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Religion and Race Under the Constitution: Similarities and Differences

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COLLOQUY

RELIGION AND RACE UNDER THE CONSTITUTION: SIMILARITIES AND DIFFERENCES

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There is a morally compelling and constitutionally powerful tradition in the United States against treating people differently because of either their race or their religious beliefs. Nevertheless, the Supreme Court has employed criteria under the Religion Clauses of the First Amendment[1] for reviewing government action dealing with religion in an approach that varies considerably from the one it has used for race under the Equal Protection Clause of the Fourteenth Amendment.[2] The object of this Article, which focuses on the *purpose* and the *effect* of state regulations that either *favor* or *prejudice* persons or groups on account of race or religion, is mainly to outline an analysis of the Religion Clauses, and secondarily to contrast that analysis with the doctrines that the Court has developed under the Equal Protection Clause.

I
PURPOSE

A. Intentional Prejudice

1. *Similarities Between Race and Religion*

There is a powerful resemblance between the government singling out persons for imposition of adverse consequences because of their skin color[3] and because of or their ideological beliefs. This likeness calls for analogous handling under the Constitution. Perhaps the strongest justification for strict judicial scrutiny of any official attempt to accord persons less than equal respect and dignity either because of their religious beliefs or race rests in the fact that throughout history

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1 U.S. CONST. amend I.

2 U.S. CONST. amend. XIV § 1.

3 Throughout this article, I include ethnicity within the same protected category as race.

such efforts have been similarly rooted in "hate, prejudice, vengeance, [and] hostility."[4] Although race may seem to be a more immutable condition than religion,[5] and religious belief systems may appear to have a more interwoven effect than race on the conduct of people's lives, both traits have been the object of public (and private) stereotyping, stigma, subordination and persecution in strikingly similar ways.

In response, the Court has properly viewed both racial and religious discriminations with particular suspicion,[6] and demanded "that they be justified in terms of a significantly more pressing governmental objective than normally required, and a near perfect fit between the characterizations employed and the objective pursued."[7] This method is a "way of uncovering official attempts to inflict inequality for its own sake—to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members,"[8] a course of conduct based on assumptions of the "differential worth"[9] of religious and racial groups including judgments of their odiousness or inferiority. Because it is extremely difficult for these

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4 Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 358 (1949).

5 For a discussion of the immutability of religious beliefs, see Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 62-63 (1992).

6 In New Orleans v. Dukes, 427 U.S. 297, 303 (1976), the Court unanimously categorized religion along with race as being "suspect" classifications.

7 Hall, *supra*, note 5, at 55. The few decisions of the Supreme Court that have involved deliberate disfavoring of persons or groups because of religious beliefs they do or do not hold have employed the test of strict scrutiny, either expressly or implicitly, to invalidate the regulations. *See* Church of the Lukumi Babalu Aye v. Hialeah, 113 S. Ct. 2217 (1993) (holding that a state may not forbid ritual animal sacrifice); McDaniel v. Paty, 435 U.S. 618 (1978) (holding that a state may not disqualify members of clergy from being legislators); Larson v. Valente, 456 U.S. 228 (1982), *reh'g denied*, 457 U.S. 1111 (1982) (holding that a state may not impose registration and reporting requirements only upon religious organizations that solicit more than half their funds from nonmembers); Torcaso v. Watkins, 367 U.S. 488 (1961) (holding that a state may not require notaries public to take oath of belief in God). The one possible exception, Gillette v. United States, 401 U.S. 437 (1971), did not acknowledge as being discriminatory the Selective Service Act provision that exempted from the draft individuals who were religiously opposed to "war in any form" but did not excuse those who were religiously opposed only to "unjust wars." *Id.* In any event, the Court's reasoning in *Gillette* is not necessarily inconsistent with its usual approach to the problem. *See* Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and An Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 960 (1986).

8 JOHN HART ELY, DEMOCRACY AND DISTRUST 153 (1980).

9 Paul Brest, *Forward* to *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976).

stringent criteria to be met either factually[10] or legally,[11] very few classifications that intentionally prejudice persons because of their race or religion have been or will be upheld.[12]

It is useful to note the peculiar nature of the personal quality or characteristic that is the subject of the special judicial protection against deliberately disadvantaging people because of their religious principles. At issue are beliefs or membership in a group that shares a set of beliefs, rather than participation in some course of generally regulated conduct. This concerns an ideal that extends beyond the value of religious liberty, one that is deeply ingrained in several constitutional provisions apart from the Religion Clauses. Thus, the First Amendment freedoms of speech and association have frequently been used to protect a broad range of ideological convictions including religion,[13] and would be applicable here as well.

2. *Judicial Scrutiny of the Motives of Lawmakers*

The intentional prejudice category plainly includes government regulations that discriminate on their face. This category also condemns more subtle forms of state action which, by their explicit language, may appear to accomplish a constitutionally permissible end, but whose real aim is to disadvantage persons because they are members of a certain race or because they hold or do not hold certain religious convictions. This requires the Court to ascertain whether the lawmaking body intended to achieve a goal through the effect of the regulation that is not plainly prescribed by its words.

Despite "the general rule that legislative motive or purpose is not a relevant inquiry in determining the constitutionality of a statute,"[14] the Court's approach both to the Religion Clauses and to racial discrimination under the Equal Protection Clause has made legislative

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10 *See* Korematsu v. United States, 323 U.S. 214 (1944) and Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding military orders for exclusion and curfew of Japanese-Americans on the West Coast during World War II); *cf.* Lee v. Washington, 390 U.S. 333, 334 (1968) (Black, Harlan & Stewart, JJ., concurring) (discussing possibility of temporary racial segregation in prison in response to racial tensions that threaten prison security).

11 The Court has ruled that government action preferring racial minorities and disfavoring the racial majority may be permissible, e.g., to remedy past discrimination in violation of statute or the Equal Protection Clause. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Sheet Metal Workers Local 28 v. EEOC, 478 U.S. 421 (1986).

12 Query as to the validity of requiring immunization of all members of a racial or religious group that seems peculiarly susceptible to a particular illness such as sickle cell anemia or Tay Sachs disease.

13 *See* Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 581-83 (also suggesting the "fundamental rights branch of equal protection doctrine" as a source for protecting against "government action that deliberately singles out one or more religious groups for adverse treatment or that penalizes or withholds benefits from persons because of their peculiar sectarian beliefs").

14 *McDaniel*, 435 U.S. at 636 n.9 (Brennan, J., concurring).

and administrative motivation a major criterion.[15] Still, there is broad agreement, reaching back to the landmark ruling in *Fletcher v. Peck*,[16] that divining the real motives of lawmakers "is a perilous enterprise"[17] and "a notoriously tricky affair."[18] Thus, it is important to emphasize several factors that limit the scope of this judicial inquiry regarding lawmaking that is alleged to deliberately disadvantage people because of either their race or religion.

First, there is a substantial "distinction between those things a legislator hopes to accomplish *by the operation of the statute* for which he is voting, and those things he hopes personally to achieve *by the act of his vote*."[19] For example, in *Edwards v. Aguillard*,[20] the Court had before it a Louisiana statute that forbade "the teaching of the theory of evolution in public schools unless accompanied by instruction in 'creation science.' "[21] The former category of "hopes" includes the question of whether a state legislator "voted for the Act . . . because he wanted to foster religion or because he wanted to improve education."[22] In contrast, the kinds of "hopes" described at length by Justice Scalia in *Edwards* fall more readily into the latter category:

> [A legislator] may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the majority leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, . . . or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations.[23]

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15 *See id.* ("cases under the Religion Clauses have uniformly held such an inquiry [into legislative motive or purpose] necessary"); Washington v. Davis, 426 U.S. 229, 240 (1976) ("basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").

16 10 U.S. (6 Cranch) 87, 130 (1810).

17 Thomas A. Schweitzer, Lee v. Weisman *and the Establishment Clause: Are Invocations and Benedictions at Public School Graduation Constitutionally Unspeakable?*, 69 U. DET. MERCY L. REV. 113, 192 (1992).

18 Hall, *supra* note 5, at 65.

19 John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1218 (1970) (discussing Ira Michael Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CALIF. L. REV. 104 (1961)).

20 482 U.S. 578 (1987).

21 *Id.* at 581.

22 *Id.* at 637 (Scalia, J., dissenting).

23 *Id.*

Admittedly, there is only a difference of degree rather than kind "between those things a person intends to result immediately from his act [the former category], and other more distant and less certain, but nonetheless intended, results [the latter category]."[24] Moreover, resolving even questions in the former category "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[25] But it appears to be within the judiciary's capacity to reach a decision about the former category with adequate certainty; exploring motivations in the latter category, however, seems to be "almost always an impossible task."[26]

Second, the process of examining an intention to disadvantage a racial or religious minority is to uncover only whether the government action is meant to implement unspoken antagonism toward such a minority. This judicial inquiry is quite narrow and vastly different from asking whether the legislators' purpose was in some oblique fashion to "advance" a religious or racial cause when promulgating a regulation that is religiously and racially neutral in both its language and administration. It is one thing to question whether a lawmaking body acted with racial or religious animus, such as, whether "an admittedly impermissible motive has poisoned the political process."[27] It is quite another to determine whether the purpose of a law that has concededly been enacted to serve permissible public welfare goals was in some part attributable to the racial or religious background, aspirations, ideologies or beliefs of members of the legislature.

Religious motivations of this type are especially hard to isolate because:

> Beginning with the Founding itself, the history of the United States reveals an inseparable connection between religion, morality, and law. Many of our laws, even our basic system of constitutional government and individual rights, rest to a significant degree on religious understandings of the world, of human beings, and of social relationships.[28]

Furthermore, individuals and groups often support a wide variety of political, social and economic policies because of their religious ideals.[29] If the "real" purpose of programs of this kind was a ground for

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24 Ely, *supra* note 19, at 1219.

25 Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

26 Edwards v. Aguillard, 482 U.S. at 636 (Scalia, J., dissenting).

27 Hall, *supra*, note 5, at 66.

28 Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1, 6-7 (1991).

29 Timothy Hall has noted religion's potential to influence social policies:

> Welfare programs may be supported for religious reasons relating to perceived obligations to the poor. Statutes restricting the availability of abortions may be supported by individuals who believe that abortion violates

judicial invalidation, then laws against homicide and theft would be constitutionally vulnerable under the Religion Clauses.[30] Because "religious beliefs and values may permeate a person's world view by underlying, reinforcing, and interacting with other 'secular' convictions,"[31] many legislators themselves would find it impossible to "fathom their reactions to cross-currents of psychic stimuli"[32] so as to distinguish between which of their social views have a worldly basis and which have deep religious roots. The problems for judges in unscrambling the multiple purposes and unconscious motivations of legislators in this context are greatly exacerbated when compared to those involved in the surgically precise determination of whether there was a specific legislative intention to disadvantage a racial or religious group.

a. *Examples*

Experience indicates that this confined inquiry into the motivations of lawmakers has been a manageable task for the federal courts. Fortunately, intentional religious or racial discrimination occurs only infrequently, and when it does, its suspicious appearance will ordinarily be fairly clear, even if wrapped "in the verbal cellophane"[33] of legitimacy. A few examples enforcing the racial equality precept of the Fourteenth and Fifteenth Amendments should help demonstrate the usual ease by which the judiciary may state the obvious to smoke out illicit purposes of the overwhelming percentage of legislators. In *Gomillion v. Lightfoot*,[34] the Court held that the gerrymandering of Tuskegee, Alabama, which altered the city's shape "from a square to an uncouth twenty-eight sided figure,"[35] was unconstitutional because it could have no purpose other than the disenfranchisement of blacks in municipal elections.[36] The Court found it "difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect

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God's law. The Civil Rights Act of 1964 was passed with substantial support from religious believers who supported the Act, in part, on religious grounds.

Hall, *supra* note 5, at 68. *See generally* KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

30 *See* Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 998 (1989).

31 Schweitzer, *supra* note 17, at 195.

32 Gary Leedes, *Taking the Bible Seriously*, 1987 AM. B. FOUND. RES. J. 311, 315.

33 United States v. Kahriger, 345 U.S. 22, 38 (1953) (Frankfurter, J., dissenting).

34 364 U.S. 339 (1960).

35 *Id.* at 340.

36 *Id.*

invalid."[37] A similar case, *Guinn v. United States*,[38] dramatically illustrates that some instances of inevitable effect "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."[39] *Guinn* invalidated Oklahoma's literacy test for voting because its "grandfather clause" effectively exempted whites.[40] Oklahoma then immediately enacted a new rule providing that all persons who had previously voted were qualified for life but that all others must register within a twelve day period or be permanently disenfranchised.[41] In *Lane v. Wilson*,[42] the Court rejected the new Oklahoma rule on the ground that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination."[43]

Until recently, there were *no* cases in which the Supreme Court found it necessary to examine legislative motive in order to secure religious liberty against willfully prejudicial government regulations. But this changed with the 1993 decision of *Church of the Lukumi Babalu Aye v. Hialeah*,[44] which invalidated ordinances that barred ritual animal sacrifice. The Court agreed that the words of the regulations were "consistent with the claim of facial discrimination."[45] However, because the language was "not conclusive,"[46] the Court found that "[t]he [legislative] record . . . compels the conclusion that suppression of . . . [religious] worship service was the object of the ordinances."[47] No member of the Court dissented from the following judgment:

> The pattern . . . discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more reli-

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37 *Id.* at 342. Alexander Bickel observed that:

> Fanciful suggestions might have been possible, and they might have included whim; but they would all have been disingenuous on their face given the meticulous care with which, running the line house-by-house, the legislature succeeded in [removing all but four or five of the municipality's black voters while] not eliminating a single previous white resident of Tuskegee from the new city limits.

ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 211 (1962).

38 238 U.S. 347 (1915).

39 Washington v. Davis, 426 U.S. 229, 242 (1976).

40 *Id.*

41 *Id.*

42 307 U.S. 268 (1939).

43 *Id.* at 275.

44 113 S. Ct. 2217 (1993).

45 *Id.* at 2227.

46 *Id.*

47 *Id.* at 2231.

gious conduct than is necessary in order to achieve the legitimate ends asserted in their defense.[48]

Moreover, there has been a series of church-state rulings, involving government programs to *favor* religion, which further demonstrates that finding a law's "pre-eminent purpose,"[49] as required in order to identify deliberate *disfavor*, is a relatively straightforward task. In *Epperson v. Arkansas*,[50] invalidating a statute prohibiting the teaching of evolution in public schools, the Court concluded that "Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine."[51] Citing newspaper advertisements and letters supporting adoption of the statute in 1938, the Court found it "clear that fundamentalist sectarian conviction was and is the law's reason for existence."[52] Similarly, in *Torcaso v. Watkins*,[53] the Court observed that there could be "no dispute about the [religious] purpose"[54] of a requirement that public officeholders declare a belief in God.[55] And in *Engel v. Vitale*,[56] the Court had "no doubt that . . . daily classroom invocation of . . . the Regents' prayer is a religious activity."[57] This conclusion was greatly bolstered by the Regents' Statement on Moral and Spiritual Training in the Schools which proclaimed the prayer's goal to be "teaching our children . . . that Almighty God is their Creator, and that by Him they have been endowed with their inalienable rights."[58]

In other cases invalidating religious influences in the public schools, the Court has drawn on common understanding to impeach what it concluded were obviously implausible assertions that there were nonreligious purposes for the challenged practices. In *Abington School District v. Schempp*,[59] the school boards contended that the reading, without comment, of a chapter of the Bible at the opening of the school day served such nonsectarian ends as promoting moral values, contradicting the materialistic trends of the times, and teaching literature. The Court's brusque reply was that "[s]urely the place of the Bible as an instrument of religion cannot be gainsaid."[60] Similarly, in

48 *Id.* at 2231.
49 Stone v. Graham, 449 U.S. 39, 41 (1980).
50 393 U.S. 97 (1968).
51 *Id.* at 103.
52 *Id.* at 107-08.
53 367 U.S. 488 (1961).
54 *Id.* at 489.
55 *Id.*
56 370 U.S. 421 (1962).
57 *Id.* at 424.
58 Record at 28, *Engel*, 370 U.S. 421.
59 374 U.S. 203 (1963).
60 *Id.* at 224.

Stone v. Graham,[61] the Court summarily reversed a decision of the Kentucky Supreme Court which had upheld the practice of posting copies of the Ten Commandments in public school classrooms.[62] The avowed purpose for the state program was printed at the bottom of each copy: "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."[63] Observing that the Commandments were not integrated into any study of history, ethics or comparative religion, but could only have the effect, if any, of inducing students to meditate on, revere, or perhaps obey them, the Court concluded that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."[64] In the late 1950s, when a New York school board similarly required that a "neutral version" of the Ten Commandments be placed in all classrooms, it was not so disingenuous as the Kentucky legislature. The New York school board's announced purpose "to strengthen the moral and spiritual values of the students in the school district,"[65] was struck down.[66] Finally, in *Wallace v. Jaffree*,[67] an Alabama statute, authorizing a moment of silence in all public schools "for meditation," was amended to read "for meditation or voluntary prayer."[68] The only conceivable purpose for the changed language was to clarify the intent that the period be used for prayer. No state witnesses suggested otherwise, and the amendment's prime legislative sponsor acknowledged the aim of returning prayer to public schools.[69]

b. *Procedures*

The Supreme Court, aided by perceptive commentators,[70] has developed an approach for ascertaining invidious purpose in the area of race.[71] It has been less clear on a detailed method for determining similar motives in the area of religion. However, the parallels between

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61 449 U.S. 39 (1980).

62 *Id.*

63 *Id.* at 41.

64 *Id.*

65 Robert J. Coan, Comment, *Bible Reading In the Public Schools*, 22 ALB. L. REV. 156, 156 (1958).

66 *Id.* at 157 n.4.

67 472 U.S. 38 (1985).

68 *Id.* at 40.

69 *Id.* at 56-57 & n.43.

70 *See, e.g.*, Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

71 *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

race and religion outlined here strongly suggest that the same system be employed.

Articulation of a specific set of rules on the subject is beyond the scope of this Article, but a few basic points may be sketched. The approach to intentional discrimination on the basis of religion or race should *not* be that invalidity requires that "there was *no* question that the statute or activity was motivated *wholly* by religious [or racial] considerations"[72] of the kind prohibited by the Constitution. Such government action, "to avoid suspicion, must have more than a mere rational relationship to some valid nonreligious [or nonracial] purpose";[73] it should be more than "minimally related to the promotion" of some permissible objective.[74] That standard would automatically immunize virtually all regulations that threaten racial or religious liberty in the most objectionable way. If the Court has good reason to believe—and it may be that there is no "better" way to describe the "test" which, as we have seen, is usually satisfied quite readily—that a deliberate effort to harm persons or groups because of their race or their religious beliefs has played a material role in the decisionmaking process—especially if the Court's judgment is informed by general societal perception—then certain procedural rules should come into play. For example, in order to dispel the inference of illicit motivation, I would favor placing the burden on the state to show that it has no alternative means to achieve its permissible objective "that is both less drastic in terms of effects adverse to the [nondiscrimination principle] and not beyond the state's capacity to implement."[75] By stipulating that an improper purpose need be only a material (or substantial) rather than the predominant (or primary) factor in order to trigger special attention and by assigning the burden of justification to those defending the government action, this procedure seeks to uncover concealed animosity toward racial and religious groups while also allowing the state the opportunity to accomplish any lawful goal that it may have.

B. Intentional Advantage

1. *Favoring Majorities*

a. *Differences between race and religion*

Deliberately benefiting the racial majority concomitantly prejudices racial minorities. It therefore falls within the preceding

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72 Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (emphasis added).

73 Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 329 (1989).

74 Brest, *supra* note 70, at 122.

75 Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 923 (1987).

analysis and plainly violates existing constitutional principles as well as moral norms. In contrast, intentionally supporting mainstream religions[76] has not unfailingly been held to be invalid.[77] This judicial posture reflects the value judgment that it is worthwhile for government to acknowledge the feelings of members of religious faiths about "their most central values and concerns" by responding to their wishes not to be "excluded from a public culture devoted purely to secular concerns."[78] In my view, these "accommodations" should survive constitutional attack if they do not pose a meaningful threat to religious liberty.[79] While intentionally *disadvantaging* individuals because of their religion is the constitutional and moral equivalent of invidiously discriminating against people because of their race, our historic traditions and contemporary experience indicate that there are significant differences between race and religion when deliberate *advantage* is at issue. These distinctions are sufficient to warrant contrasting constitutional treatment.

Government action that purposefully confers a benefit on whites—for example, exempting them from a rule against serving alcoholic beverages to minors, or making public property available to celebrate the Confederacy—ordinarily treats nonwhites with a tangible disrespect by denying a meaningful privilege. Alternatively, such ac-

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76 Among the more than one thousand different religions in the United States, I include in the term "mainstream" those defined by a recent study as "Protestantism as it finds expression among the Baptists, the Methodists, the Episcopalians, the Presbyterians, the Congregationalists, the Disciples of Christ and the Lutherans, as well as the other two 'great faiths,' 'Catholicism and Judaism.' " I contrast these with "groups that have been called 'marginal' or 'non-normative' or 'cults' in their history, such as Mormons and Christian Scientists, Spiritualists and Theosophists, followers of Meher Baba or the Reverend Sun Myung Moon, practitioners of Hare Krishna, feminist witchcraft, or Zen." MARY BEDNAROWSKI, AMERICAN RELIGION: A CULTURAL PERSPECTIVE 2-3 (1984). The "mainstream" has been described more succinctly as "the dominant, culturally established faiths held by the majority of Americans." WADE ROOF & WILLIAM MCKINNEY, AMERICAN MAINLINE RELIGION: ITS CHANGING SHAPE AND FUTURE 6 (1987).

77 *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573 (1989) (upholding holiday display of Chanukah menorah and Christmas tree outside city-county building); Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding city's inclusion of creche in annual large Christmas display in private park).

78 Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 311 (1987). Some commentators observed that

> [T]he Founders affirmed the importance of religion to the new republic and would have rejected the use of the establishment clause to eradicate the religious leaven from public life. Instead, while recognizing the historical dangers posed by religious establishments, they would agree that government may acknowledge the crucial importance of religion to many citizens.

Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1616 (1989).

79 *See* Jesse H. Choper, *Church, State and The Supreme Court: Current Controversy*, 29 ARIZ. L. REV. 551, 553-57 (1987); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980) [hereinafter, Choper, *Reconciling the Conflict*].

tions convey a message of racial insensitivity that is usually not present when analogous action benefits mainstream religions. While I agree that "[a] favorable statement about one class is not necessarily a correlative pejorative remark about another class,"[80] that is *not* true in the racial examples just given.

On the other hand, although I concede that "[w]hen government displays the symbols of the dominant religion—as when government displays the symbols of white supremacy—the pain is not distributed evenly,"[81] I do not believe that the message sent to religious minorities in the former situation is in any meaningful way as hurtful and offensive as it is to racial minorities in the latter. This is probably true in part because the substantive precepts of both mainstream and minority faiths (such as the golden rule or most of the Ten Commandments) are often perceived as containing special value for the welfare of society. As a consequence, it is possible that favor or support for some religions may be viewed as public appreciation for certain appealing beliefs or for various wholesome activities rather than as an indirect expression of disrespect toward other, "non-preferred" religions. The overtones of racial prejudice and intolerance historically associated with messages of white supremacy, for example, are simply not present. Thus, favoring the dominant racial group realistically imposes the same constitutionally forbidden harm as deliberately disadvantaging racial minorities, and should be almost always invalid. Assisting mainstream religious groups, however, need not be forbidden, in my judgment, unless it adversely affects religious liberty. In contrast to our national ideal that a person's race should be irrelevant to decisionmaking by government officials and private citizens, our heritage has traditionally affirmed the unique contribution of religious institutions to the pluralism of American society and has positively approved of the flourishing of religious freedom.

b. *Judicial scrutiny of the motives of lawmakers*

Although intentional government favoring of religion does not automatically produce a violation of the Religion Clauses under my approach, it does remain a significant factor in determining constitutionality. Therefore, like scrutiny of actions that deliberately disadvantage racial or religious groups, this requires an assessment of legislative purpose. There is an important distinction between a lawmaking body intending to give an "advantage" to—or, in alphabetical order, to "advance," "aid," "assist," "benefit," "favor," "help," "sponsor," or "sup-

80 William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 365 (1991).

81 Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 511 (1992).

port"—a religious cause, and state action that is concededly taken to further legitimate public welfare ends but is in some part traceable to the religious affiliation, ideals, ideologies or values of members of the legislature.[82] It is the deliberate conferral of an advantage of the first kind that is the subject of discussion here and that calls for examination of lawmakers' motivations in an effort to ascertain what they really hoped to accomplish through the *operation* of their enactment. Because action of the first kind is more constitutionally vulnerable than action of the second kind[83] (or than action undertaken for truly mixed motives),[84] lawmakers may be encouraged to cloak their real design, thus increasing the need for judicial standards that can readily identify the legislators' true intentions.

Fortunately, this incentive to conceal actual motivations is not as great as it is in the context of purposefully *disadvantaging* racial or religious interests—probably because deliberately *favoring* mainstream religious groups is not seen as being as hostile to deeply held national values as are conscious attempts to prejudice persons because of their race or their religious beliefs. Therefore, most legal enactments that favor religion do so plainly by their terms—for example, a statutory military draft exemption for religious objectors or a city's display of a Latin cross on public property—and pose no problems of going behind the letter of the law to discover purpose.

Admittedly, some government efforts to favor religion are more subtle (or even hidden) and either make no mention of religion or characterize as nonsectarian an activity that is generally understood as having only a religious basis.[85] Still, in such cases, discerning legislative intent readily falls within judicial capacity: the suspicious appearance of these programs will ordinarily be quite clear even if disguised in the garb of secular public welfare. Indeed, when discussing the relative ease of discerning motivation in the intentional prejudice category above,[86] almost all of the illustrations from the religious area, in contrast to race, grew out of government attempts to *favor* religion—public school activities like Bible reading, prayer, teaching evolution and creation science and posting the Ten Commandments in classrooms. Additionally, several cases concerning government programs that officially acknowledge religion—legislative prayers by chaplains, and the

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82 *See supra* notes 27-32 and accompanying text.

83 *See supra* notes 27-32 and accompanying text.

84 This third category covers situations in which many lawmakers wish to accomplish either both ends, or one of the two ends. Regulations prohibiting abortion and providing aid to parochial schools strike me as especially good examples.

85 Assume that the school board of an overwhelmingly Catholic community explained its requirement that the catechism be taught to all first graders in the public schools as a technique to develop memory skills.

86 *See supra* notes 44-69 and accompanying text.

display of crèches and menorahs on public property—present activities that may be readily categorized as purposefully meant to favor religion. Occasional protestations by some justices to the contrary notwithstanding,[87] the straightforward assessment of most members of the Court comports with the general public perception. As under the intentional prejudice category, this assessment makes the delicate inquiry into what the lawmaking body really hoped to accomplish a manageable task.

2. *Favoring Minorities: Differences Between Race and Religion*

The constitutional implications are generally similar for government action that intentionally favors a *minority* racial or religious group and government action that grants deliberate advantage to the *majority.* Affording a preference to a minority religious group is much more likely to be upheld than intentionally granting an advantage to a minority racial group.

Although not adherents of the neutrality approach,[88] traditional liberal church-state separationists like Justice Brennan,[89] advocates of the endorsement approach to interpreting the Religion Clauses developed by Justice O'Connor,[90] and conventional deferential conservatives like Justice Scalia[91] would all sustain state action that grants special consideration to adherents of minority religions by excusing them from generally applicable government regulations that burden them because of the tenets of their faith. Most church-state theorists conclude that no special constitutional scrutiny is ordinarily required in such instances, although they usually feel obliged to explain their reasoning as to why extending this special protection for religious exercise does not conflict with the Establishment Clause. My own view is somewhat different: government preferences for both minority and mainstream religions should be treated in the same way in that both

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87 *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 616-21, (1989) (Blackmun, J., announcing judgment of the Court) (display of Christmas tree and menorah "simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season"); Lynch v. Donnelly, 465 U.S. 668, 680-81 (1984) (crèche has "legitimate secular purposes" and "depicts the historical origins" of Christmas); *id.* at 691 (O'Connor, J., concurring) (crèche has "legitimate secular purpose" and "celebrat[es] . . . the public holiday through its traditional symbols").

88 *See* Choper, *Reconciling the Conflict, supra* note 79, at 688 (noting that the neutrality approach, articulated most fully by Professor Kurland, has never been embraced by any member of the Court).

89 *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

90 Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 346-49 (1987) (concurring opinion).

91 *See, e.g.*, Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 29-33 (1989) (dissenting opinion).

should be invalid when they pose a meaningful threat to religious freedom.[92]

There is much greater disagreement among scholars and judges (and among elected officials and the citizenry at large) about whether government may grant some form of preference to minority racial groups. Much of this dispute stems from the different contexts in which government attempts to assist religious or racial minorities. Intentionally conferred religious benefits ordinarily take the form of exemptions from generally applicable regulations, usually for very small numbers of people. These immunities seem relatively benign, and often desirable, because they are granted to make it easier for people to adhere to the dictates of their faiths and are thereby seen as promoting religious liberty. Programs that intentionally benefit racial minorities, in contrast, usually impose broader structural changes with respect to government benefits such as employment and education, "characteristically occur[ring] in circumstances in which the use of race to the advantage of one person is necessarily at the obvious expense of a member of a different race."[93]

These race-conscious plans have been grounded in several rationales which lend support to different types of programs. The most widely—indeed, near universally—accepted justification for a government entity's use of a racial classification is as a remedy for its own past racial discrimination against the persons or group that is now being benefitted.[94] Another goal that has been frequently advanced as justifying affirmative action programs is obtaining the benefits that flow from racial diversity.[95] This purpose is particularly relevant in the educational setting, where it has been urged that people from a variety of ethnic, geographic and economic backgrounds will contribute to the exchange of a broader range of ideas in the classroom.[96] This dialogue, it is argued, will enrich the education of the entire student body and "better equip . . . graduates to render with understanding their vital service to humanity."[97] Probably the most controversial argument

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92 *See id.*

93 Shaw v. Reno, 113 S. Ct. 2816, 2846 (1993) (Souter, J., dissenting).

94 City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). In fact, this type of action has been characterized by one of the Court's most vocal opponents of racial preferences as "race-neutral remediation"—that is, as nothing more than a "preference to identified victims of discrimination" regardless of their race. *Id.* at 526 (Scalia, J., concurring). *See* Jesse H. Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle*, 72 IOWA L. REV. 255, 263 (1987).

95 Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 311-15 (1978) (plurality opinion of Powell, J.).

96 *Id.* at 312-13 n.48.

97 *Id.* at 314.

for the legitimacy of preferential treatment of minorities[98] is that this is needed to counter the effects of societal discrimination, both historical and ongoing.[99] A variety of defenses has been offered for this position. One is the view that unequal distributions of economic resources and opportunities, or de facto exclusion of racial minorities from meaningful participation in the political process are as harmful, and as offensive to the Equal Protection Clause, as de jure discrimination.[100] Increasing opportunities and representation of minorities offset these effects by producing various "tangible and fully justified future benefits."[101] Among these are the emergence of "role models"—examples of success that other members of the minority group will emulate in the future.[102]

Proponents of affirmative action programs contend that it is constitutionally permissible to disadvantage members of the racial majority in order to further these goals. First, because these race-based remedies serve "benign" government purposes and because whites do not have the traditional indicia of suspectness, disadvantaged members of the racial majority cannot experience the stigmatic harm that minorities have experienced.[103] Second, the means and ends of such programs will remain "benign" over time because the racial majority is unlikely to disadvantage itself due to prejudice or to underestimate its own needs.[104] Finally, because subtle forms of de jure discrimination against racial minorities presently exist anyway, it is unrealistic to use the Equal Protection Clause's ideal of "colorblindness" to prohibit race-based policies that seek to make minority groups whole.[105]

From the other side of the spectrum, many persons find governmentally conferred preferences for racial minorities to be trouble-

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98 A more extreme, but not seriously debated, ground in favor of special benefits to racial minorities is compensating them for past discrimination. *Bakke*, 438 U.S. at 306 n.43; *see* BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS (1973). Underlying this purpose is a recognition that prior de jure discrimination leaves minorities underrepresented in various walks of life even after the discrimination has ended and that long-term underrepresentation stigmatizes minority groups.

99 A majority of the Court has rejected this as a constitutionally adequate justification for a racial classification. *See Croson*, 488 U.S. at 497-98 (1989).

100 *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 487-88 (1976) ("Providing unequal and inadequate school resources and excluding black parents from meaningful participation in school policymaking are at least as damaging to black children as enforced separation.").

101 *Croson*, 488 U.S. at 511 n.1 (Stevens, J., concurring).

102 Martin H. Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 UCLA L. REV. 343, 391 (1974).

103 *Bakke*, 438 U.S. at 327 (Brennan, J., concurring in the judgment in part and dissenting).

104 John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974).

105 *Bakke*, 438 U.S. at 327 (Brennan, J., concurring in the judgment in part and dissenting).

some, particularly because for every person of one racial group who benefits, someone of another racial group is deprived. The four members of the Court who joined Justice O'Connor's dissenting opinion in *Metro Broadcasting v. FCC*,[106] involving a federal policy granting racial minorities a preference in ownership of radio and television licenses, articulated this concern as follows:

> "Benign racial classification" is a contradiction in terms. Governmental distinctions among citizens based on race or ethnicity . . . exact costs and carry with them substantial dangers. To the person denied an opportunity or right based on race, the classification is hardly benign. The right to equal protection of the laws is a personal right, securing to *each* individual an immunity from treatment predicated simply on membership in a particular racial or ethnic group.[107]

Similarly, Justice Scalia has taken the position that special government exceptions for religious minorities are readily permitted,[108] but in *City of Richmond v. J.A. Croson Co.*,[109] involving a preference for minority businesses in securing city construction contracts, he wrote that a racial quota "derogates the human dignity and individuality of all to whom it is applied. . . . Moreover, it can easily be turned against those it purports to help."[110] He argued further that "even 'benign' racial quotas have individual victims, whose very real injustice we iguore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race."[111]

Finally, Justice Kennedy's dissent in *Metro Broadcasting* contended that granting advantages to racial minorities may actually stigmatize the present members of the majority racial group by implying that they are responsible for the past discrimination that prompted the affirmative action programs.[112] Moreover, these policies may also disparage the beneficiaries by suggesting that they are "inherently less able to compete on their own."[113]

Thus, some observers view government preferences for racial minorities as conveying the same constitutionally impermissible message of disrespect to the racial majority as invidious government discrimination against minorities conveys to the members of minority groups. As

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106 497 U.S. 547 (1990).

107 *Id.* at 609 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (citation omitted).

108 Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (Scalia, J., dissenting).

109 488 U.S. 469 (1989).

110 *Id.* at 527 (Scalia, J., concurring in the judgment) (*quoting* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 133 (1975)).

111 *Id.* (Scalia, J., concurring in the judgment).

112 497 U.S. at 637 (Kennedy, J., dissenting).

113 *Id.* at 636 (Kennedy, J., dissenting).

a consequence of this division of opinion, the appropriate level of scrutiny for a minority racial preference is much less clear than for a religious exemption from generally applicable government rules. Some members of the Court suggest that racially-based affirmative action programs should be subject to the same strict scrutiny applied to any other racial classification.[114] Others contend that they should be subject to the "intermediate level" scrutiny applied to gender-based classifications.[115] All members of the Court agree, however, that some form of heightened scrutiny is appropriate, in marked contrast to their approach to preferences for minority religious faiths.

II
EFFECT

A. Burdensome Impact: Differences Between Race and Religion

Actions *intended* to disadvantage either a racial or a religious group are both properly subject to a rule of almost per se invalidity. But despite the fact that the Court subjects "to the most exacting scrutiny laws that make classifications based on race,"[116] it has expressly declined[117] to give any but the most deferential review to "race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group."[118] Whether or not this interpretation of the Equal Protection Clause is correct,[119] there is a stronger argument, in my view, for finding that "generally applicable religion-neutral laws that have the effect of burdening a particular religious practice"[120] are more threatening to constitutional values[121] than government action that has a disproportionate impact on minority racial groups.

A core value of the Equal Protection Clause is to forbid people from being prejudiced because of their race. Race-neutral laws that have a disproportionate impact on minority racial groups do not injure members of those groups *because of* their race, but because the minority group members are disproportionately represented in the larger group affected (often the poor, or the poorly educated), all of whom are suffering disadvantage.[122] Not all people who suffer the spe-

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114 *Croson*, 488 U.S. at 494.

115 *Metro Broadcasting*, 497 U.S. at 564-65.

116 *Smith*, 494 U.S. at 886 n.3.

117 Washington v. Davis, 426 U.S. 229 (1976) (holding that in cases of alleged racial discrimination, strict scrutiny under the Equal Protection Clause is triggered only if it is shown that the government intends to treat racial groups differently).

118 *Smith*, 494 U.S. at 886 n.3.

119 *See infra* note 126 and accompanying text.

120 494 U.S. at 886 n.3.

121 For further development, see Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651 (1991).

122 Admittedly, there may be exceptional situations in which minority group members suffer unique injury because of their race from the effect of laws that are race-neutral by

cial operative consequences of the government action are members of the racial group and not all members of the racial group suffer the operative consequences.

A core value of the Religion Clauses is to forbid people from being prejudiced because of their religion. This parallels the prohibition of the Equal Protection Clause as to race. However, since religion not only confers a status but also imposes an often multi-faceted belief system on its adherents, religion-neutral laws that have the effect of burdening a particular religious practice do injure persons *because of* their religion. Even though these laws have a fully legitimate public purpose and achieve beneficial results generally, *all* persons who suffer the special operative consequences adverse to their belief system are necessarily members of that religion and *all* members of that religion suffer the special operative adverse consequences. As a result of this unique effect on religion, laws that unintentionally burden the exercise of religion are more analogous to laws that deliberately disadvantage racial or religious groups than they are to laws that inadvertently impose disproportionate disadvantage on minority racial groups.[123] This similarity between burdensome effect on religion and the type of *de jure* discrimination that is most offensive to the Constitution justifies heightened judicial scrutiny of the impact of such laws under the Religion Clauses, although such effects might not be reviewed so carefully under the Equal Protection Clause.

There is an additional reason, grounded in weighty practical considerations, for a constitutional rule that is more protective of religion than race against neutral laws that have disproportionate impacts. While the traditional relief from regulations that intentionally prejudice racial or religious groups is to completely strike down that part of the law imposing the disadvantage, the usual remedy where a law inad-

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their terms and intent. *See* Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 298-307 (1972). There is a good argument that the Court should apply some form of heightened scrutiny here as well as in respect to the analogous situation with minority religions.

123 The paradigmatic instance of deliberately disadvantaging a racial group is government action that by definition prejudices *all* members of a racial minority and *only* such persons: for example, a law that excludes all blacks from serving on juries. There are also instances of laws that intentionally disadvantage a minority group but that do not necessarily affect all members of the group. For example, a law forbidding all blacks without high school diplomas from serving on juries intentionally disadvantages blacks, and thereby is as offensive to the Constitution as a law forbidding all blacks from serving, even though it does not affect all blacks. These types of laws demonstrate some of the subtlety involved in defining discrimination and refute the proposition that *all* intentional discrimination necessarily affects all members of the group subject to disadvantage. *Cf.* Geduldig v. Aiello, 417 U.S. 484 (1984) (denial of disability benefits for pregnancy and childbirth does not discriminate against women). Nevertheless, the paradigm case best illustrates both the fundamental evil of intentional discrimination—prejudicing minorities *because of* their minority status—and why laws that unintentionally burden religious minorities exhibit a similar evil.

vertently burdens minority religious groups is simply to grant an exemption. Therefore, protecting against burdensome effects on religion will usually result only in limiting the reach of government action in discrete instances. Protecting against burdensome effects on race, in contrast, would have much broader consequences. In holding that an equal protection challenge fails if a law with a racially discriminatory effect has "some rational basis,"[124] the Court was significantly influenced by the recognition that a more restrictive rule would realistically eliminate or severely disrupt many important longstanding and widely supported arrangements such as, "tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities . . . ; [s]ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges."[125] It would hardly be feasible to excuse all members of racial minority groups from the obligations of these programs. But granting a religious exemption in response to a successful free exercise challenge in this context ordinarily carries only a modest societal impact and has proven to be a traditionally accepted and workable remedy.

B. Beneficial Impact: Differences Between Race and Religion

State programs that inadvertently disfavor minority racial groups have been the subject of substantial constitutional challenge.[126] However, judges and scholars have not seriously questioned the validity of government action that has unintended beneficial effects for the racial *majority*—an example might be agricultural price supports. The likely reason for this disparity is that adventitious favoring of the dominant racial group does not carry with it an associated message of disrespect for those racial groups that are not so advantaged. It follows as a matter of both logic and policy that government action that inadvertently favors a *minority* racial group—an example might be Aid to Families with Dependent Children—presently stirs no constitutional debate.

Some proposals for interpreting the Religion Clauses similarly ignore the beneficial effects of government action. For example, under the neutrality approach,[127] as long as the state regnlation does not draw a religious classification, the fact that it favorably affects religious interests within a sufficiently larger category is irrelevant to its constitu-

124 *Davis*, 426 U.S. at 247-48.

125 *Id.* at 248 n.14 (quoting Goodman, *supra* note 122, at 300).

126 *See, e.g.*, City of Memphis v. Greene, 451 U.S. 100 (1981); City of Mobile v. Bolden, 446 U.S. 55 (1980); Washington v. Davis, 426 U.S. 229 (1976). Scholarly commentary is extensive. *See, e.g.*, Theodore J. Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

127 *See* discussion *supra* note 88 and accompanying text.

tionality. Most significant efforts to develop legal doctrines for the resolution of disputes under the Religion Clauses, however, attribute substantial importance to impact. Thus, a major element of the Supreme Court's *Lemon*[128] test, the governing approach to judging Establishment Clause issues since the early 1970s, is that a law's "principal or primary effect must be one that neither advances nor inhibits religion."[129] In Justice O'Connor's development of the endorsement approach, she also emphasized the effect of government action by making the *perception* of a reasonable or objective observer determinative.[130] Finally, Justice Kennedy's "coercion" approach—originally constructed as an alternative to both the *Lemon* test and the endorsement proposal[131] and, in my view, the governing standard on the Supreme Court for Establishment Clause questions during the 1992-1993 Term[132]—looks almost exclusively to the way that the challenged regulation operates.[133]

Under my approach, the Religion Clauses' dominant concern of protecting religious liberty should extend to government action that has the inadvertent effect of benefiting religion. At the outset, it should be noted that apart from some deliberate efforts by government to favor sectarian interests, there are virtually no laws whose *only effect* is to aid religion; practically every government rule can reasonably be found to ultimately influence some public welfare end. A number of such regulations, however, accomplish the secular goal only as a consequence of the prior achievement of a religious purpose. To put it another way: the secular effect is not independent; rather, it depends on (or derives from) the initial completion of the religious aim. These laws, in Madison's words, "employ Religion as an engine of Civil policy."[134] To immunize them because of their public welfare benefits would, I believe, effectively read much of the core of the Establishment Clause out of the First Amendment.[135] For example, it

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

129 *Id.* at 612. The Court's earlier "test" also required that a law's "primary effect" may not be either "the advancement or inhibition of religion." School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963).

130 County of Allegheny v. ACLU, 492 U.S. 573, 625-26 (1989) (O'Connor, J., concurring); Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 349 (1987) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

131 *See* Jesse H. Choper, *Separation of Church and State: "New" Directions by the "New" Supreme Court*, 34 J. CHURCH & ST. 363, 364-65 (1992).

132 *See* Lee v. Weisman, 112 S. Ct. 2649; Jesse H. Choper, *Benchmarks*, 79 A.B.A. J. 78, 80 (1993).

133 County of Allegheny v. ACLU, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part).

134 JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, sec. 5 (1786), *quoted in* Everson v. Board of Educ. 330 U.S. 1, 67 (app.) (1947).

135 *See* Choper, *supra* note 13, at 607 n.142.

would justify state subsidization of that church which the government found best inculcates its members with the deep convictions that make for better citizenship. Accordingly, in my view, government action—regardless of its purpose or general applicability—that benefits religious interests and has no independent secular impact[136] should violate the Establishment Clause if the action poses a meaningful danger to religious liberty. This principle should apply if the law aids *any* religion—mainstream or minority.

Because government expenditures that eventually provide a financial advantage to church-related institutions probably comprise the largest category of state programs that have the unplanned effect of aiding religion, it is appropriate to conclude this discussion by explaining why these public appropriations may pose a threat to the religious freedom of individuals and groups. In the judgment of many, "[t]he most serious infringement upon religious liberty"[137] is posed "by forcing [citizens] to pay taxes in support of a religious establishment or religious activities."[138] This is cogently confirmed by Thomas Jefferson's "Virginia Bill for Religious Liberty"[139] which proclaimed "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical";[140] by James Madison's "Memorial and Remonstrance Against Religious Assessments,"[141] which condemned even forcing "a citizen to contribute three pence only of his property" to support any religious establishment;[142] by Thomas Cooley's *Constitutional Limitations*,[143] which found clearly unlawful "under any of the American constitutions . . . [c]ompulsory support, by taxation or otherwise, of religious instruc-

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136 For amplification, see Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260, 279 (1968).

137 Leo Pfeffer, *Some Current Issues in Church and State*, 13 W. RES. L. REV. 9, 18 (1961). *See* Flast v. Gardner, 271 F. Supp. 1, 15 (S.D.N.Y. 1967), *rev'd* 392 U.S. 83 (1968) (dissenting opinion by Frankel, J.). Judge Frankel noted that "[i]t is now familiar to all who have touched this subject that a central concern—perhaps the most central concern—of the Establishment Clause is to ban utterly the use of public moneys to support any religion or all religions." *Id.* at 6. *See generally* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986); Adams & Emmerich, *supra* note 78, at 1620-21.

138 Paul G. Kauper, *Church and State: Cooperative Separatism*, 60 MICH. L. REV. 3, 9 (1961).

139 12 Hening, Statutes of Virginia 84 (1823). *But cf.* MARK D. HOWE, THE GARDEN AND THE WILDERNESS; RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 26 (1965).

140 12 Hening, Statutes of Virginia 84 (1823).

141 MADISON, *supra* note 134, *quoted in* Everson, 330 U.S. 1, 65-66 (app.). *See also Flast*, 271 F. Supp. at 6-7 (dissenting opinion of Frankel, J.) (" 'Support' by use of taxpayers' money lay at the heart of Jefferson's and Madison's concern."); Leo Pfeffer, *Federal Funds for Parochial Schools? No*, 37 NOTRE DAME L. REV. 309, 310-11 (1962).

142 *Id.*

143 THOMAS M. COOLEY, 2 A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 966-67 (8th ed. 1927).

tion";[144] and by many important Supreme Court opinions.[145] Indeed, one need look no further than the Court's first major interpretation of the Establishment Clause in which the justices, unanimously emphasizing the "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions,"[146] reasoned that the First Amendment means at least that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[147]

While public subsidy of religion may not directly influence people's beliefs or practices, it plainly coerces taxpayers either to contribute indirectly to their religions or, even worse, to support sectarian doctrines and causes that are antithetical to their own convictions. As a matter of both historical design and present constitutional policy, the Religion Clauses—particularly the Establishment Clause—should be interpreted to forbid so basic an infringement of religious liberty.[148] Where such a meaningful threat to freedom exists and there is no independent secular impact, the government action should be invalid under the Establishment Clause.

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144 *Id.*

145 *See, e.g., Engel*, 370 U.S. at 442 n.7 (Douglas, J., concurring); McGowan v. Maryland, 366 U.S. 420, 452-53 (1961); McCollum v. Board of Educ., 333 U.S. 203, 248-49 (1948) (Reed, J., dissenting); *Everson*, 330 U.S. at 8, 10-12; *id.* at 33, 41, 44, 52-53 (Rutledge, J., dissenting); *see also* Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 48-49 (1815).

146 *Everson*, 330 U.S. at 11.

147 *Id.* at 15.

148 The existence of an *individual* right not to have one's compulsorily raised tax funds spent for religious purposes explains the Court's decision in Flast v. Cohen, 392 U.S. 83 (1968), granting federal taxpayers standing to challenge federal expenditures allegedly in violation of the Religion Clauses. As the Court put it:

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. . . . The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim.

Id. at 103. *See also id.* at 114 (Stewart, J., concurring) ("Because . . . [the Establishment Clause] plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution."). Finally, Justice Harlan's dissent, acknowledged the essence of the Court's reasoning "that a taxpayer's claim under the Establishment Clause is 'not merely one of ultra vires,' but one which instead asserts 'an abridgment of individual religious liberty' and a 'governmental infringement of individual rights protected by the Constitution.' " *Id.* at 125 (Harlan, J., dissenting) (citing Choper, *supra* note 136, at 276).