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**THE COURT OF DISBELIEF:  
THE CONSTITUTION'S ARTICLE VI RELIGIOUS TEST PROHIBITION AND  
THE JUDICIARY'S RELIGIOUS MOTIVE ANALYSIS**

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## INTRODUCTION<sup>1</sup>

In several federal cases concerning whether particular statutes or policies violate the First Amendment's prohibition of religious establishment, both the United States Supreme Court and other federal courts have rejected the constitutionality of these laws and policies on the grounds that they have an exclusively religious purpose. Part of the courts' analyses in some of these cases rely on the apparent religious *motives* of the statute's or policy's sponsors and/or citizen-supporters as the basis by which the courts infer that the law or policy in question has a religious *purpose*.

I argue in this paper that this sort of analysis may violate the no religious test clause section of Article VI of the U. S. Constitution as well as the prohibition of punishing or rewarding citizens based on their beliefs. I also argue that the judiciary's failure to appreciate these possible violations is the result of embracing a mode of analysis, when applied to the origin and purpose of statutes and policies, that is based on a conflation of the terms "motive" and "purpose" as well as a mistake in thinking that the reasons employed to justify laws and policies are the same as the beliefs that motivate the persons who support them. And because of these confusions, the judiciary in effect limits the enumerated powers of legislators, and provides a perverse incentive for both citizens and legislators to pretend that their motives are not religious in order to convince a skeptical judiciary that the laws and policies they support have secular purposes. Learning from the judiciary's example, activists now draw pejorative attention to the apparent religious motives of citizens and legislators in order to shore up popular support against, and influence future cases on, legislation they think violates the Establishment Clause of the First Amendment.<sup>2</sup>

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<sup>1</sup>Special thanks to Casey Luskin and Barry Hankins for reading an earlier draft of this paper and offering the author important suggestions, some of which he included in this version. Nevertheless, any flaws in this paper are entirely the author's.

<sup>2</sup>For example, Barbara Forrest writes: "At heart, proponents of intelligent design are not motivated to improve science but to transform it into a theistic enterprise that supports religious faith." Barbara Forrest, *The Newest Evolution of Creationism: Intelligent Design is About Politics and Religion, Not Science*, in 111.3 *Natural History* 80 (Apr. 2002). Joined by two co-authors Professor Forrest has also offered a lengthy legal

In order to make my case, I present an analysis of (I) the no religious test clause and the First Amendment, (II) the difference between motive and purpose, and (III) the distinction between belief and action. I then (IV) review two cases in which federal courts employ a religious motive analysis. I conclude that this mode of analysis targets beliefs and thus violates article VI when applied to lawmakers and is an illegitimate assessment of belief when applied to either legislators or ordinary citizens.

## I. THE NO RELIGIOUS TEST CLAUSE AND THE FIRST AMENDMENT

Article VI of the U. S. Constitution states that “no religious test shall ever be required as a qualification to any office or public trust under the United States.”<sup>3</sup> According to Daniel Dreisbach, this “provision generated energetic debate in the state ratifying conventions.”<sup>4</sup> For it was widely believed at the time of the American Founding that certain religious traditions and systems of belief in comparison to others were more conducive to protecting and sustaining republican government and civil society.<sup>5</sup> Dreisbach quotes Luther Martin in this regard: “[I]t should be at least decent to hold out some distinction between Christi-

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assessment of the teaching of intelligent design (ID) in public schools in which she stresses the “religious motives” of many ID supporters as dispositive for rejecting the teaching of ID in public schools as constitutionally permissible. See Steven G. Gey, Matthew J. Brauer, and Barbara Forrest, *Is it Science Yet?: Intelligent Design Creationism and the Constitution* 79-93 (September 2004). FSU College of Law, Public Law Research Paper No. 125. <http://ssrn.com/abstract=590882> (24 July 2005)

<sup>3</sup>U. S. Constitution, Art. VI.

<sup>4</sup>Daniel Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 949 (Fall 1996).

<sup>5</sup>As Philip Hamburger points out when explaining the reaction of the Danbury Baptists to the Letter sent to them by then-President Thomas Jefferson (See *infra*, II, III), “[I]t may be useful to begin by considering the [Baptists’] awkward situation.... [E]stablishment ministers [i.e., those ministers supported state religious establishments] had long accused dissenters of advocating separation, whether of church from state or religious from government.... Of course, Baptists merely sought disestablishment and did not challenge the widespread assumption that republican government depended upon the people’s morals and thus upon religion.” PHILLIP HAMBURGER, SEPARATION OF CHURCH & STATE 165 (2002)

anity and downright infidelity or paganism.”<sup>6</sup> However, supporters of Article VI’s religious test ban, notes Dreisbach, “framed the debate in terms of religious liberty.”<sup>7</sup> Take for example the defense offered by a Connecticut delegate to the Constitutional Convention, Oliver Ellsworth:

My countrymen, the sole purpose and effect of it [i.e., Article VI] is to exclude persecution, and to secure to you the important right of religious liberty. . . . In our country every man has a right to worship God in that way which is most agreeable to his conscience. If he be a good and peaceable person[,] he is liable to no penalties or incapacities on account of his religious sentiments; or in other words, he is not subject to persecution.<sup>8</sup>

As Dreisbach notes, the federal ban on religious tests was not the result of a consensus of delegates rejecting such bans in principle. For religious tests and/or oaths were found in almost all state constitutions during the time of the Revolutionary War, and some of these state tests and oaths were fashioned and championed by some of the delegates at the Constitutional Convention who supported a federal prohibition of religious tests and oaths.<sup>9</sup> This suggests that concerns for both protecting Federalism and making sure that state religious tests and oaths were not superceded by national tests were factors in the passage of the federal ban.<sup>10</sup> The common understanding at the time did not maintain that religious

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<sup>6</sup>Dreisbach, *supra* note 4, at 950, citing 5 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 385-86 (Jonathan Elliot ed., 1859) [hereinafter Elliot’s Debates]

<sup>7</sup>Dreisbach, *supra* note 4, at 950.

<sup>8</sup>Oliver Ellsworth, *The Landholder*, VII, Connecticut Courant (Dec. 17, 1787), reprinted in Essays on the Constitution, *supra* note 11, at 167, 168. reprinted in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 167, 168 (New York, Paul L. Ford ed., Burt Franklin 1970) (1892) [hereinafter ESSAYS ON THE CONSTITUTION], as quoted in Dreisbach, *supra* note 4, at 950.

<sup>9</sup>Dreisbach, *supra* note 4, at 950.

<sup>10</sup>*Id.*, at 950-951. Judge Michael McConnell writes:

liberty and religious disestablishment were inconsistent with state religious tests and oaths for public office, since it was widely believed, as I noted above, that the role of a public official required a certain moral character that could best (or only) be sustained in a citizen who had been inculcated with certain religious beliefs.<sup>11</sup> Nevertheless, given the historical milieu in which the Constitution's drafters found themselves, the radical and groundbreaking nature of Article VI cannot be overstated, even though it seems modest by today's standards. For it "was a bold and significant and departure from the prevailing practices in Europe, as well as most of the states."<sup>12</sup> Dreisbach goes on to explain:

Religious tests had long been a favored instrument for preserving the political power of established churches and denying equal political opportunity to adherents of other creeds. The test ban was not strictly a "disestablishment" measure since there was no formal establishment to abolish. However, the test ban preempted the prospect of a national ecclesiastical establishment by removing a useful mechanism for a religious denomination to exert control over the political processes. Moreover, the ban opened the door for members of minority sects to become full and equal participants in the democratic enterprise. The ban was thus calculated to secure re-

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At the federal level, restrictions of this sort were barred by Article VI of the Constitution, which provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." This is the only explicit "religious liberty" provision of the original Constitution. It proved, however, to be one of the more controversial features of the document. Many Americans considered it too risky a proposition to allow Catholics or non-Christians to hold office. What if they introduced the Inquisition? The provision ultimately proved acceptable less because of opposition to test oaths than to concerns that test oaths at the federal level might reflect the views of some other religious faction than one's own. As with so many matters, federalism offered a solution to otherwise deeply divisive problems. (notes omitted)

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion* 44 WM AND MARY L. REV. 2105, 2178-79 (April 2003) (notes omitted)

<sup>11</sup>Dreisbach, *supra* note 4, at 950-951. See also, Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself* 1987 37 CASE W. RES. L. REV. 674, 681-87

<sup>12</sup>Dreisbach, *supra* note 4, at 951.

ligious liberty, deter religious persecution, ensure sect equality before the law, and promote independence of the federal government from ecclesiastical domination and interference.<sup>13</sup>

Despite the historical significance of the inclusion of Article VI in the Constitution of the early republic, the *text* of the religious test ban has become more or less a dead letter since the Supreme Court has found the prohibition of religious tests and oaths in the Free Exercise and/or Establishment Clauses and their application to the states by incorporation of the First Amendment through the Fourteenth Amendment.<sup>14</sup> For instance, in the case of *Torcaso v. Watkins* (1961),<sup>15</sup> the Supreme Court declared as unconstitutional a Maryland law that required a declaration of belief in God's existence as a condition for holding public office. Justice Hugo Black wrote in the Court's unanimous opinion, "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person to 'profess a belief or disbelief in any religion.' . . . This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and

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<sup>13</sup>*Id.*

<sup>14</sup>See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1155 n.1 (2d ed. 1988); ERWIN CHEMERINKSY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 971-72 (1997). The Court first incorporated the freedom of speech and press clauses, eventually incorporating the entire First Amendment. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (freedom of speech and press "are among the fundamental personal rights and 'liberties' protected by the Due Process Clause of the Fourteenth Amendment from impairment by the states"); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action"); *De Jorge v. Oregon*, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press as fundamental"); *Cantwell v. Connecticut* 310 U.S. 296, 303-304 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered legislatures of the States as incompetent as Congress to enact such laws"); and *Everson v Board of Education* 330 U.S. 1 (1947) (Justices unanimously agreed that the Establishment Clause applies to the States through the Fourteenth Amendment).

<sup>15</sup>*Torcaso v. Watkins*, 367 U.S. 488 (1961).

therefore cannot be enforced against him.<sup>16</sup> Although he leaves out the citation, Justice Black, in this passage, seems to be relying on an interpretation of the First Amendment he first offered over a decade earlier in *Everson v. Board of Education* (1947),<sup>17</sup> in which he states: “No person can be punished for entertaining or professing religious beliefs or disbeliefs. . . .”<sup>18</sup> Four years earlier, Justice Robert Jackson, seeming to rely on the same sort of reasoning, writes in *West Virginia Board of Education v. Barnette* (1943):<sup>19</sup> “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>20</sup> The principle that seems to ground this reasoning has its origin in what was once called “freedom of conscience”:<sup>21</sup> *no citizen’s religious beliefs may be employed by the government to disqualify*

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<sup>16</sup>*Id.*, at 495

<sup>17</sup>*Everson*, 330 U.S. 1 (1947)

<sup>18</sup>*Id.*, at 15-16

<sup>19</sup>*West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943)

<sup>20</sup>*Id.*, at 642.

<sup>21</sup>Although a minority view at the time of the American Founding, Thomas Jefferson articulates it well in his Bill for Establishing Religious Freedom:

That our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; that, therefore, the proscribing of any citizen as unworthy of the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right.

*A Bill for Establishing Religious Freedom* (1786), as reprinted in MICHAEL W. MCCONNELL, ET. AL., *RELIGION & THE CONSTITUTION* 70 (2002), as quoted in McConnell, *supra* note 10, at 2179.

James Madison’s defense of freedom of conscience is more explicit than Jefferson’s. Madison writes:

Because we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the [Manner of discharging it, can be directed only by reason and] conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. . . . We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil So-

*that citizen from either public office in particular or political participation in general.*

So, what was first a Constitutional prohibition of religious tests and oaths for only federal offices--partly motivated by both sustaining Federalism and protecting local religious tests and oaths from federal supercession—eventually was extended to all public offices in every jurisdiction of the United States. It is no exaggeration to say that the ban on religious tests and oaths for public office is now a fixed principle of America’s Constitutional framework, and, as I argue below (*infra* IV.B), that principle is no less violated when a legislator’s powers are obstructed by a religious test *after* he or she enters public office than it is when he or she is excluded on religious grounds from holding public office altogether. It seems clear as well that this principle has been extended, through the contemporary interpretation of the Free Exercise and Establishment Clauses, to prohibiting the government from punishing or rewarding citizens for “entertaining or professing beliefs or disbeliefs.”<sup>22</sup>

## **II. THE DISTINCTION BETWEEN BELIEF AND ACTION: FREEDOM OF BELIEF AS AN ULTIMA FACIE RIGHT**

The Supreme Court has, in several opinions, concluded that holding a *religious belief* is an ultima facie right. Unlike prima facie fundamental rights—e.g., freedom of speech, free

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ciety, and that Religion is wholly exempt from its cognizance. . . .

Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We reverse this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?

James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in THE COMPLETE MADISON 299-301 (S. Padover ed. 1953), as quoted in *Wallace v. Jaffree*, 472 U.S. 38, 53 n. 38 (1985)

<sup>22</sup>*Everson*, 330 U.S. at 15-16 (1947)

exercise of religion—that may be trumped by the government’s compelling state interest, religious beliefs as such *may never* be proscribed or serve as the basis of punishment or reward by the government.<sup>23</sup> This seems to be what Thomas Jefferson had in mind when he told the Danbury Baptists in his famous letter to them “that the legitimate powers of government reach actions only, & not opinions.”<sup>24</sup>

In *McDaniel v. Paty* (1978),<sup>25</sup> the Supreme Court held that “[t]he Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious *beliefs as such*...”<sup>26</sup> The Court relied on a notion it clearly articulated fifteen years earlier in *Sherbert v. Verner* (1963):<sup>27</sup>

*The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such, ...Government may neither compel affirmation of a repugnant belief, ...nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, ...nor employ the taxing power to inhibit the dissemination of particular religious views...On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for “even when the action is in accord with one's religious convictions, (it) is not totally free from legislative restrictions.” ... The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or or-*

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<sup>23</sup>“Although a law targeting religious *beliefs as such* is never permissible...; ... if the object of a law is to infringe upon or restrict *practices* because of their religious motivation, the law is not neutral, ....and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (emphasis added)

<sup>24</sup>Thomas Jefferson, *Jefferson’s Letter to the Danbury Baptists* (Jan. 1, 1802), 57 THE LIBRARY OF CONGRESS INFORMATION BULLETIN 6 (June 1998), available at <http://www.loc.gov/loc/lcib/9806/danpre.html> (last visited May 1, 2005).

<sup>25</sup>*McDaniel v. Paty*, 35 U.S. 618 (1978)

<sup>26</sup>*Id.*, at 626 (emphasis added)

<sup>27</sup>*Sherbert v. Verner* 374 U.S. 398 (1963)

der.<sup>28</sup>

The jurisprudential paternity of these holdings can be found in the Jefferson-influenced, *Reynolds v. the United States* (1878):<sup>29</sup> “Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices.”<sup>30</sup> Clearly, the judiciary and other branches of government are not restricted from assessing the *actions* of the country’s constituent governments and their citizens,<sup>31</sup> and the *reasons* offered by these governments and citizens to support these actions.<sup>32</sup> But the *beliefs* of both citizens and lawmakers are not legitimate objects of assessment by the state including its courts.<sup>33</sup>

The Court, at least on one occasion, has expressed skepticism in being able to clearly demarcate between beliefs and actions. In *Wisconsin v. Yoder* (1972),<sup>34</sup> the Court claimed that the case “does not become easier because respondents were convicted for their ‘actions’ in refusing to send their children to the public high school; in this context belief and

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<sup>28</sup>*Id.*, 402-03. (citations omitted) (emphasis added)

<sup>29</sup>*Reynolds v. United States* 98 U.S. 145 (1878)

<sup>30</sup>*Id.*, at 166

<sup>31</sup>Consider, for example, *the actions* of teacher-led, government-authored, school-prayer, *Engel v. Vitale* 370 U. S. 421 (1962), and a university’s refusal to pay for the printing costs of a religious publication that is similarly-situated to secular publications whose printing costs are covered by the school, *Rosenberger v. Rectors and Visitors of the Univ. of Virginia* 115 S. Ct. 2510 (1995). In both these cases, the Court assessed the actions of state actors in light of the requirements of the First Amendment.

<sup>32</sup>Consider, for example, *the reasons* offered by the state justify teacher-led, government-authored, school prayer, *Engel*, 370 U. S. 421, and a university’s refusal to pay for the printing costs of a religious publication that is similarly-situated to secular publications whose printing costs are covered by the school, *Rosenberger*, 115 St. Ct. 2510. In both these cases, the Court assessed the reasons offered by the state and ruled that they were inadequate to justify the policies under the principles of the First Amendment.

<sup>33</sup>In *Marbury v. Madison* 5 U.S. 137, 180 (1803) the Supreme Court affirmed that the courts are not exempt from being prohibited from employing “a law repugnant to the [C]onstitution”: “Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.”

<sup>34</sup>*Wisconsin v. Yoder* 406 U.S. 205 (1972)

action cannot be neatly confined in logic-tight compartments.”<sup>35</sup> Nevertheless, I am not convinced that the distinction between belief and practice—as articulated by Jefferson and in *Reynolds*—was rejected in *Yoder*. In *Yoder* the Court was assessing the question of whether Wisconsin’s forbidding of Amish children to be exempted from the state’s compulsory education requirement could be upheld because the law only touched the actions and not the beliefs of the Amish. But, as the Court points out,<sup>36</sup> the education of the Amish community’s children is one of those cases in which belief and action are tightly intertwined, since the community’s view of education is inexorably connected to Amish theology’s views on humanity, the social order, knowledge, and the good life. Nevertheless, the Court’s claim did *not* reject the Jeffersonian principle—affirmed in *Reynolds*, *McDaniel*, and *Sherbert*-- that *mere* belief (or “belief as such,” as the Court calls it) could not be the object of state interference, which is essential to the case I am making in this paper. After all, if the state of Wisconsin had targeted the Amish’s religious beliefs *as such*, rather than the community’s refusal to conform to the state’s compulsory education policy, the state would have probably lost on summary judgment in the trial court.

### III. MOTIVES AS BELIEFS

So far, I have shown that two points of American constitutional law are well-established: (1) a religious test or oath for office (and by extension, a religious test for the rights and powers of citizenship in general) is forbidden by the Constitution; (2) the government, including the judiciary, is categorically forbidden from limiting a citizen’s political rights on the basis of her religious beliefs.

In this section, I argue that motives are types of beliefs. This is important for the case I am making, because I want to argue that the judiciary’s religious motive analysis runs afoul of the two well-established constitutional principles defended above. In order to

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<sup>35</sup>*Id.*, at 220

<sup>36</sup>*Id.*, at 209-219.

make this case, I offer two points. (A) I argue that purposes and motives are conceptually distinct. (This is because, as we shall see in *infra* IV, the judiciary oftentimes confuses the purpose of a piece of legislation with the motive of the legislator who supports it). (B) I then explain why motives are types of beliefs.

#### *A. Purposes and Motives Are Conceptually Distinct*

Consider a modest example derived from a familiar case. Imagine that it is 1802 and you are a leader in the Danbury Baptist Church of Connecticut and you are not pleased that your state has levied a tax to support its established church, Congregationalism. Although Connecticut does allow Baptists and other citizens to request that the state redirect their tax money to their own churches, the process requires that “they first. . .obtain, fill out, and properly file an exemption certificate.”<sup>37</sup> And because “Baptists [are] a harassed minority, some communities [make] it difficult for them to receive these exemptions,”<sup>38</sup> which is why you and your fellow Baptists share your complaint with President Thomas Jefferson. The President replies in what has become a famous letter. In that reply, Jefferson writes that he agrees “with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions.” Jefferson goes on to announce his reverence for the American people’s embracing of that portion of the First Amendment that declares that Congress “should `make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of *separation between Church & State.*”<sup>39</sup>

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<sup>37</sup>Derek H. Davis, *Thomas Jefferson and the “Wall Of Separation” Metaphor*, 45 J. CHURCH & STATE 5, 10 (Winter 2003).

<sup>38</sup>*Id.*

<sup>39</sup>Thomas Jefferson, *Jefferson’s Letter to the Danbury Baptists* (Jan. 1, 1802), 57 THE LIBRARY OF CONGRESS INFORMATION BULLETIN 6 (June 1998), available at <http://www.loc.gov/loc/lcib/9806/danpre.html> (last visited May 1, 2005).

Suppose that you agree with the President's sentiments and wish that your state, Connecticut, would include religion clauses in its constitution similar to those found in the federal constitution and extolled by the President in his reply. So, in principle you support religious free exercise for all faiths including your own. You see, correctly, that *the purpose* of such a constitutional amendment would be to increase religious liberty for all by forbidding the state to establish a religion and support it financially by taxing those of contrary faiths. However, your *motive* for advancing this constitutional amendment is so that the state may relieve your religion of a financial burden that is inhibiting evangelism. That is to say, your motive for supporting this constitutional amendment is religious: you believe that it is a good thing for people to convert to the Baptist faith and the current legal arrangement in your state makes such conversions more difficult. But that is not a complete account of your motive. It also has a state-restricting aspect to it. For you have no intention in establishing the Baptist faith as the state's official religion, even if you had the opportunity and power to do so, because you sincerely hold to the theological belief that faith resulting from coercion, however minimal, is not authentic faith. So, your motive for supporting a state constitutional amendment that protects religious liberty and forbids religious establishment is unequivocally to advance a particular understanding of religious truth. Nevertheless, the purpose of the proposed amendment is consistent with a liberal view of religious freedom and anti-establishment, which, by any account, is secular. So, we have a case in which a particular law's purpose is secular while the motive of its supporter is purely religious. And yet, it seems odd to say that this law, because of the motive of its supporter, would violate religious establishment. After all, the law, motivated by religious beliefs, *forbids* religious establishment.

Now imagine that you are a resident of Virginia, and you, with the help of the President, convince your fellow citizens that the state should place in its constitution an amendment that consists of religious liberty and anti-establishment clauses that is identical

to the amendment proposed in Connecticut. Suppose, however, that your motive for proposing this amendment is not religious at all. Rather, your beliefs in religious liberty and anti-establishment are motivated by the belief that a good community is one that ought to rid itself of any vestiges of a bygone era in which citizens persecuted each other for political power so that the state may endorse, establish, and support a particular ecclesiastical body. Although the purpose and wording of the amendment offered in Virginia is identical to the one the Baptists are suggesting for Connecticut, the first is motivated by what most people would consider non-religious beliefs while the second is religiously motivated. Yet, the motive of the supporters of each adds nothing to the content and purpose of the amendment. In conclusion, a law's purpose and a legislator's (or citizen's) motive are conceptually distinct.

### *B. Motives Are Types of Beliefs*

A motive is a type of *belief* that is causally effective in contributing to the bringing about of an action *by an agent* (i.e., a citizen). A motive, of course, is not a sufficient condition to bring about an action by an agent, since an agent may have a number of beliefs that, though potentially causally effective, never contribute to bringing about an action for a variety of reasons including the absence of other conditions such as the agent's failure to exercise the power to act. For example, if I am a citizen with libertarian philosophical beliefs I would be motivated to support legislation that would eradicate the public school system if such legislation were proposed by the lawmakers in my state. But because no such legislation has been proposed—that is, a condition for my acting is absent—my motive is merely a potentially causally effective contributory condition for me to bring about an action, namely, to offer financial and political support for the legislation.

A motive, however, is not the act or policy itself, and neither is the motive the reason *that justifies the particular policy or action*. At best, a motive may *explain why* an agent

supports a particular policy, but an explanation is neither the policy itself nor the justification for the policy. For example, one's belief in God may be *explained* by one's belief that one ought to follow the religious tradition of one's family, but the belief itself—"God exists"—and the *justification for* that belief—e.g., the cosmological argument, one's personal encounter with God—are separate matters all together and should be assessed as such. To discount the veracity of belief<sub>1</sub> on the grounds that one may offer another belief<sub>2</sub>, a motive, as a causally contributory condition that helps account for how belief<sub>1</sub> arose in the believer's noetic structure is to commit the genetic fallacy.<sup>40</sup>

Consider the role of motives on questions of public policy and law and their relation to the policy or law in question and the reasons for it. Two people, for instance, can have the exact same motive for two contrary policies or acts—e.g., Bob opposes, and Fred supports, welfare reform because each is motivated by a desire to help the poor. Moreover, one policy or act may be supported by citizens with contrary motives—e.g., Bob opposes welfare reform because he is motivated to help the poor; Tom opposes welfare reform because he is motivated to get reelected and most of his constituents oppose welfare reform. In addition, one policy or act may be supported by two citizens with the same motive but each justifies the policy or act for different reasons—e.g., Bob and Sid both oppose welfare reform because each is motivated to help the poor, but Bob justifies the policy by showing that a similar policy in California failed whereas Sid justifies the policy by appealing to what he thinks are sound principles of social justice. A motive in many ways is a belief properly basic to one's personal constitution, character, and inner life and cannot be "unbelieved" by an act of will in the way that one may willingly and without much

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<sup>40</sup>The genetic fallacy occurs when the origin of a viewpoint or argument, rather than its merits, is employed to dismiss it out of hand. Although the origin of an idea may play a part in assessing its merits, the genetic fallacy is committed when the idea is dismissed based on its origin even though the origin of the idea is not a necessary condition for the soundness of the arguments for it

difficulty offer different reasons or purposes for the same policies and acts one may advance throughout one's life.

In terms of constitutional law, these distinctions are important. Let me repeat some points brought up earlier (see *supra* II). The Supreme Court holds that “[t]he Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious *beliefs* as such...”<sup>41</sup> This is because the Court makes a distinction between belief and practice: “Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices.”<sup>42</sup> Although the government (including the judiciary) may assess its own *actions* and those of its citizens, as well as the reasons for those actions, it follows that it may not assess religious motives *if* motives are beliefs.

#### **IV. RELIGIOUS MOTIVE ANALYSIS**

In this section I critically examine two federal court cases in which government acts were declared unconstitutional because of the motivation of its legislative and/or citizen supporters. In my assessment of these two cases I hope to show that the religious motive analysis violates the Constitutional principles presented in *supra* I and II.

##### *A. Selman v. Cobb County School District (2005).*<sup>43</sup>

In March 2002, the school board of Cobb County, Ga., ordered that a cautionary sticker be placed on science textbooks covering the topic of evolution. The sticker states: “This textbook contains material on evolution. Evolution is a theory, not a fact, regarding

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<sup>41</sup>*McDaniel*, 35 U.S., at 626 (emphasis added)

<sup>42</sup>*Reynolds*, 98 U.S. at 166.

<sup>43</sup>*Selman v. Cobb County Sch. Dist.*, 2005 U.S. Dist. LEXIS 432 (N.D. Ga., Jan. 13, 2005)

the origin of living things. This material should be approached with an open mind, studied carefully and critically considered.”<sup>44</sup>

A group of parents whose children attend Cobb County schools went to court to challenge the constitutionality of this warning.<sup>45</sup> On January 13, 2005, U.S. District Judge Clarence Cooper agreed that the sticker violates the Establishment Clause of the First Amendment. While the Cobb County sticker has its problems,<sup>46</sup> what is far more troubling is the court’s analysis.

Judge Cooper begins his opinion with some important clarifications. He points out that the court’s opinion deals with a narrow question—the constitutionality of the sticker’s content—and does not address the many other issues that animate the differing factions in this debate. For Cooper, this case is not about the relationship between science and religion or even the proper classification of evolution as a theory or a fact.<sup>47</sup> He then applies to the narrow question the three-prong test laid out by the Supreme Court in *Lemon v. Kurtzman* (1971):<sup>48</sup> “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>49</sup> A statute or policy that fails any one of these prongs violates the Establishment Clause.

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<sup>44</sup>*Selman*, 432 (N.D. Ga., Jan. 13, 2005), at 13

<sup>45</sup>*Id.*, at 1-2

<sup>46</sup>There are at least two problems with this sticker. First, calling evolution a theory “regarding the origin of living things” may be misleading if one is talking about biological evolution, which concerns how living things that already exist change over time. Second, the claim that evolution is “not a fact” is inconsistent with the school board’s call for critical thinking. The board cannot say that evolution is not a fact and at the same time suggest to students that they should have an open mind on the subject, since having an open mind requires that they critically consider the possibility that evolution is a fact.

<sup>47</sup>*Selman*, 432 (N.D. Ga., Jan. 13, 2005), at 3-4.

<sup>48</sup>*Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down as unconstitutional statutes in Pennsylvania and Rhode Island that involved public aid programs to private school teachers including parochial school teachers).

<sup>49</sup>*Id.*, at 612-13.

The Cobb County sticker passes the first prong because it has two secular purposes, writes the judge. First, the sticker “fosters critical thinking by encouraging students to learn about evolution to make their own assessment regarding its merit.”<sup>50</sup> Second, the sticker is an attempt to present evolution “in a manner that is not unnecessarily hostile” in order to “reduce offense to students and parents whose beliefs may conflict with the teaching of evolution.”<sup>51</sup>

To determine whether the sticker passes Lemon’s second prong—its “principal or primary effect must be one that neither advances nor inhibits religion”—Cooper conscripts the rationale behind the Supreme Court’s endorsement test.<sup>52</sup> If a statute or policy creates a perception that the state is either endorsing or disfavoring a religion, the action is unconstitutional. As Justice Sandra Day O’Connor notes in *Lynch v. Donnelly* (1984),<sup>53</sup> the concern here is whether the disputed law or policy sends “a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”<sup>54</sup> In *Wallace v. Jaffree* (1985), Justice O’Connor argues that a statute violates the establishment clause if an objective observer fully informed of all the facts “would perceive it as a state endorsement” of religion.<sup>55</sup>

Judge Cooper concludes that the sticker fails this test, though this judgment is not based on the “views or reactions held by the Plaintiffs or the numerous citizens and organizations who wrote to the Board.”<sup>56</sup> Rather, it is based on “the view of a disinterested, reasonable observer.”<sup>57</sup> Such a person, fully conversant with the history of opposition to

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<sup>50</sup>*Selman*, 432 (N.D. Ga., Jan. 13, 2005), at 56.

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* At 57-79

<sup>53</sup>*Lynch v. Donnelly* 465 U.S. 668 (1984)

<sup>54</sup>*Id.*, at 688 (O’Connor, J., concurring)

<sup>55</sup>*Wallace*, 472 U.S., at 67 (O’Connor, J., concurring)

<sup>56</sup>*Selman*, 432 (N.D. Ga., Jan. 13, 2005), at 58.

<sup>57</sup>*Id.*

Darwin's idea, would recognize that the assertion "evolution is a theory, not a fact" has its origin in anti-evolution literature published by creationists.<sup>58</sup> Thus, an informed, reasonable observer would view the sticker as endorsing a particular view of evolution espoused by the religiously motivated citizens and public officials of Cobb County. This, according to the court, tells citizens who are staunch supporters of "evolution that they are political outsiders."<sup>59</sup>

This analysis fails for several reasons. First, it seems inconsistent with the court's analysis under Lemon's first prong, which affirms that one of the sticker's secular purposes is to reduce offense to religious citizens. In other words, religious citizens stated, through their government representatives, a goal of attempting to reduce hostility to certain religious beliefs, and the court acknowledges that such a goal constitutes a secular purpose

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<sup>58</sup>*Id.*, at 62. *Creationism*, as understood by American courts and popular culture, is synonymous with *young-earth creationism*. This view, according to Phillip E. Johnson (who is not a young-earth creationist), is associated with the "term 'creation-science,' as used in the Louisiana law [that required "balanced treatment" between evolution and creationism, and struck down in *Edwards v. Aguillard* 482 U.S. 578 (1987)], [and] is commonly understood to refer to a movement of Christian fundamentalists based upon an extremely literal interpretation of the Bible." "Creation-scientists," writes Johnson, "do not merely insist that life was *created*; they insist that the job was completed in six days no more than ten thousand years ago, and that all evolution since that time has involved trivial modifications rather than basic changes. . . . [Young-earth creationism] attributes the existence of fossils to Noah's flood." PHILLIP E. JOHNSON, *DARWIN ON TRIAL* 4 (1991).

<sup>59</sup>*Selman*, 432 (N.D. Ga., Jan. 13, 2005), at 58. Writes Judge Cooper:

In this case, the Court believes that an informed, reasonable observer would interpret the Sticker to convey a message of endorsement of religion. That is, the Sticker sends a message to those who oppose evolution for religious reasons that they are favored members of the political community, while the Sticker sends a message to those who believe in evolution that they are political outsiders....

Further, the informed, reasonable observer would be aware that citizens and parents largely motivated by religion put pressure on the School Board to implement certain measures that would nevertheless dilute the teaching of evolution, including placing a disclaimer in the front of certain textbooks that distinguished evolution as a theory, not a fact. Finally, the informed, reasonable observer would be aware that the language of the Sticker essentially mirrors the viewpoint of these religiously-motivated citizens.

*Id.*, at 58, 61.

that passes Lemon's first prong. Yet somehow the policy does not survive under Lemon's second prong for precisely the same reason that the court had just approved it under the first prong.

Second, this reasoning presents a Catch-22 that makes it nearly impossible for religious citizens to remedy public policies that they believe are uniquely hostile to their beliefs. For who but the citizens who take religious offense would be the most vocal critics of such policies and the most visible proponents of ways to mitigate them? Consequently, it is difficult to believe that the judge is suggesting that citizens who desire to remedy a religious offense in their public school curricula cannot themselves lobby their government. Yet if political representatives respond to their concerns (just as elected officials might respond to citizens objecting to school policies for non-religious reasons or even to citizens calling for the teaching of evolution), such a response would, under Judge Cooper's reasoning, raise Establishment Clause concerns. The result is to impose a special burden on the political activity of religious citizens, a burden not placed on secular political participation.

Third, what makes this opinion particularly strange is not that Judge Cooper is relying on the actual motives of religious citizens to dismiss the textbook disclaimer as unconstitutional, though he does indeed do that. Rather, the strangeness of this opinion lies in the judge's relying on what a third-party may believe about the motives of the law's citizen-supporters based on the history and common understanding of the debate over evolution. Here, the First Amendment has been completely turned on its head. Rather than serving as a protector of believing-citizens and a bulwark against religious prejudice, the coercive power of the First Amendment's Establishment Clause, according to Judge Cooper, is *triggered* for the purpose of limiting the political actions of religious citizens *whenever* secular citizens *believe* that the political views of their religious neighbors are the result of a type of belief, a religious motive, even if the law under scrutiny has a bona fide secular

purpose and is supported by secular reasons. So, in this case, the government rewards secular citizens for their beliefs about religious citizens and punishes religious citizens because of what secular citizens perceive the religious citizens believe. But if government cannot touch beliefs, as the current understanding of the First Amendment seems to indicate (*supra* I), then this opinion is inconsistent with the Constitution. For its major premise relies entirely on the *beliefs* of citizens including some of these citizens' beliefs about other citizens' beliefs and their religious content.

*B. Wallace v. Jaffre (1985)*<sup>60</sup>

In this case, the U.S. Supreme Court struck down as unconstitutional an Alabama statute that *permitted*, but did not require, the following to take place in its public schools:

At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.<sup>61</sup>

This portion of the code is one of three parts brought to the attention of the Court. The first—which required meditation and did not mention prayer<sup>62</sup>—was not challenged by the appellees. The third--- “enacted in 1982, which authorized teachers to lead ‘willing stu-

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<sup>60</sup>*Wallace*, 472 U.S. 38.

<sup>61</sup>Alabama Code § 16-1-20.1 (Supp. 1984), as quoted in *Id.*, at 40 n. 2.

<sup>62</sup>Alabama Code § 16-1-20 (Supp. 1984), which reads: "At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in."

dents" in a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the world"<sup>63</sup>—was struck down by the Court a year earlier.<sup>64</sup>

So, the Court in this case dealt only with the statute that permitted teachers to start class with a moment of silence that may include either meditation or prayer. Unlike the third portion of the code, it did not specifically permit teachers to lead students in a particular prayer, but rather, merely allowed teachers to set aside a minute at the commencement of the day in which the instructor informs her students that they may meditate or pray as a result of their own initiative. The Court, nevertheless, struck down the statute because it violated the purpose prong of the Lemon test. And the reason for this, the Court opines, is because the law's chief sponsor, State Senator Donald Holmes, was motivated by a desire "to return voluntary prayer to our public schools . . . [I]t is a beginning and a step in the right direction."<sup>65</sup> Moreover, because "Senator Holmes unequivocally testified

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<sup>63</sup>*Wallace*, 472 U.S., at 40, quoting Alabama Code § 16-1-20.2 (Supp. 1984) (note omitted). Here's the portion of the code in its entirety:

From henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:

Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.

Alabama Code § 16-1-20.2 (Supp. 1984)

<sup>64</sup>*Wallace v. Jaffree*, 466 U.S. 924 (1984)

<sup>65</sup>*Wallace*, 472 U.S., at 57, quoting from a statement that Senator Holmes inserted into the legislative record, which read in its entirety:

Gentlemen, by passage of this bill by the Alabama Legislature our children in this state will have the opportunity of sharing in the spiritual heritage of this state and this country. The United States as well as the State of Alabama was founded by people who believe in God. *I believe this effort to return voluntary prayer to our public schools for its return to us to the original position of the writers of the Constitution, this local philosophies and beliefs hundreds of Alabamians have urged my continuous support for permitting school prayer. Since coming to the Alabama Senate I have worked hard on this legislation to accomplish the return of voluntary prayer in our public schools and return to the basic moral fiber.*

Quoted in *id.*, at 57 n. 43. (emphasis added by Court).

that he had `no other purpose in mind,'"<sup>66</sup> the Court concluded that "the record not only provides us with an unambiguous affirmative answer [as to the religious purpose of the statute], but it also reveals that the enactment of [it] was not motivated by any clearly secular purpose -- indeed, the statute had *no* secular purpose."<sup>67</sup>

Three problems emerge from the Court's analysis, the second and third of which are germane to this paper's thesis. First, Senator Holmes' motives may not represent the motives of his colleagues who voted to pass the legislation for which he was the primary sponsor.<sup>68</sup> After all, as I noted above (*supra* III.B), legislators support bills for a variety of motives, including a desire to get reelected, to please a particular constituency or to advance the public good. It seems to me that a plausible, though admittedly disputed, reading of Senator Holmes' comments shows that his motive was in fact not religious. It seems to me that he was motivated by a desire to advance a notion of the public good that he believes is connected to America's religious heritage and its importance in the moral formation of the school-age members of civil society. Holmes states that " by passage of this bill by the Alabama Legislature our children in this state will have the opportunity of sharing in the spiritual heritage of this state and this country. The United States as well as the State of Alabama was founded by people who believe in God."<sup>69</sup> He, apparently, sees in this a wisdom in which the young people of his state should have the opportunity to voluntarily partake: "Since coming to the Alabama Senate I have worked hard *on this leg-*

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<sup>66</sup>*Id.*, at 43 (note omitted)

<sup>67</sup>*Id.*, at 56.

<sup>68</sup>Chief Justice Warren Burger says as much:

As even the appellees concede... there is not a shred of evidence that the legislature as a whole shared the sponsor's motive or that a majority in either house was even aware of the sponsor's view of the bill when it was passed. The sole relevance of the sponsor's statements, therefore, is that they reflect the personal, subjective motives of a single legislator. No case in the 195-year history of this Court supports the disconcerting idea that postenactment statements by individual legislators are relevant in determining the constitutionality of legislation

*Id.*, at 86-87 (Burger, J., dissenting) (citation omitted).

<sup>69</sup>Quoted in *id.*, at 57 n. 43.

islation to accomplish the return of voluntary prayer in our public schools and return to the basic moral fiber."<sup>70</sup>

Second, even if Senator Holmes had only a religious motive for sponsoring this bill, it does not follow from this that the legislation itself may not have a secular purpose. As I pointed out above (*supra* III.A), motives and purposes are conceptually distinct. For this reason, to employ the concepts interchangeably, as the Court does in its reasoning in *Wallace*, is to offer an analysis that is fundamentally flawed. After all, even if Senator Holmes was motivated to sponsor this legislation in order to pave the way for the eventual reinstatement of unconstitutional teacher-led prayer in public schools, as the Court suggests,<sup>71</sup> it does not follow that the law in question in fact violates the same principle on which the Court relied when it declared teacher-lead prayer unconstitutional.<sup>72</sup> That is, the law and its purpose and the reasons for it, and not Senator Holmes' motives, are the proper object of analysis. For one could without much difficulty *both* grant that Senator Holmes' motives are purely and unambiguously religious *and at the same time* construct a plausible secular purpose for this legislation that would not be inconsistent with the language of the statute.<sup>73</sup> For example, because religious free exercise is part of the secular Constitution, one could argue that Alabama's statute is simply informing its public school

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<sup>70</sup>*Id.* (emphasis added by Court)

<sup>71</sup>The Court writes:

The sponsor of the bill that became § 16-1-20.1, Senator Donald Holmes, inserted into the legislative record -- apparently without dissent -- a statement indicating that the legislation was an "effort to return voluntary prayer" to the public schools. Later Senator Holmes confirmed this purpose before the District Court. In response to the question whether he had any purpose for the legislation other than returning voluntary prayer to public schools, he stated: "No, I did not have no other purpose in mind."

*Id.*, at 56-57. (notes omitted).

<sup>72</sup>See *Engel*, 370 U. S. 421

<sup>73</sup>As the Court points out: "The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

students that they may, if they so choose, exercise this religious freedom by engaging in voluntary prayer. As Justice Byron White eloquently points out in his dissenting opinion, if more than half of his brethren would “approve statutes that provided for a moment of silence but did not mention prayer,”<sup>74</sup> then where precisely would his brethren come down in the case of a teacher who answered “yes” when asked by a student if she could silently pray during the approved moment of silence?<sup>75</sup> And if the giving of that answer by a state actor, the teacher, is permissible, then why is it not permissible for the Alabama legislature to provide precisely the same answer before the question is asked?<sup>76</sup> Moreover, because earlier cases against school-sponsored prayer may have led some citizens to mistakenly believe that *all* prayer is prohibited in public schools, another purpose of this legislation is to remedy that misconception by showing that the state is not hostile to religious free exercise voluntarily engaged in by its citizens.<sup>77</sup>

Third, and most importantly, the Court offers an extended lesson on the freedom of conscience before it directly assesses the issue before it.<sup>78</sup> This lesson includes a sizeable litany of quotes from prior cases and important figures in American history,<sup>79</sup> some of which are quoted above in this paper (see *supra* II including footnotes). The purpose of

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<sup>74</sup>*Wallace*, 472 U.S., at 91 (White, J., dissenting)

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup>Chief Justice Burger, in fact, makes this point in his dissent:

Even if an individual legislator's after-the-fact statements could rationally be considered relevant, all of the opinions fail to mention that the sponsor also testified that one of his purposes in drafting and sponsoring the moment-of-silence bill 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... That testimony is at least as important as the statements the Court relies upon, and surely that testimony manifests a permissible purpose.

*Id.*, at 87 (Burger, J., dissenting) (citation omitted).

<sup>78</sup>“Before analyzing the precise issue that is presented to us, it is nevertheless appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.” *Id.*, at 48-49.

<sup>79</sup>*Id.*, at 48-55 (including some footnotes)

this portion of the Court's opinion is to scold the District Court for its "remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion."<sup>80</sup> The Court concludes its lesson with these words:

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also 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. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. *But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.* This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects -- or even intolerance among "religions" -- to encompass intolerance of the disbeliever and the uncertain.<sup>81</sup>

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<sup>80</sup>*Id.*, 48. The offending portion of the District Court opinion states: "Because the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional. Therefore, the Court holds that the complaint fails to state a claim for which relief could be granted." *Jaffree v. Board of School Comm'rs of Mobile County*, 554 F.Supp. 1104, 1128 (SD Ala. 1983). The District Court's judgment was stayed by Justice Lewis F. Powell, justice for the Eleventh Circuit. See *Jaffree v. Board of School Comm'rs of Mobile County*, 459 U.S. 1314 (1983) (in chambers). The Eleventh Circuit overturned the District Court's opinion on appeal. See *Jaffree v. Wallace* 705 F.2d 1526 (1983); *Jaffree v. Wallace* 713 F.2d 614 (1983)

<sup>81</sup>*Id.*, at 52-54 (notes omitted) (emphasis added).

What is ironic about this summary is that it is inconsistent with the Court's religious motive analysis found elsewhere in the same opinion. As I have already noted, motives are types of beliefs (*supra* III.B); citizens, including legislators, have an *ultima facie* right to their beliefs such that the state ought not reward or punish them for having these beliefs (*supra* II); and a statute's purpose and the reasons for it are conceptually distinct from the motives of the statute's supporters in both the legislature and in the citizenry (*supra* III.A). Therefore, when the Court claims that a statute or policy violates the Establishment Clause because of a legislator's or a citizen's religious motives, it is in fact limiting one of the enumerated powers of that legislator or the political rights of that citizen *solely* based on the religious quality of *beliefs* that contribute causally to the exercise of each individual's political powers and rights.

Concerning citizens who hold public office, the Court's religious motive analysis functions as a *de facto* religious test for legislators since it limits the powers of their office. The fact that the legislators have already assumed office does not seem to be relevant, since it seems to me that an Article VI violation would occur if a state passed a law that forbade only Catholic elected officials from voting on matters concerning human reproduction. Therefore, a religious test that limits a citizen's right to exercise the powers of public office—whether to limit all her powers by forbidding her to hold office or to limit some of her powers after she holds office—is nevertheless a religious test for public office. Moreover, just because a court, rather than a legislature or an executive branch, offers the test and targets a legislator's religious motive, rather than her ecclesiology or her creedal commitments, does not make it any less a government action or any less a religious test for public office.

When the religious motive analysis is applied to citizens in general, it shows, in the words of the Supreme Court, disrespect for “the individual's freedom of conscience”<sup>82</sup> and “freedom of mind,”<sup>83</sup> for it results in a subtle coercion of, and it provides an incentive to, religiously-motivated citizens to publicly pretend as if they do not have the motives they in fact have. It punishes these citizens because of their beliefs, since their political freedom as citizens to shape their communities is limited by a judicial prohibition of laws and policies that happen to have proponents who are motivated exclusively by their religious beliefs. In addition, the religious motive analysis provides sustenance to a political culture in which citizens are taught that any public disclosure of their beliefs that serve to motivate a legislative proposal may result in the judiciary’s rejection of that proposal regardless of its content or the reasons offered for the proposal.

## CONCLUSION

Citizens and legislators are often motivated by their religious beliefs to influence the institutions of government and to craft laws and policies that affect the trajectory of their communities. Oftentimes these policies and laws are proposed in order to remedy what these citizens and legislators think is a wrong or an injustice, and sometimes these laws and policies are offered to merely advance what these citizens and legislators believe is the public good. In a liberal democracy, the religious motives of these citizens and legislators should never serve as a basis by which the courts reject as unconstitutional the laws and policies that likely would have not been offered by these citizens and legislators if not for their motives. Although one could construct a good philosophical argument against this judicial practice, as some indeed have,<sup>84</sup> one need not do so. For, as I have argued in

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<sup>82</sup>*Id.*, at 53

<sup>83</sup>*Id.*, at 52.

<sup>84</sup>See Nicholas Wolterstorff’s contribution to ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE (1997).

this paper, the principles against the religious motive analysis are already firmly embedded in our Constitutional jurisprudence.