against the creation science.\textsuperscript{96} In other words, the theory of evolution did not require any protection, because it was already freely taught. Creationism, on the other hand, was not. Thus, to protect academic freedom, the legislators may have felt that the lesser-used theory needed additional safeguards. Scalia, citing the legislative history of the statute, argued:

The Louisiana legislators had been told repeatedly that creation scientists were scorned by most educators and scientists, who themselves had an almost religious faith in evolution. It is hardly surprising, then, that ... the legislators protected from discrimination only those teachers whom they thought were \textit{suffering} from discrimination. ... [Also, witnesses had informed the

\textsuperscript{89}482 U.S. 578, 581-82 (1987).
\textsuperscript{90}Id. at 581.
\textsuperscript{91}Id. at 586.
\textsuperscript{92}Id. at 587.
\textsuperscript{93}Id. at 628 (Scalia, J., dissenting).
\textsuperscript{94}Id. (Scalia, J., dissenting).
\textsuperscript{95}Id. at 588.
\textsuperscript{96}See id. at 630-31 (Scalia, J., dissenting).
legislators that, because of the hostility of most scientists and educators to creation science, the topic had been censored from or badly misrepresented in elementary and secondary school texts. In light of the unavailability of works on creation science suitable for classroom use . . . and the existence of ample materials on evolution, it was entirely reasonable for the legislature to conclude that science teachers attempting to implement the Act would need a curriculum guide on creation science, but not on evolution, and that those charged with developing the guide would need an easily accessible group of creation scientists.97

Since 1987, perhaps because of the apparent disingenuousness of its analysis in Edwards, the Supreme Court has not used motivation analysis to invalidate a statute under the Establishment Clause.98 The Establishment Clause cases taken together demonstrate the temptation that motivation analysis represents—the temptation to assume that, because a statute seems foolish to a judge, it must have been the result solely of a motivation to aid religion. Unless the apparent foolishness of the statute is itself unconstitutional, however, the temptation should certainly be resisted. In at least two of the cases, Epperson and Stone, the Court could have relied on alternative analysis to reach the same holding.99 But the Court, for whatever reason, relied on motivation analysis alone, despite the fact that it is improper in light of the history and text of the Religion Clauses and the legitimacy of religious beliefs as a source of truth.

2. Two Types of “Illegitimate” Motivations: Why Religious Motivation Is Not Necessarily Bad

From these 1980s Establishment Clause cases, a significant distinction appears between two types of supposedly illegitimate motives. The alleged motivations in Wallace and Stone illustrate the first type and can

97 Id. at 630-31.
98 The Court may have felt pressure to rule as it did in Edwards, and simply apply a stamp of approval to evolution and of disapproval to creationism. Supporting the challenge to the legislation was a brief “that included an unprecedented seventy-two Nobel Prize winners as signatories—the largest group of Nobel laureates ever to support a single statement on any subject.” Todd Picus, Note, Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media, 71 Tex. L. Rev. 1053, 1092 (1993).
99 But see Ely, Motivation, supra note 10, at 1318 (suggesting that effect without motivation would have been insufficient to invalidate the statute in Epperson).
best be described as a desire to encourage religious activity or to purify religious doctrine—for example, posting the Ten Commandments to encourage children to adhere to Christian values. The second type is illustrated by the motivation in the opening hypothetical and should not be considered illegitimate at all. The example here involves voting to increase spending for NASA’s long-range space exploration program because some of the legislators are religiously motivated to believe that extra-terrestrial life exists. This type of motivation is not a desire to promote or establish religion, but rather the use of religious influence as a legitimate source of truth. The distinction between the two types of motivation, though somewhat illusory, relates to whether the decision involves religious intent, or whether it is merely influenced by religious beliefs. At least in the latter instance, unless we are to completely reject religion as a potential source of truth, so-called religious motivation, no matter how influential, should be irrelevant in the constitutional analysis. Legislative decision-making grounded in factual conclusions that are influenced by religious doctrine is both inescapable and appropriate. Simply stated, in the extra-terrestrial life example, the religious influence is too far removed from the legislative enactment.

If all other problems with motivation analysis could be overcome, and if the distinction between the first and second types of motivation discussed above were not so ephemeral, then an argument to find an Establishment Clause violation because of the first, “encouraging-religion” motivation might be strong. To demonstrate this premise, first assume the Court accurately discovered the motivations of the legislators in Wallace and Stone. In Wallace, for example, assume that a majority of Alabama legislators voting in favor of the “or prayer” amendment were primarily motivated by a desire to encourage students to pray, rather than a desire to clarify that prayer was not forbidden in public schools. Additionally, in Stone, assume that rather than posting the Ten Commandments to educate, the legislators primarily wanted to persuade students to revere and obey the Christian God. With these assumptions, the power of the state would be wielded with the intent to establish religion in violation of the Constitution. One way to reach this conclusion is to ask whether a statute explicitly mandating the fulfillment of the legislators’ desires, as opposed to whatever language the statute provides, would establish a religion. Obviously, statutes requiring all students to pray to or obey God would violate the Establishment Clause. Thus, the intent to accomplish the same end through the use of a moment of silence or the posting of the Ten Commandments likewise clashes with the Constitution.
In contrast, consider legislative motivations like that found in the opening hypothetical. Assume here that a legislator votes for federal spending for long-range space exploration, because her religious beliefs indicate that life on other planets will be discovered. Again, we must ask whether this motivation alone causes the otherwise legitimate statute to establish religion. Even if motivation were considered, the power of the state has not been used to establish religion in this example. Instead, the legislator has simply called upon one facet of her history, in this case her religious studies, as the factual basis for making her decision. Obviously, this is a much different analysis than that described in the Wallace and Stone examples. It is, moreover, an analysis demanded by the inherently philosophical and religious issues our society confronts today, and the traditional respect we have afforded religious thought.

Take, for example, the abortion issue. This issue is necessarily attached to some religious, philosophical, or ideological baggage that cannot be checked at the courthouse door. Yet we do not, or should not, consider it an establishment of religion to legislate the procedures surrounding the issue. Non-establishment does not equate to religious hostility, although some would argue that the latter best represents the current state of Establishment Clause affairs.\(^{100}\) The mere fact that a legislator's decisions are compatible with their interpretations of the Bible does not transform that decision into an Establishment Clause violation. A legislator's understanding of science, his religious beliefs, and his life experiences should all be considered legitimate sources for determining what is fact and what is fiction.

Other questions to which science cannot provide a definitive answer also demonstrate this point. The Constitution should not be interpreted to reject religion as a source of beliefs by making unlawful the following sincere thought processes of three hypothetical legislators:

(1) Based on my interpretation of the Old Testament and the distinctions implicit there between pre- and post-natal life, I do not believe a fetus is a human life. Therefore, I will vote to allow non-life-threatening interests of a pregnant woman sometimes to outweigh an interest in the life of a fetus.

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\(^{100}\)See Serr, supra note 8, at 320 ("The Court's recent Free Exercise decisions permit a government 'neutrality' of callous and often destructive indifference toward religion, while its late 20th century Establishment Clause decisions mandate a government 'neutrality' of hypersensitivity toward even the most limited acknowledgments of religion in public life.").
Based on my interpretation of the Bible and the importance God attached to certain important figures while they were yet in their mothers' wombs, I believe a fetus is a human life, and I will vote to protect it like any other human life.

I have learned of the scientific evidence for and against evolution, and for and against creation science. My understanding of Genesis is more consistent with creation science, so I believe this theory is more likely accurate than the theory of evolution. Thus, in light of an inappropriate bias toward evolution in our schools, I will vote to encourage the teaching of the scientific evidence for creation science's theory.

These legislators could have arrived at these opinions through thought processes that did not dip into the well of religious text, for the issues the legislators voted on were not inherently religious, such as school prayer might be. It should stand, then, that by dipping into that well, as many Americans apparently do in their own decision-making, the hypothetical legislators did not violate their oath of office to uphold the Constitution. Instead, they simply relied on their own life experience and opinions to reach an individual decision concerning a disputed factual question. Surely a society founded on religious freedom should not attack legislative decisions based on those same ideals. But even if the Court were to ignore the importance of upholding religion as a basis for decision-making, the practical problems of ferreting out a legislator's motivation form the largest hurdle yet.

III. SOME PRACTICAL PROBLEMS WITH DETERMINING MOTIVATION

A. The Problems

Far from being just a reason why motivation analysis is distasteful, the practical problems with proving legislative motivation were the primary reason it was ignored for 150 years, and these problems continue to be fertile soil for criticism today. What sets this analysis apart from much of the writing that has come before is that, here, the argument to disregard motivation does not rely on the problems of proof, but more on the

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101 But see infra note 164 and accompanying text.
legitimacy of certain motivations and the impact motivation analysis has on jurisprudence. Still, the practical considerations should not be ignored.

Arguments concerning the problem of proving legislator motivation arise again and again in several contexts. These issues focus on the need to answer two questions. First, what role must the improper motive have played in the decision-making? The most principled answer, if improper motivation really should render a statute unconstitutional and if proving motivation were an exact science, is that the improper motive must be a but-for cause of the law's adoption. In other words, if the statute would have been passed in the absence of improper motivation, it should not be unconstitutional under a motivation analysis. Thus, assuming such analytical precision were possible, if 49 of 100 legislators voted to enact a law for a proper reason and two voted for an improper reason, the law would be unconstitutional. Or, if the 51 legislators who voted for a law were only 51 percent sure of their vote, and two percent of their assurance came from an improper motivation, the law would again be unconstitutional. One commentator has noted that "but for" is the standard in Equal Protection cases and argued establishment cases should be treated likewise.\(^1\) Indeed, a footnote in the 1977 Village of Arlington Heights v. Metropolitan Housing Development Corp. Equal Protection case suggested that, had it been proved that the local government was "motivated in part by a racially discriminatory purpose," the burden would have shifted to the government to establish that the same decision would have resulted, even had the impermissible purpose not been considered.\(^2\) It does not take an experienced litigator to recognize that this sort of burden shifting will probably operate against the government; it is one thing to prove that certain motivations existed, and quite another to establish the sort of unrealistic 51/49 precision suggested above. In fact, such an analysis would require that every legislator fill out a survey stating not only why he voted a particular way, but also to what extent he supported his own vote. Not only would such a requirement be unrealistic, but even then the Court would debate as to which reasons violated the establishment prohibition. For this reason, if the Supreme Court insists on retaining the first prong of the Lemon test, it should continue to require


only "a secular purpose" analysis, rather than a test requiring "no religious purpose." 104

The second question at issue is what evidence is relevant to prove motivation? For instance, are one legislator's public statements the determining factor? Or, perhaps, it is what the sponsor of the law inserted into the record after enactment, 105 what several legislators said during debate on the law, or what the public was saying about the law before it was passed. 106 In the Equal Protection context, Arlington Heights summarized generally what evidence should be considered: The Court advised analyzing, if available, at least the "impact" of the government action, the "historical background of the decision," the "specific sequence of events leading up to the challenged decision," any "[d]epartures from the normal procedural sequence," and the "legislative or administrative history." 107 Likewise, Edwards v. Aguillard summarized sources of proof in the Establishment Clause context: The Court, looking to precedent, pointed to "the statute on its face, its legislative history, or its interpretation by a responsible administrative agency," "the historical context," and "the specific sequence of events leading to [its] passage." 108

Not surprisingly, the factors in both cases are predominantly circumstantial. It is not as though courts ask legislators what they were thinking, although this option may be available on the unusual occasion that a legislator waives privilege or is not protected by privilege. 109 But if courts resort to analyzing legislative motivation, it may become increasingly unusual for a legislator to reveal his motivation during debates on a bill, or else face reversal. Obviously, given the intangibility of legislative motivation and the circumstantial nature of its proof, courts face an extremely difficult task when they seek to extract a single motivation from a large legislative body whose members do not always say what they think. Thus, the practical considerations encourage many commentators to argue against application of this analysis.

104 But see supra note 72 (citing language by the Court that suggests more than just "a" secular purpose is required).
106 See Epperson v. Arkansas, 393 U.S. 97, 107-09 & n.16 (1968) (describing public debate about a bill to remove evolution from public schools).
107 429 U.S. at 266-68.
109 See Arlington Heights, 429 U.S. at 268.
B. Keep the "Baby": Why the Practical Problems with Motivation "Bathwater" Do Not Compel Throwing Out Purpose Analysis in the Legislative Interpretation Context

Despite the obvious problems with applying a purely motivation-based analysis, these authors do not suggest that Lemon's purpose prong should be wholly ignored. Many of the problems discussed above likely would exist any time a court looks to external sources to illuminate a statute's meaning. We should distinguish, however, between using legislative history to interpret the meaning of a statute and reading the legislator's minds to determine its constitutionality. This fact is particularly true given that many legislators make decisions based on multiple motives. For example, one commentator, writing about O'Brien, the case involving a Free Speech Clause challenge to a destruction of Selective Service registration certificates prohibition, stated:

[W]hile a single sane legislator cannot at the same time intend that private deconstructions be outlawed and that they not be outlawed, he can quite consistently intend to discourage expression and to protect government records . . . . The two expectations probably were intertwined in the minds of most legislators, and evidence of a sort available only to the Almighty would be needed to sort them out or to assign them relative weights.\(^{110}\)

Granted, the problem of mixed motives for the entire multimember body still exists, but again only one meaning can be given to the statute. Perhaps 51 of the 100 legislators voting for a moment-of-silence law meant to require a teacher to observe the moment and 49 meant only to authorize observation. In a case where a teacher refused to observe the moment, a court could productively inquire which interpretation governed. The court might err and find observation was not meant to be required, but at least its inquiry was not futile. The statute's purpose will always be relevant to statutory analysis. Ultimately, the significant difference between this example and the motivation analysis discussed above is that the legislature must give a statute meaning, but that meaning need not be based on any particular motivation.

Consider also the discussion above concerning the two types of religious motivation. These authors argued that the first, exemplified by the legislator's desire to create a religious moment for school prayer,

\(^{110}\)Ely, Motivation, supra note 10, at 1214.
clearly implicated Establishment Clause prohibitions. The second motivation, exemplified by the decision to increase NASA funding based on factual conclusions influenced by religious beliefs; did not invoke the same consideration. In effect, the distinction between these two motivations hinges on a pure secular purpose analysis under the Lemon test. Under Lemon, a court would still be entitled to consider legislative history to interpret a statute’s purpose. In the first example, courts likely would conclude, despite other purposes that might be articulated, that the true purpose (or effect) of the statute was to create a religious moment. In contrast, in the second example, even if the legislator explicitly stated that he was voting for NASA funding due to his religious beliefs, the purpose of the statute (reflected in its effect) remains unaffected. Thus, the purpose prong of Lemon essentially ferrets out the same concerns identified by motivation analysis, but protects religious influence as a basis for decision-making. For this reason, Lemon’s purpose analysis should be retained.

IV. THE IMPROPRIETY OF CONSIDERING MOTIVATION

The impropriety of a motivation inquiry is apparent from four perspectives. First, scrutinizing the motivations of individual legislators unjustifiably involves the judicial branch in the affairs of the legislative branch. Second, the intent of the Framers and Ratifiers of the First Amendment was probably to put on trial legislation, rather than legislators. Third, when motivation becomes the focus of judicial inquiry, it is generally at the expense of focusing on the real issue—the effect on those the Bill of Rights was meant to protect. Fourth, and most unique to the context of the Religion Clauses, questioning a legislator’s religious motivations seriously risks marginalizing and punishing a source of beliefs that millions of Americans utilize and that should be considered legitimate if our government is not to scoff at the power of religion to provide truth, particularly where other sources fail.

A. Separation-of-Powers Arguments

Perhaps courts today are more confident of their capacity to determine truth and more willing to put an entire legislature on trial. As a result, motivation analysis blossomed in the latter half of this century. Justice O’Connor’s concurring opinion in the moment-of-silence case indicated such confidence: “I have little doubt that our courts are capable of
distinguishing a sham secular purpose from a sincere one . . . ."  

This confidence, though expressed in the context of describing the deference the Court would show a legislature, contrasts starkly with the apparent deference-at-all-costs approach apparent in prior cases. Consider, for example, the early case of *Fletcher v. Peck*. In that case, some legislators allegedly took a personal interest in a deed before voting on a law concerning that same deed. Justice O'Connor would surely have had no problem finding that any purpose those legislators claimed might be a sham. The attitude of the Court in *Fletcher*, however, seemed to be that its hands were tied. The Court lamented, "that impure motives should contribute to the passage of a law . . . [is a circumstance] most deeply to be deplored," but went on simply to state that the motivation of individual legislators could not be considered. More recently, the Court in *United States v. O'Brien* expressed a strong respect for legislatures and their handiwork when it refused to consider whether Congress might have been motivated by a desire to abridge speech when it amended a Vietnam era statute prohibiting destruction of Selective Service registration certificates: "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and *the stakes are sufficiently high* for us to eschew guesswork."  

Why do some courts fear questioning the legislative branch? Is not the judiciary's primary purpose to provide checks and balances to Congress's passage of laws? The answer to the question probably implicates tradition more than the Constitution itself. "Any inquiry into motive requires an

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111 *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring). O'Connor's confidence may have been misplaced. Some would argue that the Court did miss a sham purpose in *United States v. O'Brien*. 391 U.S. 367 (1968). Although the Court in that case deemed motivation irrelevant, it still addressed the question and suggested that the legislative motivation to protect government records justified the statute. *Id.* at 385-86. In light of Vietnam War protesting in the form of draft-card burning and the anti-protester speeches of some legislators, *see id.* at 386, the real motivation may have been to suppress expression.

112 10 U.S. (6 Cranch) 87 (1810); *see also supra* notes 20-21 and accompanying text.

113 *See Fletcher*, 10 U.S. at 88-89.

114 *Id.* at 130.

115 Some evidence in the case suggested legislators intended the law to prevent an increasingly popular form of protest, burning the certificates. *See O'Brien*, 391 U.S. at 385-86.

116 *Id.* at 384 (emphasis added); *see also supra* notes 40-42 and accompanying text.

117 The concept of separation of powers seems to be more "constitutional" than actually in the Constitution. *See*, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (explaining that the act of state doctrine is not required by the Constitution, but that the doctrine does have "constitutional" underpinnings" because it arises out of government's separation of powers).
extraordinary degree of intrusion into the decision making process,"\textsuperscript{118} which is not consistent with the traditional deference courts show legislatures.\textsuperscript{119} Furthermore, the lack of deference accuses legislators, not of making an error (as when the effects of legislation are unconstitutional), but of violating their oaths of office.\textsuperscript{120} Finally, the fear that seeking evidence of motivation might be leading the judiciary to delve into the realm of politics—a realm where its integrity may suffer—is very real.\textsuperscript{121} Increasing reliance on motivation is not surprising, then, in view of the historically recent activism and politicization of courts.\textsuperscript{122}

B. A Historical Perspective

The Drafters of the First Amendment would have been hypocrites, indeed, had they intended that government decision-makers could not be motivated by their religious beliefs. Clearly, many of those Drafters, who also ratified the Declaration of Independence, were influenced by religion, as evidenced by the words of the Declaration alone.\textsuperscript{123} As Justice Scalia noted in his \textit{Lee v. Weisman} dissent, the Declaration of Independence, "the document marking our birth as a separate people, 'appeal[ed] to the Supreme Judge of the world for the rectitude of our intentions' and avowed

\textsuperscript{118}Raveson, \textit{supra} note 24, at 886; \textit{see} Cousins v. City Council, 466 F.2d 830, 856-57 (7th Cir. 1972) (Stevens, J., dissenting) (arguing that it "demeans the legislative process to inquire into [legislators'] private conversations," and to infer evil intent from their awareness of certain facts).

\textsuperscript{119}See United States v. Falk, 479 F.2d 616, 629-30 (7th Cir. 1973) (Cummings, J., dissenting) (arguing that inquiring into motivation destroys the distinction between different departments of Government).

\textsuperscript{120}See Raveson, \textit{supra} note 24, at 886; Whitmore Gray, \textit{Note, Developments of the Law - Equal Protection, 82 Harv. L. Rev. 1065, 1093 (1969)}.

\textsuperscript{121}See \textsc{Robert H. Bork, The Tempting of America: The Political Seduction of the Law} 349 (1990) ("No legal system can produce increasingly political results without at some point ceasing to be, or earning the respect due, a legal system."); \textit{see also} Gray, \textit{supra} note 120, at 1093-94 (arguing that a motivation inquiry "involves a court in the give-and-take of politics").

\textsuperscript{122}Bork argues that courts have been seduced by politics. In arguing for an "original understanding" approach to constitutional law, he criticizes the counter-argument that good cases would have been decided differently if original understanding had controlled, and he labels the counter-argument "seduction" that is causing law to lose "its integrity as a discipline." \textsc{Bork, supra} note 121, at 262. This idea of logic that works backwards, taking an attractive result and creating a justification, may explain how the Court has reached some of the decisions this Article criticizes.

\textsuperscript{123}Theology continues to be a valuable source of ideas for legal theorists. \textit{See, e.g.}, \textsc{H. Jefferson Powell, The Moral Tradition of American Constitutionalism: A Theological Interpretation} (1993); \textsc{Milner S. Ball, The Word and the Law} (1993).
‘a firm reliance on the protection of divine Providence.’”[124] Likewise, the anti-establishment campaigns of Madison and Jefferson in the 1780s, which are commonly used to demonstrate the original intent to separate church and state, were “animated by an overtly religious rationale.”[125] Jefferson, for example, supported his position by arguing that “Almighty God hath created the mind free.”[126] Similarly, George Washington was certainly motivated by his religious beliefs when he made a prayer part of his first official act as President, and “[s]uch supplications have been a characteristic feature of inaugural addresses ever since.”[127] Clearly, this country was founded upon the religious ideals of the time, and that religious influence should not suddenly be taboo in legislative decision-making.

Still, had the Religion Clauses been worded differently, the Drafters could have evinced a double standard. “One could argue . . . that any time Congress acts with the intent of advancing religion, it has enacted a ‘law respecting an establishment of religion’; but far from being an unavoidable reading, it is quite an unnatural one.”[128] An example of an alternative wording of a Religion Clause that would suggest motivational relevance is found in Madison’s original draft of the Free Exercise Clause. However, the portion of the text implicating motivation was removed, leaving only a standard that prohibited certain effects. The original took two swipes at protecting free exercise: First, it provided that “[t]he civil rights of none shall be abridged on account of religious belief or worship;” second, that the “full and equal rights of conscience [should not] be in any manner, or on any pretext, infringed.”[129] The second prong is more like the actual Free Exercise Clause, and it has the same style as the Establishment Clause.[130] Indeed, the selection committee omitted the first prong and abbreviated the second to read much like the final version: “nor shall the equal rights of conscience be infringed.”[131] This fact suggests the intent was to protect

[126] Id.
[127] Lee, 505 U.S. at 633 (Scalia, J., dissenting).
[130] But see supra note 57 and accompanying text (discussing an argument that the Free Exercise Clause protects individual liberties while the Establishment Clause is concerned with requiring legislative responsibility).
substantive liberties, rather than to adopt "formal neutrality," which an emphasis on motivation would accomplish. Thus, historically, the purpose behind the First Amendment not only focused on the individual rather than the state, but, in fact, individuals created the First Amendment bent on preserving religious integrity. It has only been in the last century that forced government neutrality or "hypersensitivity toward religion" has been imposed.

C. Taking the Focus off of Effect

1. The Problem in Establishment Cases.

The Supreme Court has had a difficult time developing a test for evaluating what sort of effect violates the Establishment Clause. Prongs two and three of the Lemon test look for a 'primary effect' that 'advances or inhibits religion' and 'an excessive entanglement with religion.' Other tests have been proposed and used as well. Justice O'Connor's endorsement test focuses on whether the law can be perceived as "endorsing" religion. Likewise, Lee v. Weisman's coercion test asks whether the law "coerces." Difficult as it may be to find a legitimate, workable, effects-oriented test, at least the effort is a constructive one.

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132 Id. (outlining the history of the Free Exercise Clause and arguing that the Religion Clauses were meant to address effects, not intents).


134 Lynch v. Donnelly, 465 U.S. 668, 688-89 (1984) (O'Connor, J., concurring). Even this test, as O'Connor would implement it, seems to weigh the government's intent: She argues in Lynch that the Court should examine both what the government "intended to communicate" in its action allegedly endorsing religion and what message the action "actually conveyed." Id. at 690. O'Connor's explanation, however, makes clear that she would look to government intent solely for its potential to affect how some citizens perceive the action:

Some listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent by, for example, examining the context of the statement or asking questions of the speaker.... [W]hen government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message.

Id.; see also supra note 10 and accompanying text.


136 Of course, it is also no easy task to determine what particular motivation is unconstitutional:
Courts should not use motivation as a mechanism to skirt their responsibility to define unconstitutional effects, but this is effectively how the inquiry has been applied.

What difference did it make to the school children in *Stone v. Graham* that some legislators hoped that the students would read the Ten Commandments and be influenced to behave like a Christian or a Jew?\(^{137}\) What difference did it make to the children in *Wallace v. Jaffree* that some legislators hoped the students would use their moment of silence to pray?\(^{138}\) The answer to both questions is probably “not much.” If the children in either case actually felt or were likely to feel ostracized or intimidated, or if some other improper effect were likely to occur, the Court should have addressed that effect, rather than the legislative motivation as a basis for its holding.

The facts in both cases reveal effects the Court could have further analyzed and relied upon. In *Stone*, the Court even stated that the only effect the statute could have had was to further religion.\(^{139}\) Why then did the Court not rely on the “primary effect” prong of *Lemon*, rather than legislator motivation, to invalidate the statute? The answer may be that the Court did not mean what it said. Posting the Ten Commandments, especially with the notation included at the bottom,\(^{140}\) could very well have had the effect of actually educating children. The Court, however, knew it “smelled” something wrong,\(^{141}\) and held accordingly. Yet, it missed its opportunity to define exactly what effects are permissible.

[Even the most conscientious governmental officials can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which is of course unconstitutional.


\(^{137}\) 449 U.S. 39 (1980); see supra notes 73-76 and accompanying text.

\(^{138}\) 472 U.S. 38 (1985); see supra notes 78-87 and accompanying text.

\(^{139}\) See supra note 72 and accompanying text.

\(^{140}\) Each copy was to include a notation at the bottom: “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.” *Stone*, 449 U.S. at 41.

\(^{141}\) This accusation hints at Bork’s criticism of courts that were result-oriented. BORK, supra note 121, at 262 (criticizing judges who would ask what result is attractive and then work backwards to justify the result).
The Court missed its opportunity again in *Wallace*, as Justice O'Connor's opinion helps demonstrate. The *Wallace* majority discussed allegations in the plaintiff's complaint\(^{142}\) and findings of the trial court\(^{143}\) that illustrated the harm suffered by individual students when the challenged moment-of-silence statute had been in effect. Certainly, one can understand the invalidation of the statute in light of these allegations and findings, but again, why did the Court not rely on the harmful effects as the basis for its holding? It could be that the behavior leading to the harm was inconsistent with the plain language of the statute and thus, did not taint it. The Court, also, could have relied upon the effects test in its discussion of the additional language in the first statute granting time for "meditation." The Court held the addition was intended as "state endorsement and promotion of prayer."\(^{144}\) Is there not an effects analysis suggested by the facts that could lead the Court to the same conclusion?\(^{145}\) While Justice Powell thought not,\(^{146}\) O'Connor saw such an analysis in the endorsement test.\(^{147}\) Whether or not the endorsement test is the best articulation of the effects analysis, at least O'Connor chose to address effects more directly than the majority did.

\(^{142}\)The complaint alleged:

that two of the children had been subjected to various acts of religious indoctrination . . . ; that the defendant teachers had "on a daily basis" led their classes in saying certain prayers in unison; that the minor children were exposed to ostracism from their peer group class members if they did not participate; and that [one student] had repeatedly but unsuccessfully requested that the devotional services be stopped.

*Wallace*, 472 U.S. at 42 (footnotes omitted).

\(^{143}\)Id. at 44 n.23 (discussing the district court finding that some teachers led prayer activities over the objections of students, and citing several of the prayers and their references to God).

\(^{144}\)Id. at 59.

\(^{145}\)Not to imply, of course, that the judgment was correct.

\(^{146}\)Wallace, 472 U.S. at 66 ("I would vote to uphold the Alabama statute if it also had a clear secular purpose.") (Powell, J., concurring).

\(^{147}\)Id. at 67 (concluding "the purpose and likely effect" of the statute was to endorse voluntary prayer) (O'Connor, J., concurring in judgment). She discusses her endorsement test, which she seems to view as combining the purpose and effect inquiries. Id. at 69 ("The endorsement test is useful because of the analytic content it gives to the Lemon-mandated inquiry into legislative purpose and effect."); id. at 73 (detailing what constitutes endorsement in the moment-of-silence context, and concluding, "[t]he crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer").
The transition from *Epperson* to *Edwards* (and possibly from *Scopes v. State*" to *Epperson*) provides an excellent study, not only in how the Court avoids the effects issue, but also in the danger to decision-making of doing so. *Epperson* is difficult to criticize, because the invalidated statute both restricted a teacher’s freedom and prevented students’ access to information (specifically, a legitimate scientific theory). The Court did not invalidate the statute on these grounds, however, and so its reasoning should be criticized—not for lack of logical consistency or failure to follow precedent, but for failing to address the real issue of the “potential” rights of teachers and students. The Court had the opportunity to flesh these rights out and to describe how they were protected, or if it believed no such rights existed, a duty not to invalidate the statute. Instead, the Court operated by “smell” and set a dangerous precedent.

The danger took its toll in *Edwards*, the worst of the religious motivation decisions. Certainly the Court had at its disposal *Epperson* precedent to handle the evidence of legislative motivation, but, as applied to the *Edwards* statute, the logic is no longer sympathetic. Even if every single legislator voting for that statute was motivated entirely by her belief in creationism, which in turn stemmed from her belief in the biblical creation account, the statute was not improperly enacted. Had *Epperson* spelled out what sorts of rights students and teachers have without focusing on legislative motivation, the *Edwards* Court would have recognized, as Justice Scalia did in dissent, that the *Epperson* infringement was not present here. True, the Court does appear concerned with some effects, but judging by the Court’s analysis of these effects, it chose to avoid criticism by basing its decision on the easier to apply motivation analysis.

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148 289 S.W. 363 (Tenn. 1927). *Scopes* concerned the criminal conviction of a defendant accused of teaching that man descended from a lower form of life. The Court in *Epperson* noted that the Arkansas statute in that case was based on the Tennessee law at issue in *Scopes*, a law that was more explicit in its religious purpose than its Arkansas successor. *Epperson v. Arkansas*, 393 U.S. 97, 98 (1968).

149 “Potential” because a right is nothing without a remedy.


151 After evaluating the statute on its face, the Court found the law had the purpose “of discrediting ‘evolution by counterbalancing its teaching at every turn with the teaching of creationism . . . .’” *Id.* at 589. Furthermore, the Court found, “the Creationism Act is designed either to promote the theory of creation science which embodies a particular religious tenet . . . or to prohibit the teaching of a scientific theory disfavored by certain religious sects . . . .” *Id.* at 593. The Court does not suggest that these purposes and designs would not actually be effected, so perhaps it had available to it an alternative religious-effects basis for its judgment. If this basis stemmed from the above-quoted language, however, the decision might have been justified.
2. A Lesson from Free Exercise Jurisprudence.

Ignoring effects is not a mistake restricted to establishment cases. Actually, in the arena of Free Exercise, the mistake was popularly criticized and then apparently remedied by the Religious Freedom Restoration Act of 1993 (RFRA).\textsuperscript{152} The need for the RFRA became apparent after the Supreme Court’s decision in Employment Division v. Smith.\textsuperscript{153} There, the Court considered a criminal law prohibiting drug use, and its burden on the free exercise of two members of the Native American Church to ingest peyote as a traditional ritual practiced by the church.\textsuperscript{154} Because the criminal law was generally applicable (and thus not motivated by a desire to prohibit free exercise), the actual effect of severely burdening the church members’ free exercise was not even considered,\textsuperscript{155} lest their consciences become “a law unto [themselves].”\textsuperscript{156}

The RFRA re-focused free exercise analysis on effect, providing that any law that has the effect of substantially burdening free exercise must be narrowly tailored to further a compelling governmental interest.\textsuperscript{157} Although the Supreme Court eventually struck down the RFRA, because Congress violated the separation of powers doctrine by impermissibly broadening the judicially-determined test to encompass strict-scrutiny, Establishment Clause jurisprudence can learn something from the approach

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\textsuperscript{153} See 494 U.S. 872 (1990); 42 U.S.C. § 2000bb (a)(4) (expressing the finding of Congress that with the Smith decision, “the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion”).

\textsuperscript{154} Smith, 494 U.S. at 874.

\textsuperscript{155} Id. at 884-85.

\textsuperscript{156} Id. at 890.

of the RFRA.\textsuperscript{158} Establishment questions, like free exercise questions, should be decided by a court by inquiring into the law’s effect (its level and nature, perhaps) and the governmental interest in, not the legislative motivation of, the law. In both cases, whether or not the regulation results from “hostility, indifference, or ignorance, the consequences to Religious believers are the same.”\textsuperscript{159} Given the significance of effects and the problems with motivation analysis in the context of both Religion Clauses,\textsuperscript{160} establishment jurisprudence should follow the RFRA’s approach in ignoring motivation.\textsuperscript{161}

\textbf{D. Religion as a Special Case}

Are the scientific method\textsuperscript{162} and secular humanism\textsuperscript{163} the only sources of truth? And if they are, should our society punish the use of and

\begin{itemize}
\item \textsuperscript{160} Members of Congress were aware of problems with motivation analysis when they were considering the RFRA. \textit{See} H.R. Rep. No. 103-88, at 6 (1993) (“[L]egislative motive often cannot be determined and courts have been reluctant to impute bad motive to legislators.”).
\item \textsuperscript{161} Congress was not prepared to extend the logic of the RFRA to the Establishment Clause. 42 U.S.C. § 2000bb-4 (1995) (stating that the Act should not "be construed to affect, interpret, or in any way address" establishment jurisprudence). The compelling interest part of the RFRA standard probably best explains this caution. Laycock and Thomas reveal that this section was added to appease Catholic leaders who were worried the RFRA could be used to challenge tax exemptions and government funding for religious organizations. \textit{See} Laycock \& Thomas, \textit{supra} note 159, at 238-39. The compelling interest requirement is difficult to meet, not merely because "compelling" is a powerful word like "paramount," "gravest," or "highest," but also because the interest must exist with respect to the very specific free exercise rights of the plaintiff. \textit{Id.} at 224 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)). For example, in the case of a generally applicable law, the government must show that an exception for religious claimants would defeat the compelling interest; it does not suffice to show the easier requirement that a compelling interest for the law exists in general. \textit{See id.} Because no plaintiff’s free exercise rights are at issue in a pure establishment case, a court evaluating legislation challenged under the Establishment Clause should probably apply, if the requisite effects are present, the easier governmental interest requirement and ask whether some degree of interest (compelling, substantial, \textit{etc.}) exists for the legislation in general.
\item \textsuperscript{162} The scientific method is implicated by one scholar’s distinction between religion, which is an illegitimate motivation for the exercise of power, and ideology, which is legitimate. In his paradigm, religion is illegitimate because it is not independent from any extrasensory reality that
marginalize all other potential sources? An affirmative answer should direct you to read no further. It should also direct you to segregate schools or even return to the days of slavery, for much of the truth that African-Americans should be treated fairly had and has as its source religious tenets. Of course, this is just one illustration, designed to appeal to widely-held values of equality; but no matter what the end sought, religious beliefs ought not be marginalized solely because of their religious nature.

The Constitution simply does not require Americans to hand over the government to some hypothetical legislators whose relevant beliefs stem only from scientifically provable ideas. What is more, the Constitution does not even allow, much less require, individuals with alternative beliefs to be excluded from positions of governmental authority. Still, many scholars would at least remove the beliefs themselves from political debate. These scholars are aided in their cause by the devotion to formal religious neutrality inherent in a “legislative motivation” approach to Establishment Clause cases (or by the significance of legislative

serves as an authority higher than the state (i.e., it is not scientific). Stanley Ingber, Religion or Ideology: A Needed Clarification of the Religion Clauses, 41 STAN. L. REV. 233, 332-33 (1989).

Secular humanism, with its attendant faith in human intellect, is implicated by its association with Enlightenment thought, which many believe should be the only source of truth in American politics. Id.

See, e.g., Dorothy Sterling, Ahead of Her Time: Abby Kelley and the Politics of Antislavery (1991). The argument that religion is a valuable source of truth is not defeated by the undeniable fact that religious doctrine was also invoked to support slavery. The name of science was also invoked for this purpose. Any source of belief can be manipulated, it seems.

See generally McDaniel v. Paty, 435 U.S. 618 (1978) (invalidating on free exercise grounds a Tennessee law that prohibited a priest from serving in the legislature).

Professor Carter, in his book describing how American law and politics trivialize religious devotion, writes:

For example, the political scientist Stephen Holmes, in discussing what he calls “gag rules,” argues that “[i]n a liberal social order, the basic normative framework must be able to command the loyalty of individuals and groups with widely differing self-understandings and conceptions of personal fulfillment.” For Holmes, this is a reason that liberal theory must “steer clear of irresolvable metaphysical disputes.” Similarly, the legal theorist Bruce Ackerman has argued that the goal of dialogue is to “locate normative premises both sides find reasonable.” Thomas Nagel has called for a dialogue involving “the exercise of a common critical rationality” in which evidence for justification is limited to evidence that all can accept. Unfortunately, all of these efforts to limit the conversation to premises held in common would exclude religion from the mix.

motivation inherent in a “religious neutrality” approach). Unfortunately, as fair a concept as “neutrality” sounds in the abstract, searching for its presence in legislative deliberations can lead to results “which partake . . . of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.”167 The Establishment Clause, then, would be “not antiestablishment but antireligion.”168

Edwards probably provides the best example of antireligious judicial decision making in a Supreme Court opinion. The majority seems to rest on two assumptions: (1) That creation science is not a legitimate scientific theory because the Bible describes it; and (2) that the judiciary is obliged to keep illegitimate theories out of public schools. Whatever the merit of the second assumption, the first assumption is an attack on religion. As one commentator notes, however, “there is little except the conflict with science to distinguish religiously motivated legislation requiring the teaching of creation theory from religiously motivated legislation to implement the Biblical injunction ‘Thou shalt not kill’—or religiously motivated legislation . . . [to achieve] a more equitable sharing of the nation’s wealth.”169 He suggests, however, that the holding in Edwards was correct because of the illegitimacy of creationism as a natural science.170 He and the Court may be wrong on this score. The mainstream scientific community certainly has been wrong before; and anyway, why must a state legislature be confined to judicial decree as its source of specific truth, especially when its legislation, which would not exclude the theory of evolution, would encourage presentation of an arguably more balanced picture of the question of life’s origins?

Thankfully outside the realm of majority thought is a recent opinion even more hostile to religion as a source of beliefs than the Edwards opinion. Justice Stevens, in the 1989 case of Webster v. Reproductive Health Services, would have invalidated the preamble to a Missouri statute restricting abortions, because it found life begins at conception (defined as the moment of fertilization), and it “command[ed] that state laws shall be construed to provide the maximum protection to ‘the unborn child at every stage of development.’”171 He saw no secular purpose, because he was “not aware of any secular basis for differentiating between contraceptive

167 Abington Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) (suggesting that “untutored devotion to the concept of neutrality can lead to...[such] results”).
168 Carter, supra note 1, at 113.
169 Id. at 165.
170 Id. at 112.
procedures that are effective immediately before and those that are effective immediately after fertilization.” The abortion debate actually provides a good example of issues, which society must address, that necessarily require the help of some religion, or at least religion-like philosophy. Science can arguably never tell us when human life begins. It may provide evidence (such as how an egg is fertilized or when a fetus becomes sentient or viable) for a decision maker to filter through his religious perspective, but at some point “human life” must be defined without the authority of science. Justice Stevens, however, would apparently require the authority of some “secular basis,” if not science itself.

V. CONCLUSION

Religion is to be feared when it is wielded as a weapon by a powerful majority, but the weapon being wielded by a powerful Court today is antireligion, disguised as neutrality. The Religion Clauses should protect against both possibilities. Punishing legislators for their religious motives alone not only fails to further the goal of protecting those not a part of the majority religion, it affirmatively punishes religious devotion. Such a holding should not govern legislative analyses.

What is the alternative, then? While this Article does not detail a specific test, it suggests the Court look at some balance between a law’s improper effects and the governmental interest furthered by the law’s effects considered as a whole. Governmental interest analysis does not equate to legislative motivation analysis. The former focuses on legitimate governmental ends actually served by legislation; the latter, on the thoughts that lead legislators to act. This distinction was noted by the Supreme Court in 1990 when it returned briefly to the original meaning of Lemon’s first prong: “[W]hat is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the

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172Id. at 566.
173A well-known philosopher and legal scholar might extend this concept and argue that states may not legislate at all in the area of abortion because it is fundamentally a religious issue. See Ronald Dworkin, Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom 166 (1993). But, as a reviewer of Dworkin’s book notes, “in the abortion context, the government’s abstention is not neutral.” Daniel J.H. Greenwood, Beyond Dworkin’s Dominions: Investments, Memberships, the Tree of Life, and the Abortion Question, 72 Tex. L. Rev. 559, 566 (1994) (book review).
law.”\textsuperscript{174} In upholding the Equal Access Act, the Court found irrelevant the possibility that “some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection”; and it concluded, “[b]ecause the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act’s purpose was not to ‘endorse or disapprove of religion.’”\textsuperscript{175}

Arguably, the governmental interest test would be easier to pass than \textit{Lemon}, because under \textit{Lemon’s} second prong, a certain degree of improper effects is enough to invalidate a law, without looking at the governmental interest. At the same time, however, the proposed test could, where no sufficient governmental interest existed, invalidate a law that had less than the “principal or primary” effect of advancing or inhibiting religion. Thus, whether the test is more stringent in one case or less stringent in another, it would seem to ask the more relevant questions; no matter what effects the Court eventually chooses to deem improper, the interest being served by the challenged law should be relevant in determining whether the impropriety should rise to the level of unconstitutionality. In \textit{United States v. O’Brien}, for example, which specifically held that congressional purpose could not support invalidating an otherwise constitutional law,\textsuperscript{176} the Court relied on “a sufficiently important governmental interest” to uphold the constitutionality of a law with “incidental limitations on First Amendment freedoms.”\textsuperscript{177}

As long as the Court continues to stress a myriad of interests for its analysis, Establishment Clause jurisprudence will continue to produce varying results. Contrast the following two cases: \textit{Mueller v. Allen}\textsuperscript{178} and \textit{Board of Education v. Grumet}.\textsuperscript{179} In \textit{Mueller}, a Minnesota statute aided religion by reimbursing parents (by way of a tax deduction) for “certain expenses incurred in providing for the education of their children.”\textsuperscript{180} And in \textit{Grumet}, the New York Legislature passed a law creating a separate school district “essentially to serve disabled Satmar [Hasidic Jew] children” whose parents, for religious reasons, want the children

\textsuperscript{175}Id.
\textsuperscript{176}391 U.S. 367, 383 (1968).
\textsuperscript{177}Id. at 376.
\textsuperscript{178}463 U.S. 388 (1983).
\textsuperscript{179}512 U.S. 687 (1994).
\textsuperscript{180}463 U.S. at 390.
segregated from others. 181 Stressing alternative considerations, the Court reaches vastly different results in these similar cases. Rehnquist’s majority opinion in Mueller, which upheld the tax deductions, addressed governmental interest, secular purpose, and determined a state might have “a strong public interest in assuring the continued financial health of private schools, both sectarian and nonsectarian.” 182 Rehnquist’s contention suggests interests both in education and in accommodation of those whose religious beliefs motivate them to send their children to religious schools. In contrast, ignoring that same interest, the Court in Grumet struck down the drawing of school district boundaries to create a district for orthodox Jews, because the state did not treat religion “neutrally.” 183 Thus, even when very similar religious interests or motivations are at stake, disparity in result is commonplace under existing Religion Clause jurisprudence.

Establishment jurisprudence will surely never be an exact and straightforward science, but it should at least ask the right questions. In its eternal quest to develop these questions, the Court should note that it is at least debatable whether a legislator’s desire to pursue an end consistent with his religious beliefs is even improper, much less unconstitutional. Given this uncertainty, the difficulties with a motivation inquiry, the inconsistency of such an inquiry with traditional notions of deference, and the importance of effects analysis, it is far more improper and problematic to consider motivation as a basis for striking down a statute than simply to deem motivation irrelevant altogether.

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182 463 U.S. at 395.
183 512 U.S. at 696-670.