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Creation Science and McLean v. Arkansas Board of Education: The Hazards of Judicial Inquiry into Legislation Purpose and Motive

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CREATION SCIENCE AND *McLEAN v. ARKANSAS BOARD OF EDUCATION*: THE HAZARDS OF JUDICIAL INQUIRY INTO LEGISLATIVE PURPOSE AND MOTIVE

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I. INTRODUCTION

With his customary insight into human nature and the judicial process, Justice Holmes warned about cases which attract a high degree of public attention:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.[1]

The recent "creation science" case, *McLean v. Arkansas Board of Education*,[2] received enough publicity to be classified, in Holmesian terms, as "great." At issue in *McLean* was Act 590 of 1981 of the Arkansas General Assembly:[3] an Act to require balanced treatment of creation-science and evolution-science in public schools. The atmosphere surrounding the trial never descended to that of a circus, nor did the proceedings rival the melodrama of their remote ancestor, the Scopes "monkey trial" of the 1920's. Nevertheless, *McLean* became a media event, which, despite the efforts of the parties and the court, overshadowed the constitutional issues raised in the case.

The plaintiffs, a diverse group of church officials, educators, organizations, parents, and taxpayers, challenged Act 590 on grounds that it offended constitutional prohibitions against an establishment

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1. Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

2. 529 F. Supp. 1255 (E.D. Ark. 1982).

3. ARK. STAT. ANN. §§ 80-1663 to -1670 (Cum. Supp. 1981).

of religion, that it was unconstitutionally vague, and that it unconstitutionally infringed on academic freedom.[4] Ultimately, the challenge based on the first amendment's prohibition against establishment of religion (the establishment clause) proved dispositive, and the United States District Court enjoined the enforcement of Act 590.[5]

The establishment clause, which is applicable to the states by operation of the fourteenth amendment,[6] provides, "Congress shall make no law respecting an establishment of religion . . . ."[7] During the past thirty-five years, the United States Supreme Court has decided a substantial number of cases dealing with the establishment clause and the relationship between government and religion. Therefore, *McLean* was not decided in a precedential vacuum. In fact, the *McLean* opinion did not attempt any major conceptual innovations in establishment clause jurisprudence. Rather, the district court applied a set of principles customarily used by the Supreme Court in testing the neutrality of legislation alleged to offend the establishment clause: (1) the statute must have a secular legislative purpose; (2) the principal or primary effect of the statute must be one which neither advances nor inhibits religion; and (3) the statute must not foster an excessive entanglement of government with religion.[8]

The novel and most complicating feature of the case arose from the statute itself, because, on its face, Act 590 did recite a secular legislative purpose. That purpose was to require "balanced treatment" in public schools of a subject called "creation science."[9] Moreover, on its face, Act 590 prohibited "religious instruction or references to religious writings."[10] The essence of the plaintiffs' challenge was that the theory denominated "creation science" was nothing more than an effort to inject a set of religious doctrines masquerading as science into public school classrooms.[11] The defendants maintained that creation science was a legitimate scientific theory and hence an appropriate subject for required inclusion in public school curricula.[12] Given the positions of the parties, given

4. 529 F. Supp. at 1257.
5. *Id.* at 1274.
6. Everson v. Board of Educ., 330 U.S. 1 (1947).
7. U.S. CONST. amend. I.
8. 529 F. Supp. at 1258.
9. ARK. STAT. ANN. §§ 80-1663, -1666 (Cum. Supp. 1981).
10. *Id.* § 80-1664. *See also Id.* §§ -1667, -1668.
11. Plaintiff's Pre-Trial Brief at 2-3, 24-31, *McLean*.
12. Defendant's Trial Brief at 8, 18, *McLean*.

the secular purpose recited in Act 590, and given the "test" enunciated by the Supreme Court for establishment clause cases, the district court was compelled to inquire into the "purpose" of the legislation. However, judicial determination of "legislative purpose" is hardly a precise science. Moreover, the exact scope and nature of the inquiry into secular legislative purpose had never been systematically articulated by the Supreme Court in prior establishment clause decisions. Thus, the district court was confronted with issues regarding the manner in which secular purpose should be explored when a colorably secular purpose was recited in the text of the Act, the extent to which a court should probe behind facial recitals of purpose, and the nature of the evidentiary tools it should use. One by-product of the court's efforts to deal with these issues was the questionable use of a legislator's testimony concerning his personal religious motives in sponsoring the legislation.

After describing the relevant portions of the *McLean* decision, this article will briefly discuss the elusive nature of concepts such as "legislative purpose," the indistinct line between purpose and motive, and the long-standing judicial ambivalence toward considering the motives of legislators in determining the constitutionality of a statute. A recent Supreme Court attempt to provide guidelines for judicial inquiry into legislative purpose or motives will be examined, and some of its implications will be addressed. Then, the focus will shift to Supreme establishment clause precedents and the teachings of those precedents regarding the nature and the permissible scope of inquiry into whether a statute has a secular legislative purpose. Finally, this article will return to the *McLean* decision to review the significance of its consideration of a legislator's courtroom testimony regarding his personal motives in determining legislative purpose.

II. THE DECISION: *McLEAN v. ARKANSAS BOARD OF EDUCATION*

While recognizing that the establishment clause test has been refined over the years, *McLean* relied upon the formulation recently applied by the Supreme Court in *Stone v. Graham*.[13] "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally the statute must not foster 'an excessive govern-

13. 449 U.S. 39 (1980).

ment entanglement with religion.' "[14] To pass constitutional muster, Act 590 had to satisfy each element of this three-faceted test. The court concluded that the Act failed to satisfy any of them.

In applying the "secular legislative purpose" element of the constitutional test, the court engaged in a meticulous survey of the milieu which produced Act 590.[15] The court found the roots of the controversy traceable to the religious movement known as fundamentalism. The connection between fundamentalism and the teaching of evolution in the public schools had manifested itself in earlier, unsuccessful attempts to banish the subject of evolution from public school curricula.[16] Now, the court found, another manifestation of resistance to the teaching of evolution in public schools had emerged: "scientific creationism." Organizations had been "formed to promote the idea that the Book of Genesis was supported by scientific data."[17] These organizations and their leaders were seeking to introduce "creation science" into the public schools.

Continuing its inquiry into secular legislative purpose, the court engaged in a thorough canvassing of events preceding Act 590's passage. In so doing, the court ranged far and rather wide, examining published writings and texts produced by creation science supporters and reviewing correspondence between lobbyists and legislators including letters from creation science proponents to legislators in states other than Arkansas. The political activities of one supporter and lobbyist for the legislation were characterized by the court as "[showing] a remarkable degree of political candor, if not finesse."[18] Furthermore, this person had demonstrated an "awareness" that Act 590 was part of a "religious crusade," coupled with a desire to conceal this fact.[19]

The court then described, in some detail, events more directly related to the enactment of Act 590. The immediate impetus had come from a group of evangelical religionists in Arkansas who enlisted the aid of a state senator characterized by the court as "a self-described 'born-again' Christian Fundamentalist."[20] The state senator introduced a "model" bill drafted by an individual in South Car-

14. *Id.* at 40 (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).
15. 529 F. Supp. at 1258-64.
16. *Id.* at 1259.
17. *Id.*
18. *Id.* at 1261.
19. *Id.*
20. *Id.* at 1262.

olina and circulated by creation science proponents.[21] The court found that the bill had not been referred to any Senate committee for hearing, was passed in the Senate after a brief floor discussion, and had been referred to the state House of Representatives. There, only a "perfunctory" fifteen-minute hearing was conducted in the relevant legislative committee, without testimony from either scientists or educators,[22] before it was reported to the House floor and passed. The "model" bill was adopted with no substantive change.[23]

The court found that the motivations of the drafter of the model bill, the lobbying group, and the Senate sponsor had been entirely religious.[24] According to the court, the Senate sponsor, in his testimony at the trial of the case, stated:

> that he holds to a literal interpretation of the Bible; that the bill was compatible with his religious beliefs; that the bill does favor the position of literalists; that his religious convictions were a factor in his sponsorship of the bill; and that he stated publicly to the *Arkansas Gazette* (although not on the floor of the Senate) contemporaneously with the legislative debate that the bill does presuppose the existence of a divine creator.[25]

Finally, the court found that the State of Arkansas "has a long history of official opposition to evolution which is motivated by adherence to Fundamentalist beliefs . . . . This history is documented . . . in *Epperson v. Arkansas*, 393 U.S. 97 (1968) . . . ."[26]

The reasons for its lengthy excursion into history, personalities, and motivations became more clear as the court approached its conclusion regarding whether the act had "a secular legislative purpose." On the one hand, the court was confronted with legislative statements of purpose which (1) recited secular aims, (2) disclaimed and even prohibited religious teachings, and (3) taken at face value, colorably amounted to nothing more than requiring balanced treatment of a scientific subject neglected by the schools. Moreover, the language used by the Supreme Court for the "purpose" facet of the establishment clause test weighs in favor of upholding a statute. Superficially, the statute need have only "a" secular legislative purpose.[27]

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21. *Id.*
22. *Id.* at 1262-63.
23. *Id.*
24. *Id.* at 1263.
25. *Id.* at 1263 n.14.
26. *Id.*
27. *But cf.* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773

On the other hand, the statutory statements of legislative purpose, while entitled to deference, do not automatically bar further judicial inquiry.[28] Addressing itself to the means by which the lack of a secular legislative purpose could be ascertained, the court stated:

> In determining the legislative purpose of a statute, courts may consider evidence of the historical context of the Act, *Epperson v. Arkansas*, 393 U.S. 97 (1968), the specific sequence of events leading up to passage of the Act, departures from normal procedural sequences, substantive departures from the normal, *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), and contemporaneous statements of the legislative sponsor, *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).
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> The unusual circumstances surrounding the passage of Act 590, as well as the substantive law of the First Amendment, warrant an inquiry into the stated legislative purposes. The author of the Act had publicly proclaimed the sectarian purpose of the proposal. The Arkansas residents who sought legislative sponsorship of the bill did so for a purely sectarian *purpose*. These *circumstances alone may not be particularly persuasive*, but when considered with the publicly announced *motives* of the legislative sponsor made contemporaneously with the legislative process; the lack of any legislative investigation, debate or consultation with any educators or scientists; the unprecedented intrusion in school curriculum; and official history of the State of Arkansas on the subject, it is obvious that the statement of purposes has little, if any, support in fact. The State failed to produce any evidence which would warrant an inference or conclusion that at any point in the process anyone considered the legitimate educational value of the Act. It was simply and purely an effort to introduce the Biblical version of creation into the public school curricula. The only inference which can be drawn from these circumstances is that the Act was passed with the specific purpose by the General Assembly of advancing religion. The Act therefore fails the first prong of the three-pronged test, that of secular

(1973), in which the purpose facet of the test was stated somewhat differently. The statute "must reflect a clearly secular legislative purpose . . . ." Although the word "clearly" would make more than a semantic difference, most Supreme Court establishment clause precedents do not use the word "clearly," and certainly the more recent formulations relied on in *McLean* refer simply to "a" secular legislative purpose. Nevertheless, argument could be made that even the "a secular legislative purpose" formulation should not be taken too literally, since the Supreme Court in some cases has rejected the secular purpose offered by the state. *See infra* text accompanying note 147.

28. 529 F. Supp. at 1263.

legislative purpose . . . .[29]

Thus, in the face of a statutory recital of a colorably secular purpose, the court scrutinized the legislation and the environment out of which it had emerged. According to the court, nothing in that environment, and no evidence produced by the state, gave rise to so much as an inference that a bona fide secular educational purpose existed. Therefore, Act 590 failed to satisfy the secular legislative purpose facet of the establishment clause test.

Having reached this conclusion, the court considered the defendant's contention that judicial inquiry was limited to examining the text of Act 590. The court noted that even if its consideration of the issue were limited strictly to the language of the Act itself, "the evidence is overwhelming that both the *purpose and effect* of Act 590 is the advancement of religion in the public schools."[30]

Explicating the Act's definitions of "creation science," the court found a strong correspondence between Biblical teachings in the first eleven chapters of Genesis and the Act's definition of "creation science."[31] The definition of "creation science" communicated an "inescapable religiosity."[32] Moreover, creation science was no science at all. Creation science did not meet any accepted definition of science. The record at trial demonstrated no meaningful acceptance of creation science among the loose-knit, free-thinking scientific community. The dogmatic approach of creation science, as delineated by its adherents, was unscientific by definition. Perhaps most damaging of all, its own adherents on more than one occasion had admitted that creation science was not "science."[33]

Further, the court placed special emphasis on the good faith efforts of a Pulaski county teacher assigned to research the subject of creation science and prepare curricular materials which did not incorporate religious doctrine. The teacher had discovered little or nothing in the way of scientific literature supportive of creation science. The creationists' own publications were "permeated with religious references and reliance upon religious beliefs."[34] The court reviewed the creationists' textbook materials and agreed.[35] Finally, the defendants had not produced, in response to this evidence, any

29. *Id.* at 1263-64 (emphasis added) (footnote omitted).
30. *Id.* at 1264 (emphasis added).
31. *Id.* at 1264-65.
32. *Id.* at 1265.
33. *Id.* at 1268.
34. *Id.* at 1270.
35. *Id.* at 1270-71.

text or writing which could be used in the public schools.[36] As the court pointed out:

> The conclusion that creation science has no scientific merit or educational value as science has legal significance in light of the Court's previous conclusion that creation science has, as one major effect, the advancement of religion. The second part of the three-pronged test for establishment reaches only those statutes having as their *primary* effect the advancement of religion. Secondary effects which advance religion are not constitutionally fatal. Since creation science is not science, the conclusion is inescapable that the *only* real effect of Act 590 is the advancement of religion.[37]

The remainder of the court's opinion dealt with issues outside the scope of this article. Because this article is concerned with the use of legislators' testimony in the course of a judicial search for secular legislative purpose, it is necessary to examine first the nature of "legislative purpose," the complications attendant upon the use of such a concept in constitutional adjudication, and the general implications of considering the testimony of legislators regarding motive or purpose.

III. LEGISLATIVE PURPOSE AND MOTIVE

A. *Purpose, Motive and Intent in Statutory Construction*

Legislative purpose is a somewhat insecure foundation on which to base, even in part, a judicial determination of constitutionality. Much of the underlying problem, of course, stems from the nature of legislation, which is usually the result of an intricate political process involving many participants.[38] The fictions inherent in attributing purpose, intent, motive, or any other personalized qualities, to the product of a collective body such as a legislature should be obvious. As one famous, but arguably overstated, characterization has put it: "A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which

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36. *Id.* at 1272.

37. *Id.*

38. For a relatively brief but authoritative treatment of the legislative process which focuses on the United States Congress, see J. KERNOCHAN, THE LEGISLATIVE PROCESS (1981). For a work authored by a law professor who is also a state legislator, see J. DAVIES, LEGISLATIVE LAW AND PROCESS IN A NUTSHELL (1975).

The vast majority of statutes are enacted by legislative bodies. However, in states such as Arkansas, the legislature may be by-passed through constitutional provisions for popular initiatives. ARK. CONST. amend. VII.

a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs."[39]

A court in search of legislative purpose cannot simply reconvene the legislature and take a poll. If an issue in litigation turns upon "legislative purpose," then a court must work with whatever tools are available. Those tools are words, and as Justice Frankfurter recognized, "Words are clumsy tools."[40]

"Legislative purpose" is merely one of a constellation of interrelated words which have developed in the course of judicial efforts to interpret and apply statutes. In various cases and in various contexts, courts have long used terms such as "legislative purpose," "legislative intent," and "motive," in describing the process by which they derive the meaning of particular statutory language. Unfortunately, the precise contours of terms such as "legislative purpose," "legislative intent," and "motive," remain ill-defined at best. In the abstract, there are differences among these terms, and judicial distinctions have been drawn from time to time. "Purpose" is often used in the sense of the goals to be attained by the statute.[41] "Legislative intent" is often linked more directly to inquiries into the meaning of statutory language.[42] Judicial use of the word "motive" in the statutory construction context often signals a probing into subjective states of mind of individual legislators and their reasons for voting as they did.[43] Nevertheless, courts themselves do not meticulously observe such distinctions,[44] nor have courts formulated more than general prescriptions for identifying legislative intent or purpose.

Justice Reed penned a fairly typical statement reflecting the uncertain boundaries of the search for legislative purpose or intent, the

39. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930). This article took an extreme position in questioning the soundness of any judicial attempt to discern legislative intent. "The 'intent of the legislature' is a futile bit of fiction." *Id.* at 881. For a summary of the scholarly debate touched off by Radin and a more recent inquiry into the existence and discoverability of legislative intent, see MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966).

40. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 546 (1947).

41. J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 57.04, 45.09 (C. Sands 4th ed. 1973).

42. *Id.* at §§ 45.05, 45.08.

43. *Id.* at § 48.17.

44. *E.g.*, quotations *infra* text accompanying notes 45, 50, 52, and 64; cases cited *infra* note 50. *See also* Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 U. KAN. L. REV. 1, 15 (1954).

tendency of courts to use these terms loosely, and the tendency of courts to personify legislative intent or purpose in a manner reminiscent of attributing motive.

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the *intent* of Congress. There is *no invariable rule* for the discovery of that *intention*. To take a few words from their context . . . would not contribute greatly to the discovery of the *purpose* of the *draftsmen* of a statute. . . .[45]

Typically, the vague boundaries of the judicial search for legislative intent or purpose have been described in terms such as the following:

> In order to arrive at the intention of the legislature the court should examine the statute in the light of the history of its enactment, the contemporary history of the conditions and situation of the people, the economic and sociological policy of the state, its constitution and laws, and *all other matters of common knowledge* within the limits of their jurisdiction.[46]

The scope of judicial inquiry into legislative intent or purpose is, therefore, broad. As can be gathered from the quotations above, the search includes, but is not limited to, elements of judicial notice, inferences from the circumstantial evidence of language used in the statute itself, and whatever direct evidence may be available.

The search is not totally unrestricted, however. At the outer limits of the search for legislative purpose or intent is a deeply-entrenched prohibition against calling legislators to the stand in court proceedings to testify about what they or the legislature intended.[47] As a further general limit, courts usually say that they will not inquire into the motives of members of the legislature in determining the meaning of legislation.[48]

Despite the entrenched prohibitions against courtroom inquir-

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45. United States v. American Trucking Ass'ns, 310 U.S. 534, 542 (1940) (emphasis added).

46. Prewitt v. Warfield, 203 Ark. 137, 139-40, 156 S.W.2d 238, 239 (1941) (emphasis added). The formulation in *Prewitt* is typical of a large body of such judicial recitals. *See* J. SUTHERLAND, *supra* note 41, at § 45.05 and cases cited at n.3.

47. J. SUTHERLAND, *supra* note 41, at § 48.16; for an Arkansas example, see Carr v. Young, 231 Ark. 641, 331 S.W.2d 701 (1960), *rev'd on other grounds*, Shelton v. Tucker, 364 U.S. 479 (1960).

48. J. SUTHERLAND, *supra* note 41, at § 48.17; for an Arkansas example, see Wiseman v. Madison Cadillac Co., 191 Ark. 1021, 88 S.W.2d 1007 (1935).

ies into legislators' minds or motives,[49] courts still demonstrate a tendency to speak as though some kind of subjective, personalized intent or motive were being considered. For example, courts sometimes personify legislative intent in terms of the "minds" of those who wrote or passed the law. "There is no tenable basis for supposing that the suggested far-reaching change in the fundamental conception of the crime of rape ever *crossed the minds* of those who *wrote* or *enacted* the 1975 Criminal Code."[50] Undoubtedly, the very use of subjective terms such as "intent" and "purpose" gravitates courts into various forms of subjective personification. Moreover, this judicial tendency to personify legislative intent or purpose in terms reminiscent of subjective motivation is quite understandable. At bottom, rigid distinctions between legislative purpose and the motives of legislators may be impossible. These terms are not separate and clearly distinct concepts which can be considered in isolation from each other. Depending on context, words such as "intent," "purpose," and "motive" overlap in meaning and involve varying points along a continuum or spectrum of possible connotations. Even if attempts are made to limit "legislative purpose" by applying that term only when speaking of the goals to be achieved or the policies embodied in a statute, the term still is not easily severable from the reasons motivating legislators to enact a particular

49. An important distinction must be drawn between subsequent courtroom testimony of a legislator and statements made during the course of the legislative process as part of the official, recorded legislative history of a measure. For example, legislative committee reports often describe and explain the bill which the committee is reporting to the chamber for consideration. J. KERNOCHAN, THE LEGISLATIVE PROCESS 26 (1981); J. SUTHERLAND, *supra* note 41, at § 48.06. Such reports are generally entitled to weight in determining the meaning of, and intent behind, resulting legislation. *Id.* Similarly, statements of sponsors and supporters explaining a bill, if made during the course of floor consideration and recorded in an official record such as the Congressional Record, may be considered by the courts in arriving at legislative intent or purpose. *E.g.*, Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976); National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967).

A common denominator among such sources is their status as official documents recording the legislative proceedings. Such materials are distinguishable from subsequent testimony of individual legislators or evidence of subjective motivations of legislators nowhere reflected in official legislative records.

In *McLean*, this type of legislative history material was unavailable to the court because legislative committees in Arkansas do not customarily file explanatory or descriptive reports and no official record of debates is maintained.

50. Hice v. State, 268 Ark. 57, 61, 593 S.W.2d 169, 171 (1980) (emphasis added). For examples of other cases which personify legislative intent in varying degrees, see *e.g.*, United States v. Raynor, 302 U.S. 540, 546 (1937); Commonwealth v. Welosky, 276 Mass. 398, 406, 177 N.E. 656, 661 (1931); Baker v. Jacobs, 64 Vt. 197, 201, 23 A. 588, 588-89 (1891). *See supra* text accompanying note 44.

law. At any rate, consideration of legislative purpose without some reference, either explicit or implicit, conscious or unconscious, to the motives or reasons behind an enactment may be psychologically impossible. Accordingly, this article will not attempt to observe a distinction among terms which the courts themselves often fail to distinguish.[51]

This brief excursion into the realm of "legislative purpose," "legislative intent," and the like, demonstrates a few of the problems which attend the use of concepts such as "a secular legislative purpose" in a formula used to test the constitutionality of statutes. Terms such as "legislative purpose" are artificial concepts, inconsistently applied, to describe an ill-defined judicial exercise which normally occurs in the context of statutory interpretation, rather than constitutional adjudication. The concepts underlying such terms have been the subject of considerable unresolved debate,[52] and remain, at best, elusive. Additionally, the terms themselves have such strong and overlapping subjective connotations that courts frequently are led to merge the concepts or to personify some anonymous group of legislators who, as described by the court, had a certain subjective purpose or motive when they voted for a particular statute.

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51. As one writer has expressed it, "motive and purpose as elements in litigation . . . have chronically harassed both scholars and practitioners of the law in their attempts to distinguish between them." Howell, *Legislative Motive and Legislative Purpose in the Invalidation of a Civil Rights Statute*, 47 VA. L. REV. 439, 441-42 (1961). One influential analyst of the relationship between legislative motivation and constitutionality simply discards the terms, "legislative purpose" and "legislative motive," "in order to avoid the baggage [which these terms] have acquired because of the commonly drawn, though not very helpful, 'motive-purpose' distinction." Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1207 n.1 (1970). Professor Ely also observes, "By and large the term 'purpose' has served as nothing more useful than a signal that the court is willing to look at motivation, 'motive' as a signal that it is not." *Id.* at 1217.

As indicated in the text, this article does not attempt to maintain a rigid distinction among the terms, "purpose," "motive," or "intent." Rather than discard such terms or invent new nomenclature, this article will resort more often to the expedient of referring to these closely related terms in the alternative, e.g., "purpose or motive," or by referring to the "reasons behind" an enactment. Inasmuch as the Supreme Court apparently has opened to judicial inquiry the constitutionality of motivations underlying certain legislative actions, precise distinctions among these terms are largely immaterial for purposes of this article. *See infra* text beginning at note 61.

"Secular legislative purpose," the term used in the tripartite establishment clause test, is presumed to encompass "purpose" in the sense of motive or the reasons behind an enactment. *See* text accompanying notes 56, 155, and 168 for authority which indicates the validity of this assumption.

52. MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966); F. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 67-103 (1975).

B. *Purpose, Motive, and Legislators' Testimony in Constitutional Adjudication*

In cases involving only the interpretation and application of statutes, the courts are, theoretically at least, not overturning the work of the legislature, a coordinate arm of government. They are merely seeking to apply and interpret enactments correctly. If a court misconceives the legislature's purpose, the legislature retains the power to set matters aright.

The stakes are higher when the constitutionality of a statute may hinge on finding legislative purpose, and the distinction between purpose and motive remains as ill-defined in constitutional adjudication as it is in statutory interpretation cases. As Chief Justice Warren conceded:

> Inquiries into congressional *motives or purpose* are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators [made during the legislative process] for guidance as to the *purpose* of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is *entirely a different matter* when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What *motivates* one legislator to make a speech about a statute is not necessarily what *motivates* scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the *undoubted power* to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.[53]

Chief Justice Warren's language here is consistent with a long line of Supreme Court constitutional precedents which generally prohibit judicial inquiry into legislative motive.[54]

However, the situation is not all that simple. Declaring a prohibition against inquiry into legislative motives is easy, but determining the precise scope of that prohibition, in light of the close

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53. United States v. O'Brien, 391 U.S. 367, 383-84 (1968) (emphasis added).

54. *E.g.*, Arizona v. California, 283 U.S. 423, 455 (1931); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). In *Arizona v. California*, Justice Brandeis wrote, "Into the motive which induced members of Congress to enact [the statute] this Court may not inquire." *Id.* at 455. He further stated, "Similarly, no inquiry may be made concerning the motives or wisdom of a state legislature acting within its proper powers." *Id.* at 455 n.7.

relationship between "motive" and "purpose," is more difficult. In fact, the Supreme Court has not rigidly observed its own prohibition. In a footnote to the language quoted above, Chief Justice Warren recognized that legislative motives, and the statements of legislators made during the legislative process, have been considered by the Court in "a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose."[55] Although the examples cited by the Chief Justice were generally limited to statutes challenged as bills of attainder, the cases involving inquiry into legislative motive are not so narrowly confined. There are still other Supreme Court decisions which are written as if legislative motives, or the reasons behind a statute, were considered in determining constitutionality. For example, at least two establishment clause cases[56] discuss the religious "motives" or "purposes" behind particular statutes without apology, and those motives or underlying reasons, as perceived by the Court, were apparently instrumental in reaching the conclusion that the statutes offended the establishment clause. In any event, the legislature does not necessarily have the "undoubted power to enact"[57] a statute if an unconstitutional legislative purpose or motive is at work.

Two extremely influential commentators have addressed the issue of legislative motivation in constitutional law. Professor John Hart Ely wrote a strong critique of the Supreme Court's apparent tendency to say that inquiries into legislative motivations were forbidden, while deciding many a case which certainly appeared to involve such inquiries.[58] After documenting the Court's apparent fickleness, Professor Ely warned:

> If only logical tidiness hung in the balance, bemusement might be a satisfactory response to all this. But the rights of individuals are at stake. The Court should stop pretending it does not remember opinions on which the ink is barely dry and try to formulate principles for deciding on what occasions and in what ways the motivation of legislators or other government officials is relevant to constitutional issues.[59]

Similarly, Professor Paul Brest termed the Supreme Court's han-

55. 391 U.S. at 383 n.30.

56. Stone v. Graham, 449 U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968).

57. 391 U.S. at 384.

58. Ely, *Legislative and Administrative Motive in Constitutional Law*, 79 YALE L.J. 1205, 1208-11 (1970).

59. *Id.* at 1211-12.

dling of judicial inquiries into legislative motivation "one of the most muddled areas of our constitutional jurisprudence."[60]

Together, these two authors made a convincing case for the proposition that the Supreme Court had been more than ambivalent about inquiring into legislative motive or purpose. It had been downright ambidextrous.

The work of these authors is of more than academic interest. Their influence on the *McLean* decision, while indirect, is easily traceable. In *McLean*, much of the court's authority for the scope of its inquiry into the legislative purpose of Act 590 was predicated on *Village of Arlington Heights v. Metropolitan Housing Authority*.[61] In turn, the opinion in *Arlington Heights* acknowledged the works of Professors Brest and Ely during the Supreme Court's description of how the judiciary might go about inquiring into allegedly unconstitutional legislative motive or purpose.[62]

The Court, in *Arlington Heights*, was confronted with a claim that a unit of local government had denied a rezoning request at least in part because of impermissible racial considerations. During the previous Term, the Court had ruled that governmental action would not be held unconstitutional solely because of racially disproportionate impact or effect.[63] In *Arlington Heights* the Court further stated, "[P]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[64] The Court, apparently constrained to indicate how such discriminatory intent or purpose could be established in a judicial forum, began soundly enough:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision *motivated* solely by a single concern, or even that a particular *purpose* was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that *a* dis-

60. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 99.

61. 429 U.S. 252 (1977).

62. *Id.* at 266 n.12, 268 n.18.

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

64. 429 U.S. at 265.

> criminatory *purpose* has been *a motivating* factor in the decision, this judicial deference is no longer justified.
>
> Determining whether invidious discriminatory *purpose* was a *motivating* factor demands a *sensitive* inquiry into such *circumstantial and direct evidence of intent* as may be available.[65]

In this passage, the Court provided a basis for reconciling its past explicit prohibitions against inquiries into legislative motive or the reasons behind a statute with at least those cases involving racial discrimination which had seemed to ignore the prohibition. Normally, legislators' motives are off-limits to judicial inquiry. Courts should not second-guess legislatures which are performing their role of balancing many competing considerations. However, motivation could be considered, in cases such as *Arlington Heights*, because racial discrimination "is not just another competing consideration."[66]

The Court then proceeded to suggest possible sources of "evidence" which could be explored in this search for purpose, intent, and motivation.[67] Some of this "evidence" was consistent with the established range of inquiry into legislative intent or purpose already developed in statutory interpretation cases, again indicating the close relationship between legislative purpose and motive. For instance, the historical background of the governmental action or statute could be given weight,[68] especially if it revealed a series of similar official actions taken for a similarly prohibited purpose. The effects of a statute or governmental action might be so clear that an intent could be inferred. The specific sequence of events leading up to the challenged action might also be considered evidence of the decisionmaker's purpose.[69] Departures from normal procedures might be circumstantial evidence of impermissible purposes. De-

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65. *Id.* at 265-66 (emphasis added) (Professor Brest's article was cited in footnote 12 of the Court's opinion.)

66. *Id.* at 265. This article proceeds on the assumption, obviously shared by the *McLean* court, that much of the *Arlington Heights* prescription for discovering legislative purpose or motive applies to establishment clause challenges. *Arlington Heights* involved a search for racially discriminatory purpose or motive in a case arising under the fourteenth amendment's equal protection mandate. Despite different textual roots and underlying constitutional doctrines a strong common denominator in both racial discrimination and establishment clause cases is the search for legislative purpose or motive. *Arlington Heights* provides, at the very least, some guidance for courts in search of legislative purpose in the establishment clause context.

67. *Id.* at 266-68.

68. *See supra* text accompanying note 46, for parallel principles in cases involving statutory interpretation.

69. *See* J. SUTHERLAND, *supra* note 41, at §§ 48.04, 48.18, for discussion of parallel principles in statutory interpretation cases.

partures from prior substantive policies might be considered. The legislative history might be highly relevant, especially when there were contemporary statements by members of the decision-making body, minutes of its meetings, or reports.[70]

Then the Court speculated, "In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege."[71] This particular passage in *Arlington Heights* appeared[72] to countenance a dubious undertaking. Up to this point in the opinion, the Court had listed sources which were objective manifestations, or circumstantial evidence, of motive or purpose contemporary with enactment of the statute. These sources were by and large compatible with long-standing techniques used and factors considered by courts in adducing legislative intent or purpose. However, at this juncture, the Court seemed to approve some form of testimonial inquisition into legislators' subjective states of mind as an aid in determining the purpose of the legislation. Serious questions concerning constitutional policy and practicality went unremarked.

At the very least, adducing testimony from legislators concerning reasons behind legislative action implicates fundamental policies touching on the proper balance between federal and state roles under the Constitution. Although the tenth amendment[73] has been relegated to the status of a "truism,"[74] it retains some vitality. Justice Marshall characterized the tenth amendment as expressing "the constitutional policy that Congress may not exercise power in a *fashion* that impairs the States' integrity or their ability to function effectively in a federal system."[75]

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70. *See supra* note 49, for parallels involving use of legislative history in statutory interpretation.

71. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. at 268.

72. The tentative nature of the quoted passage was further emphasized by the Court's footnote 18, which indicated that putting a decision-maker on the stand to testify should usually be avoided. The Court also indicated that a statute or governmental decision motivated in part by a racially discriminatory purpose caused the burden of proof to shift to the government to establish "that the same decision would have resulted even had the impermissible purpose not been considered." 429 U.S. at 270 n.21. For their discussion of this point, *see infra* text accompanying notes 204-07.

73. U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people."

74. United States v. Darby, 312 U.S. 100 (1941).

75. Fry v. United States, 421 U.S. 542, 547 n.7 (1975).

In 1976, *National League of Cities v. Usery*[76] overturned a congressional attempt to require federal minimum wage and overtime rates for employees of state and local governments. In that case, the suggestion was made that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority *in that manner*."[77]

Similarly, it can be said that judicial inquiry can be made into whether a legislative purpose or motive offends the Constitution, but the *manner* of the inquiry may be circumscribed by countervailing considerations of constitutional policy. The federal judiciary, no less than the United States Congress, can engage in actions which are so intrusive that those actions "impermissibly interfere with the integral governmental functions"[78] of state governments.

Even if it would not interfere "impermissibly" with integral state governmental functions, calling legislators to the stand to testify concerning the purposes or motives behind a piece of legislation raises other serious policy issues of constitutional dimensions. These issues involve considerations of how deeply and in what manner one branch of government should probe the decision-making processes of the others. In a constitutional system based on a distribution of powers, not only among a tripartite national government, but also between that national government and individual states, equilibrium must be maintained. To the extent that one arm of government begins to probe too intrusively the processes underlying the actions and decisions of the others, the necessary balance among the elements of the entire structure is unsettled, if not jeopardized. Certainly, the Supreme Court has demonstrated sensitivity to these underlying issues in other contexts. For example, the Court generally has forbidden the taking of testimony from heads of federal agencies concerning the processes by which they arrived at a decision.[79]

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76. 426 U.S. 833 (1973).

77. *Id.* at 845 (emphasis added).

78. *Id.* at 851. Overturning state statutes which conflict with the United States Constitution interferes, of course, with state functions, but such interference is not only permissible but also an affirmative duty of the Court. However, the Court has long demonstrated sensitivity to the manner in which actions overturning state laws or the judgments of state courts were taken. *Cf.* Herb v. Pitcairn, 324 U.S. 117 (1945) (restating the principle that the Court will not review judgments of state courts which rest on adequate and independent state grounds); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (359) (1816) (declining to reach the issue of the Supreme Court's authority to issue a writ of mandamus to state court).

79. United States v. Morgan, 313 U.S. 409 (1941). In *Morgan*, the Court strongly disap-

Moreover, almost all courts will refuse to consider parol evidence attempting to demonstrate that a legislature failed to comply with constitutionally required procedures for enactment of legislation.[80] In short, courts have been reluctant to delve too deeply into the actual machinery of legislative and executive decision-making. The heart of the matter may be found in Justice Frankfurter's general warning about the need for judicial self-restraint:

> The uncontrollable power wielded by this Court brings it very close to the most sensitive areas of public affairs. As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more and not less important, lest we unwarrantably enter social and political domains wholly outside our concern.[81]

Nevertheless, *Arlington Heights* suggests that intrusions into the legislative process, in the form of subsequent testimony of legislators regarding motives and purposes, are permissible, while at the same time hedging those suggestions. Testimony of legislators might be adduced in "extraordinary" circumstances and "frequently will be barred by privilege."[82]

The suggestion in *Arlington Heights* that testimony might be adduced from legislators outran the very mentors from whom the Court had drawn many of the valid reasons for judicial inquiry into legislative purpose or motive. Even Professor Brest, the stronger proponent of judicial inquiry into legislative motive, had drawn the line at evidence based on a legislator's testimony. "[The] argument

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proved of compelling testimony from heads of federal agencies for the purpose of probing into the basis of their decisions.

> But the short of the business is that the Secretary should never have been subjected to this examination. . . . Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary' . . . . Just as a judge cannot be subjected to such a scrutiny, . . .so the integrity of the administrative process must be equally respected. (Citations omitted).

Id. at 422. For a recent and narrow exception to this general prohibition, see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (suggesting the possibility of adducing testimony when there were no findings of fact by the agency and the record of administrative action was insufficient).

80. J. SUTHERLAND, *supra* note 41, at §§ 15.03, 15.07, 15.04. The United States Supreme Court, for example, has held that an enrolled act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two houses of Congress and the signature of the President, is conclusive evidence of proper enactment. Field v. Clark, 143 U.S. 649 (1892).

81. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 666 (1943) (Frankfurter, J., dissenting).

82. 429 U.S. at 268.

is persuasive that legislators should not be subject to subpoena to explain their reasons for voting for a measure. To the extent that proof of illicit motivation depends on such testimony, *the case must fail*."[83]

In an effort to offer a prescription for inquiries into legislative motivation or purpose, the Supreme Court in *Arlington Heights* simply went too far, and the *McLean* court followed its lead. By suggesting the possibility that legislators could be called to testify (circumscribed as that suggestion was), the Court opened a door which properly had been closed for generations. The suggestion was inconsistent with long-standing prohibitions against adducing legislators' testimony even when the issue was merely one of statutory interpretation. The suggestion was against the grain of significant constitutional policies and constitutionally-rooted considerations of judicial self-restraint. The suggestion contradicted even the scholar who had furnished the Court with much of the basis for its otherwise sound reasoning and approach to the problem of the role of legislative motive or purpose in constitutional adjudication.

All this is not to say that legislative purpose or motives which potentially affront the Constitution should not be carefully scrutinized. The question is, once an inquiry into legislative purpose or motive begins, where does it lead, and where should it stop?

Properly approached and conceived, inquiry into legislative purpose or motive is legitimate. As established approaches in cases involving statutory interpretation indicate and as *Arlington Heights* itself indicates for the most part, a search for legislative purpose or motive can, and ordinarily does, take place without probing, on the witness stand, the motives of participants in the legislative process. Admissions on the face of the legislation; statements of legislative purpose in the text of an act; circumstantial evidence of legislative motive; careful reading and explication of the provisions of an act; exploration of the milieu, history, and effects of the legislation; and judicial notice are usually sufficient to enable courts to discern a flawed legislative purpose or motive. If this varied arsenal is insufficient to establish an unconstitutional purpose or motive, one of two possibilities exists. Either the act is a bona fide exercise of legislative power, or the legislature has been so careful about disguising underlying motives that these motives are not manifested in any significant way in the objective world in which the statute was developed

83. Brest, *supra* note 60, at 129 (emphasis added).

or is operating. If the latter situation exists, then adducing a legislator's testimony could be futile. Even if admissions were wrung from reluctant legislators on the stand by astute questioning, a court would still be confronted with a statute which bore few, or no, earmarks of unconstitutional purpose or motive in any objective sense. The propriety of overturning a statute under such circumstances would seem doubtful in light of the Court's admonition against voiding a statute constitutional on its face "on the basis of what fewer than a handful of Congressmen said about it."[84]

As the following discussion of establishment clause cases indicates, the Supreme Court, in determining the existence or non-existence of a secular legislative purpose, has never gone as far as the *Arlington Heights* decision suggests, or as far as *McLean* went.

IV. THE ESTABLISHMENT CLAUSE, SECULAR LEGISLATIVE PURPOSE, AND LEGISLATORS' TESTIMONY

A. *Background*

The establishment clause reflects the concept that any merger of religion and secular government should be scrupulously avoided. The values embodied in the establishment clause are more than abstract; they represent lessons learned from a very long and ugly chapter of human experience. As Justice Black, in the landmark case of *Everson v. Board of Education*,[85] sought to remind us,

> With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews.[86]

However, the establishment clause does not stand alone. It is textually linked to the provision of the Constitution guaranteeing free exercise of religion: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[87]

A certain tension exists between the two concepts embodied in

84. United States v. O'Brien, 391 U.S. 367, 384 (1968).
85. 330 U.S. 1 (1947).
86. *Id.* at 9.
87. U.S. CONST. amend. I.

that language. The very grant of free exercise certainly can be said to aid religion, at least indirectly. As the Supreme Court noted in *Walz v. Tax Commission*,[88]

> The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.
>
> . . . .
>
> [T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.[89]

Therefore, the abiding touchstone in establishment clause jurisprudence has been a requirement for government neutrality in matters of religion.[90] The three-part test enunciated by the Supreme Court and followed in *McLean* can be perceived as merely an extension of the neutrality concept, a tool to aid in recognizing violations of governmental neutrality. In the end, the objectives of the establishment clause, not the precise verbal formulation of any "test," must control. As Chief Justice Burger expressed it:

> There are always risks in treating criteria discussed by the Court . . . as "tests" in any limiting sense of that term. . . . The standards should rather be viewed as *guidelines* with which to identify instances in which the *objectives* of the Religion Clauses have been impaired. . . . [C]andor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.[91]

Determining whether neutrality has been violated inevitably requires line-drawing,[92] and this task is seldom simple. Religion pervades our society. Supreme Court Justices have themselves indicated the impossibility of utterly segregating religious from secular aspects in human behavior and human institutions, including government.[93]

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88. 397 U.S. 664 (1970).

89. *Id.* at 668-69.

90. *E.g.*, Gillette v. United States, 401 U.S. 437, 449 (1971); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963); Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

91. Tilton v. Richardson, 403 U.S. 672, 678 (1971) (emphasis added).

92. Gillette v. United States, 401 U.S. 437, 452 (1971) (referring to "lines government has drawn"); Board of Educ. v. Allen, 392 U.S. 236, 242 (1968) ("line between state neutrality to religion and state support of religion is not easy to locate.").

93. For example, in Zorach v. Clauson, 343 U.S. 306, 313 (1952) the Court stated, "We

Therefore, the court in *McLean* was confronted with the problem of determining the location of Act 590 in terms of the line drawn by the neutrality requirements of the establishment clause. Did Act 590 fall on the prohibited side of the line drawn by the constellation of precedents roughly comprised of cases involving such issues as religious exercises in public schools,[94] the posting of the Ten Commandments on schoolroom walls,[95] and the statute forbidding the teaching of evolution in the public schools?[96] Or did it fall on the acceptable side of the line which involves such issues as Sunday closing laws,[97] eligibility for conscientious objector exemption from the military draft,[98] government funding of abortions,[99] and certain forms of aid which benefit sectarian schools and religious institutions?[100] More particularly, how does a court determine where the line is to be drawn when a state legislature proclaims a secular purpose and the asserted purpose is not inherently incredible? Should a court, after *Arlington Heights*, consider the testimony of legislators regarding the reasons and motives behind an enactment challenged on grounds that there is a lack of secular legislative purpose?

Some guidance can be extracted and synthesized from a brief review of leading Supreme Court establishment clause cases and the ways in which the purpose facet of the three-part test has been handled in those cases.

B. *The Cases*

1. Caveat

Two points should be made at the outset of this discussion. First, this article does not purport to discuss exhaustively the entire body of establishment clause precedents. Rather, the focus is on developing a general perspective on those Supreme Court cases which have some relevance to the issue of judicial inquiry into secular leg-

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are a religious people whose institutions presuppose a Supreme Being." In McCollum v. Board of Educ., 333 U.S. 203, 236 (1948) (Jackson, J., concurring) the Court stated, "[N]early everything in our culture worth transmitting . . . is saturated with religious influences, derived from paganism, Judaism, Christianity . . . and other faiths accepted by a large part of the world's peoples."

94. School Dist. v. Schempp, 374 U.S. 203 (1963).
95. Stone v. Graham, 449 U.S. 39 (1980).
96. Epperson v. Arkansas, 393 U.S. 97 (1968).
97. McGowan v. Maryland, 366 U.S. 420 (1961).
98. Gillette v. United States, 401 U.S. 437 (1971).
99. Harris v. McRae, 448 U.S. 297 (1980).
100. *E.g.*, Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980).

islative purpose. Second, the Supreme Court's establishment clause cases, like any other line of precedential authority, can be classified in various ways. For purposes of this article, the discussion will be divided into consideration of (1) cases which deal with some form of financial aid to religious institutions, and (2) cases which implicate nonfinancial forms of encouragement or support of religion.

2. Financial Benefits

The Supreme Court's first serious involvement with an establishment clause challenge to state law concerned a program under which transportation expenses of school children, including those attending parochial schools, were reimbursed to parents. In *Everson v. Board of Education*[101] the defendant school board had explicitly applied this program to students at "Catholic Schools."[102] A bare five to four majority, after much strong dicta pointing toward an opposite result, held that this program did not offend the establishment clause. No particular test was enunciated or followed, but a plausible fulcrum of the decision was the majority's inability to discern a sufficient distinction between public services, such as fire and police protection constitutionally provided to religious institutions, and the transportation services afforded all school children in the district. Therefore, this particular form of aid fell on the permissible, neutral side of the line drawn by the establishment clause, albeit by a narrow majority.

Twenty years later, in *Board of Education v. Allen*,[103] the question of providing textbooks on secular subjects to students in nonpublic schools, including denominational private schools, reached the Court. The aid no longer ended at the schoolhouse door, but extended inside, in the form of free loans of textbooks to students. By that time, the Court had developed two-thirds of the contemporary three-part test:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[104]

101. 330 U.S. 1 (1947).
102. *Id.* at 62 n.59 (Rutledge, J., dissenting).
103. 392 U.S. 236 (1968).
104. *Id.* at 243.

The secular purpose offered by the state in *Allen* was the "furtherance of educational opportunities available to the young."[105] The Court accepted that secular purpose. No funds or books were furnished directly to the sectarian schools themselves; the direct beneficiaries were parents and children. Therefore, the aid only indirectly benefited religious schools.

In 1970 the Court confronted issues raised by a more direct form of financial benefit to religious institutions—exemption from state property taxes. There were no parents or school children to insulate the religious institutions from scrutiny. However, the state statute at issue in *Walz v. Tax Commission*[106] granted tax exemptions not only to religious institutions but also to a wide range of non-profit organizations, such as scientific, literary, and (even) bar associations. Here too, the discovery of a secular legislative purpose took little effort. The legislative purpose was neither to inhibit nor advance religion. The exemptions were merely part of a system of exemptions encompassing a broad class of property owned by nonprofit, quasi-public institutions. The Court focused its attention in this case on the effects of the exemption and the potential for excessive entanglement, ultimately upholding the statute.

During the remainder of the 1970s, the early trickle of financial aid cases which had commenced with *Everson* developed into a substantial and convoluted stream. For example, statutes supplementing salaries of teachers in private schools were rejected.[107] Statutes seeking to achieve a partial reimbursement to parents for tuition at nonpublic sectarian schools were found to offend the establishment clause.[108] However, statutes reimbursing private schools for the costs of activities mandated by state law met with varying results, based on progressively finer distinctions among the types of activities in question.[109] Likewise, various forms of support activities in areas of guidance, testing, remedial, and therapeutic services gave rise to mixed results,[110] and delicate shades of differences were per-

105. *Id.*

106. 397 U.S. 664 (1970).

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

108. Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

109. *E.g.*, Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (statute valid); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) (statute invalid).

110. *See* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975).

ceived by an increasingly fragmented court.[111]

By 1980, in *Committee for Public Education and Religious Liberty v. Regan*,[112] Justice White seemed constrained to write an *apologia* for the Court:

> [T]his case, any more than past cases, will [not] furnish a litmus paper test to distinguish permissible from impermissible aid to religiously oriented schools. . . . [O]ur decisions have tended to avoid categorical imperatives and absolutist approaches . . . . This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the *continuing interaction* between the courts and the States . . . produces a single, more encompassing construction of the Establishment Clause.[113]

Expressed less charitably, the line-drawing by the Supreme Court in the area of financial aid to primary and secondary private sectarian schools[114] had generated a maze.

However, this line of cases is instructive on at least one point. Despite the problems of line-drawing encountered by the Court, the secular purpose facet of the establishment clause test was consistently satisfied by the challenged statutes. When statutes were overturned, it was because they failed to satisfy the effect or entanglement phase of the test.[115] A secular purpose was generally found or even assumed—education of the young or assistance to one of many beneficent organizations. It did not matter that a rather obvious subjective motive on the part of many legislators would also have been to satisfy lobbyists and constituents favoring sectarian schools or religious institutions.[116]

3. Nonfinancial "Support"

For purposes of this article, two subsets of nonfinancial support

111. *See, e.g.*, Wolman v. Walter, 433 U.S. at 230-32 (syllabus); Meek v. Pittenger, 421 U.S. at 379 (Brennan, J., concurring in part); *Id.* at 391 (Rehnquist, J., dissenting in part).

112. 444 U.S. 646 (1980).

113. *Id.* at 662 (emphasis added).

114. Aid to religiously affiliated colleges and universities has caused less severe fragmentation. A secular legislative purpose of aiding secular educational functions is generally found as long as the financial aid does not flow directly into the religious phases of the institution. The Court also seems inclined to take the position that a religious affiliation does not necessarily detract from the status of an institution of higher learning as a setting for intellectual exploration. *See* Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

115. *E.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).

116. *See* Walz v. Tax Comm'n, 397 U.S. at 670.

cases are considered. The first includes cases involving general statutes which have religious overtones. Some of these statutes, exemplified by Sunday closing laws, may have deep roots in religiosity and are probably motivated still in no small part by religious forces. However, other statutes may merely coincide with religious beliefs or values of particular denominations. In either case, as a general matter, establishment clause challenges based on legislative purpose face an uphill struggle.

The second subset includes statutes which attempt to inject religious orthodoxy into the public primary and secondary schools. In such cases, the Supreme Court has manifested a stronger tendency to draw firm lines and is quicker to find that even an "avowed" secular purpose is insufficient to meet the test.

a. General Statutes with Religious Overtones

The reluctance of the Supreme Court to invalidate general statutes which have religious overtones is demonstrated by the leading Supreme Court case of *McGowan v. Maryland*,[117] which dealt with establishment clause challenges to Sunday closing laws. There, Chief Justice Warren, writing for the majority, found a sufficient contemporary secular purpose and effect of Sunday closing laws. Even though the original purpose of the statutes had been decidedly religious,[118] the statutes had absorbed over the years a distinctly secular purpose and effect.[119] According to Chief Justice Warren, Sunday closing laws were closely akin to laws affecting public health, safety, and hours and conditions of labor. The establishment of a uniform day of rest was a sufficient secular purpose, even if that day coincided with the religious beliefs of the dominant Christian sects.[120]

The *McGowan* case is instructive because it demonstrates various acceptable avenues for judicial inquiry into legislative purpose. Secular purpose was found from a combination of the history of the types of statute at issue and the surrounding milieu. The Court's search for legislative purpose was, in fact, rather wide-ranging, both in time and space. Both Blackstone of 17th century England and the contemporary efforts of lobbyists for secular interests were

117. 366 U.S. 420 (1961).

118. *Id.* at 431-34, 446.

119. "The proponents of Sunday closing legislation are no longer exclusively representatives of religious interests. Recent New Jersey Sunday legislation was supported by labor groups and trade associations." *Id.* at 435.

120. *Id.* at 445.

among the "evidence" relied on by the Court in determining secular purpose.[121]

Chief Justice Warren, writing for the Court, suggested other avenues for judicial inquiry into secular purpose.

> [T]his case deals only with the constitutionality of § 521 of the Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause *if it can be demonstrated* that its *purpose—evidenced* either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.[122]

The Chief Justice did not, of course, indicate how a party would go about making that "demonstration."[123]

The uphill battle confronting establishment clause challenges to general statutes with religious overtones was demonstrated again in *Gillette v. United States*.[124] There, the Court found many secular purposes served by an exemption for conscientious objectors from the military draft. Those purposes were unrelated to any "design" to foster or favor religion in general or any denomination in particular.[125] For example, the draft exemption for conscientious objectors depended on individual beliefs, not sectarian affiliation.[126] The secular purpose in preventing inevitable waste of military time in trying to convert a sincere conscientious objector into a military person was virtually a matter of judicial notice.[127]

Similarly, in *Harris v. McRae*,[128] a statutory amendment restricting federal funding of abortions under Medicaid was not vulnerable to establishment clause attack on grounds that it incorporated into law the doctrines of the Roman Catholic church. Mere coincidence of a law with the tenets of some or all religions, without more, does not violate the establishment clause. The

121. *Id.* at 434-36.

122. *Id.* at 453 (emphasis added).

123. In a case recently decided by the United States Court of Appeals for the Eighth Circuit, an establishment clause challenge sought to demonstrate that the Arkansas legislature lacked a secular legislative purpose and was acting out of religious motivation in enacting a Sunday closing law. The plaintiffs employed a professor of quantitative analysis who conducted a telephone survey to determine the personal motivation of those legislators who had voted for the act, some sixteen years before. Such evidence was held to carry no weight. Discount Records, Inc. v. City of North Little Rock, 671 F.2d 1220 (8th Cir. 1982).

124. 401 U.S. 437 (1971).

125. *Id.* at 452.

126. *Id.* at 454.

127. *Id.* at 452-53.

128. 448 U.S. 297 (1980).

Court's discussion of the establishment clause challenge was brief and did not dwell on applying the three-part test. To the extent that a secular purpose was "found" by the Court, it was because the statutory provision, as the federal district court below had noted, reflected "traditionalist" values toward abortion.[129]

Considering the religious "overtone" cases together with the financial aid precedents, a certain pattern begins to emerge with respect to the purpose facet of the test. More often than not, the "secular purpose" aspect of the test tends to support the challenged statute.

This tendency is quite understandable. After all, the purpose facet of the test is not articulated in preclusive terms. Rather, there must only be "a" secular purpose.[130] Even if there were genuinely "mixed motives" for enactment, the requirement for a secular legislative purpose would seem satisfied.[131]

Consequently, it is not surprising to find that, ordinarily, challengers under the establishment clause encounter a rather high burden of persuasion if they are to show that a statute lacks an acceptable secular purpose. Ordinarily, they must prove a negative. "[T]he Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses . . . . Still a claimant alleging 'gerrymander' must be *able to show the absence* of a neutral, secular basis for the lines government has drawn."[132]

With some justification, a federal district court has concluded:

> One point should be made about the purpose test in general. The plaintiffs have made extensive arguments along this line and have relied on many cases which do not directly confront *problems inherent in putting legislative purpose in this context under the microscope*. The Supreme Court has understandably decided the vast majority of its Establishment Clause cases under either the effect test or the entanglement test. . . . The primary focus, then, *normally* would be the effect rather than the purpose of legislation.[133]

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129. *Id.* at 319.

130. *But see infra* text following note 148 and text accompanying note 153.

131. *See infra* text at notes 199-200.

132. Gillette v. United States, 401 U.S. at 452 (emphasis added). It should be emphasized that this language regarding burden of proof focuses on challenges to statutes which are alleged to represent "subtle departures from neutrality." When a statute represents a more "obvious abuse," the burden of proof is less relevant. See *infra* text at notes 196-97.

133. Women's Services, P.C. v. Thone, 483 F. Supp. 1022, 1038 (D. Neb. 1979), *aff'd*, 636 F.2d 206 (8th Cir. 1980), *vacated*, 101 S. Ct. 3043 (1981) (vacated and remanded on other grounds) (emphasis added).

This characterization, while mathematically accurate, oversimplifies the situation.

There is a discernible category of cases highly relevant to the issues in *McLean* which do not fit comfortably with broad generalizations about the "primary" focus being on the effects and entanglement facets of the establishment clause test. These cases are important, and their relatively small number does not compel the conclusion that the purpose facet of the three-part test is a useless appendage. Rather, they show that when government sponsors an intrusion of religious indoctrination into the public primary and secondary schools, the Supreme Court has been inclined to rule that a secular legislative purpose was nonexistent, and to couch its analysis in terms of the intent, motives, or purposes behind the legislation. Indeed, the Court has seldom hesitated to express dissatisfaction with the secular purposes offered to justify such intrusion.

b. Intrusions into Primary and Secondary Schools[134]

Intrusion of religious orthodoxy into public schools has been a sensitive matter for many members of the Supreme Court. In the hierarchy of values embodied in the establishment clause, importing religious instruction into public schools not only places a governmental imprimatur on religion but also entails government sponsorship of religion in an area in which sponsorship is likely to offend the objectives behind the establishment clause. As Justice Frankfurter expressed it:

> Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.[135]

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134. As with financial aid cases, the Supreme Court seems willing to afford colleges and universities somewhat more latitude than primary and secondary schools, in the establishment clause context. Certainly this is the case when the issue is also one of free speech. Thus, religious meetings and services could be held on university premises when the university had made facilities generally available for use by student groups. Widmar v. Vincent, 102 S. Ct. 269 (1981).

135. McCollum v. Board of Educ., 333 U.S. at 216-17 (opinion of Frankfurter, J., joined by Jackson, Burton, and Rutledge, J.J.) (quoted in McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1258 (E.D. Ark. 1982)).

Moreover, governmental sponsorship of religious indoctrination in schools contains the seeds for disruption of other fundamental values. If nothing else, a strong undertone of free exercise clause considerations is obvious in these cases.[136]

In two early establishment clause decisions, a rather clear line was drawn between activities which occurred on school premises and activities which took place elsewhere. Importing religious instructors into the school was a breach of the required governmental neutrality.[137] However, excusing students from otherwise required classroom attendance to go to religious instruction classes conducted off school property was held, over strong dissent, to be a proper accommodation between secular and religious interests.[138] Both of these cases predated the three-part test, and neither case appears to have focused on any real equivalent to the "secular legislative purpose" concept.

An intrusion of religion into public schools was forbidden by *Engel v. Vitale*[139] which involved a nondenominational prayer composed by officials of the state of New York and recited in class at the start of each school day. In the Court's view, a governmentally composed prayer recited in school had obvious earmarks of "establishing" religion. The lone dissenter, Justice Stewart, preferred to characterize the observance as part of the "spiritual traditions of our Nation."[140]

A year later, in *School District v. Schempp*,[141] the Court struck down statutes of Pennsylvania and Maryland which required religious exercises in public schools.

In the case which arose out of Pennsylvania's statutory requirement for the daily reading of ten verses from the Bible, without comment, and the school's added supplement, recitation of the Lord's Prayer, the Court relied on findings of the district court below that "such an opening exercise is a religious ceremony and was

136. For example, in School Dist. v. Schempp, 374 U.S. at 208 n.3, it was clear that the Unitarian parents and their children felt their right to free exercise of religion had been infringed by the Bible readings and recitation of the Lord's Prayer. And the Court in *Schempp* spoke in terms of the "inviolable citadel of the individual heart and mind." *Id.* at 226.

137. McCollum v. Board of Educ., 333 U.S. 203 (1948).

138. Zorach v. Clauson, 343 U.S. 306 (1952).

139. 370 U.S. 421 (1962).

140. *Id.* at 450 (Stewart, J., dissenting).

141. 374 U.S. 203 (1963). The test applied in this case involved only the secular legislative purpose and primary effect of the legislation. *Id.* at 222.

intended by the State to be so."[142]

Inasmuch as the Court relied on the findings of the federal district court, it is worthwhile to examine briefly what transpired at the trial. There, the testimony of the plaintiff's children established the ceremonial nature of the Bible readings and recitation of the Lord's prayer. Moreover, testimony was adduced from two experts, theologians, regarding the nature of Holy Scriptures, differences among translations of the Scriptures used by various denominations, and potential effects on children of such classroom observances. The federal district court, while conceding the literary and other merits of the Bible, nevertheless concluded that the Bible was essentially a religious document.

> The daily reading of the Bible buttressed with the authority of the State and, more importantly to children, backed with the authority of their teachers, can hardly do less than inculcate or promote the inculcation of various religious doctrines in childish minds. Thus, the practice required by the statute amounts to religious instruction, or a promotion of religious education.[143]

The district court went on to point out that the reading, without comment, of Bible verses was unacceptable, despite the argument that children were left to make their own interpretations.

> Second, the testimony of the Schempps and Dr. Grayzel proves the interpretations of the Bible, dependent upon the inclinations of scholars and students, can result in a spectrum of meanings, beginning at one end of the spectroscopic field with literal acceptance of the words of the Bible, objectionable to Unitarians such as the Schempps, and ending in the vague philosophical generalities condemned by fundamentalists.[144]

Furthermore, after noting that even counsel for the School Board had referred to the ceremony as "devotional services,"[145] the court commented:

> Our backgrounds are colored by our own experiences and many of us have participated in such exercises as those required in the Abington Township schools in our childhood. We deemed them then and we deem them now to be devotional in nature, intended to inculcate religious principles and religious beliefs.[146]

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142. *Id.* at 223 (emphasis added).

143. Schempp v. School Dist., 177 F. Supp. 398, 404 (E.D. Pa. 1959).

144. *Id.* at 405.

145. *Id.* at 406.

146. *Id.* As indicated elsewhere in this article, courts in search of legislative purpose often, in effect, exercise various forms of judicial notice. In the passage quoted in the text,

Thus, the Supreme Court impliedly approved several aspects of the lower court's search for, and refusal to discover, a secular legislative purpose: (1) use of testimony regarding the nature of the school activity, (2) testimony of expert theologians, and (3) even a personalized form of judicial notice.

In the case which arose out of Maryland's requirement for schools to begin each day with readings from the Bible, there had been no trial court findings on which the Supreme Court could rely. The state trial court had sustained the defendant school board's demurrer. Nevertheless, the Supreme Court considered the state's argument that a permissible secular purpose did motivate the required Bible readings: "Included within its secular purposes, it says, are the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature."[147]

Nonetheless, replied the court,

> [E]ven if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises. *None of these factors is consistent* with the contention that the Bible is here used either as an instrument for

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the district court seems to be referring to the judge's personal experience, as typical, in support of a conclusion that the classroom activities in question were religious in nature.

Traditional concepts of judicial notice are relatively narrow. See 9 J. WIGMORE, EVIDENCE § 2565(a) (Chadbourn rev. 1981). However, as pointed out by Professor Kenneth Culp Davis, courts frequently exercise judicial notice in a broader sense. "[J]udges and administrative officers necessarily use extra-record facts which are neither indisputable nor found in sources of indisputable accuracy." Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 949 (1955). Professor Davis distinguishes "adjudicative facts" from "legislative facts." The former relates to the kinds of factual matters normally adduced in evidence in litigation. The latter relates to general propositions of varying factual content which form part of the reasoning and policy-making process undertaken by a court.

The problems inherent in any systematic delineation of judicial notice are nowhere better demonstrated than in Wigmore, where a wide range of "miscellaneous facts" which could be judicially noticed were conceded to be incapable of generalization. 9 J. WIGMORE, *supra*, at § 2580.

Accordingly, this article will use the term "judicial notice," to refer to some of the sources of courts' knowledge concerning legislative purpose because no better or more precise term describes what a court is doing when it states general factual propositions which are apparently not a matter of record evidence. *E.g.*, *supra* text accompanying notes 46-47; *infra* text accompanying notes 147-48, 159-60, 169-70.

147. School Dist. v. Schempp, 374 U.S. at 223.

> nonreligious moral inspiration or as a reference for the teaching of secular subjects.[148]

The *Schempp* case can be read for the proposition that when the Court says "a secular legislative purpose," it does not mean that phrase to be interpreted rigidly. Several secular legislative purposes were offered but nonetheless rejected. At any rate, the Court refused to accept self-serving descriptions of purpose when those descriptions seemed pretextual.

Schempp is instructive in the search for the Court's treatment of secular purpose in several other respects. First, the Court approved the use of expert testimony, at least to probe into the nature of the exercise or ceremony, the nature of the Holy Scriptures, the religiosity of the practice carried on in the public schools, and its effect on school children. How much further and in what direction such expert inquiries could probe was not discussed, of course. Second, the Court judicially noticed that the Bible is a sacred text. Third, the Court refused to take potentially self-serving declarations of secular purpose at full face value. Fourth, the state's asserted purpose was impeached, in the Court's view, by the state's own handling of the situation. If the exercise were truly intended to be secular, then there should be no need to excuse children, presumably for free exercise reasons, any more than there could be a constitutional need to excuse children from history classes. Finally, if nothing else, the state's own handling of the situation was circumstantial evidence that the purpose was so infected by religiosity that even if "a" secular purpose existed, it was subsumed by and secondary to the religious motive, if not actually a pretext and an afterthought.

The most recent addition to the list of prohibited intrusions of religious indoctrination into public schools is *Stone v. Graham*.[149] There the Supreme Court confronted a Kentucky statute which mandated the posting of the Ten Commandments on the walls of each public elementary and secondary schoolroom. The following annotation, "in small print"[150] below the last commandment was required on each posted 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.[151]

148. *Id.* at 224 (emphasis added).
149. 449 U.S. 39 (1980).
150. *Id.* at 41.
151. *Id.* (quoting Enact. Acts 1978, ch. 436, § 1, KRS 158.178 (1980)).

The state trial court had upheld the "secular purpose," despite characterizing it as "self-serving."[152] An equally divided state supreme court had upheld the statute against establishment clause and state constitutional challenge. A five-justice per curiam opinion of the United States Supreme Court rather curtly dismissed the "avowed" secular purpose without briefing and argument. According to five justices, the required posting "had no secular legislative purpose" and was therefore unconstitutional. A merely "avowed" secular purpose was insufficient.[153]

Insofar as five members of the Court were concerned:

> The *pre-eminent* purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The 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*. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder . . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.[154]

Thus, the per curiam opinion refused to turn a blind eye to the religiosity inherent in the required posting of a religious text on schoolroom walls.

Although the Court stated early in its opinion that the law had no secular purpose and was therefore unconstitutional, it went on to speak in terms of the inevitable effects of posting the Ten Commandments.

> Posting of religious texts on the wall serves no educational function. If the posted copies of the Ten Commandments are to have any *effect* at all, it will be to induce the school children to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state *objective* under the Establishment Clause.[155]

The Court indicated that posting of the Ten Commandments was not distinguishable in any principled way from the Bible readings in the *Schempp* case.[156] Whether read aloud or posted, the in-

152. *Id.*
153. *Id.*
154. *Id.* at 41-42 (emphasis added).
155. *Id.* at 42 (emphasis added).
156. *Id.* at 41.

troduction of a religious text into the public schoolroom is the introduction of religion into the schools, unless that religious text is part of an appropriate "educational function" set in a secular context such as history, ethics, comparative religion, "or the like."[157] The Ten Commandments are a religious text. The mere posting of them without integration into education functions has an inescapably religious effect and bespeaks, louder than "avowed" purposes, a non-secular aim. Thus, the avowal of a secular purpose in the form of "small print" on the posted Commandments, noting their adaptation into secular legal systems, did not outweigh the religious effects and was contradicted by a rather obvious religious motive, inferable from those effects.

Chief Justice Burger and Justice Blackmun disassociated themselves from the per curiam opinion by noting that they would have given the case plenary consideration. Justice Stewart, the lone dissenter in *Schempp*, dissented in a brief statement that "so far as appears," the state courts had applied "wholly correct constitutional criteria."[158]

Only Justice Rehnquist attacked the majority's conclusions regarding the lack of a secular purpose.

> With no support beyond its own *ipse dixit*, the Court concludes that the Kentucky statute involved in this case 'has *no* secular legislative purpose' . . . and that "[t]he pre-eminent purpose for posting the Ten Commandments . . . is plainly religious in nature," . . . . The Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence.[159]

Justice Rehnquist then proceeded to cite various Supreme Court cases in which the secular purpose of the statute at issue had been recited by the legislatures and upheld with little or no comment by the Court. However, as the majority pointed out, the Supreme Court decisions cited by Justice Rehnquist dealt with state financial assistance to private schools.[160] In those cases, whatever result the "effect" and "entanglement" facets of the three-part test might dictate, the Court had routinely recognized a legitimate secular purpose of promoting educational opportunity for all children.

In terms of the Court's search for legislative purpose, *Stone v.*

157. *Id.* at 42.
158. *Id.* at 43 (Stewart, J., dissenting).
159. *Id.* at 43 (Rehnquist, J., dissenting).
160. *Id.* at 43 n.5.

Graham again teaches that the Court will judicially recognize that certain writings are religious texts and that a majority of the Court continues to circumstantially infer a lack of secular purpose when the situation is one of raw intrusion of a religious text into public classrooms without integration into the educational process.

A point avoided by Justice Rehnquist, and not well articulated by the majority is that, once more, as suggested by *Schempp*, a bare, self-serving statement of purpose comes very close to being no secular purpose at all, particularly when the resulting effect is perceived to be inescapably religious. Even if, as Justice Rehnquist asserts, the Court's treatment of the state statute was "cavalier,"[161] a secular purpose "disclaimer" in small print, couched in language incomprehensible to most children in early primary grades, might be expected to strain judicial credulity.

The final case to be discussed at this juncture involves a variation on the theme of intrusion of religion into public schools. In *Epperson v. Arkansas*[162] the intrusion was of a different kind. Rather than reaching into public school classrooms to impart a religious message, religious forces had reached into the public school classrooms to withdraw from secular education a subject deemed to contradict certain doctrinal beliefs. In *Epperson*, the state of Arkansas, by initiated Act, had passed a statute prohibiting the teaching in any state-supported school or university of "the theory . . . that mankind ascended or descended from a lower order of animals. . . ."[163]

The *Epperson* case, another of the few Supreme Court establishment clause precedents which turns on legislative purpose, did not come to the Court with a definitive construction by state courts.[164] Undeterred, the majority had no trouble finding a violation of the establishment clause. For one thing, the state itself apparently advanced no suggested secular purpose for a complete prohibition against the teaching of evolution in the public schools.

> No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence.[165]

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161. *Id.* at 47.

162. 393 U.S. 97 (1968).

163. *Id.* at 99.

164. The Arkansas Supreme Court had upheld the statute in a two-sentence per curiam opinion. Epperson v. Arkansas, 393 U.S. at 101.

165. *Id.* at 107-08.

In addition to the state's apparent failure to suggest a plausible secular purpose, the Court considered several sources of information indicating the purpose of the act. The Court footnoted, as "typical of the public appeal," a contemporary advertisement in the *Arkansas Gazette*, equating evolution with atheism, and various letters to the editors published in the *Gazette*.[166] Further, the model for the statute was found to be the Tennessee statute of *Scopes*[167] fame.

> Its antecedent, Tennesee's "monkey law," candidly stated its purpose: to make it unlawful "to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." Perhaps the sensational publicity attendant upon the *Scopes* trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to "the story of the Divine Creation" . . . but there is no doubt that the *motivation* for the law was the same: to suppress the teaching of a theory which, it was thought, "denied" the divine creation of man.[168]

In a footnote to the above-quoted passage, the Court pointed out that the state had indicated that the Arkansas statute was passed with the holding of the *Scopes* case in mind.[169]

Earlier in the *Epperson* opinion, the Court stated that the statute was a product of the upsurge of "fundamentalist" religious fervor of the twenties. The Arkansas statute was an adaptation of the famous Tennessee "monkey law" which that state adopted in 1925.[170] Although the Court's inquiry into the purpose of the statute was not deeply analytical, several teachings can be culled from *Epperson*.

First, the state apparently offered no secular purpose at all for the statute. Therefore, when the state does not offer a secular purpose, and at least some evidence of unconstitutional sectarian purpose is adduced, the state fails the secular legislative purpose facet of the test almost by default. Indeed, Justice Black in his concurring opinion seemed constrained to suggest that a secular legislative purpose might be found: the state might have decided to withdraw a controversial subject from public school curricula.[171]

166. *Id.* at 108 n.16.
167. Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927).
168. 393 U.S. at 108-09 (emphasis added).
169. *Id.* at 109 n.18.
170. *Id.* at 98.
171. *Id.* at 112-13 (Black, J., concurring).

Second, the Court was not inclined to ignore what everyone else seemed to know or could readily determine. The Court, essentially exercising its judicial notice prerogative without announcing that it was doing so, delved into the history and background of the statute, noting its apparent source and model. That source and model implicated the notorious history attending the *Scopes* monkey law trial. The state had as much as conceded that certain differences between the Arkansas statute and the Tennessee legislation were attributable to the *Scopes* case. Because the statute was an initiated Act, there was no formal legislative history. Therefore, the Court appeared to place some reliance on an analogue to legislative history in the form of advertisements published by supporters of the law.

C. *Secular Legislative Purpose and Subsequent Testimony of Legislators*

1. Particular Sources and General Perspectives

On the level of particular sources, the Supreme Court establishment clause cases provide considerable guidance for judicial inquiry into secular legislative purpose. For example, the Court has indicated approval of such diverse "sources" as general historical background or milieu,[172] the effects of the statute and inferences drawn from those effects,[173] the legislative history of the statute,[174] circumstantial evidence of purpose,[175] judicial notice,[176] expert testimony,[177] and credibility assessments of avowed secular purposes.[178]

Collectively, the establishment clause precedents indicate a permissible scope of judicial inquiry which approaches the *Arlington Heights* prescription for examining legislative motive or purpose. However, the Supreme Court has had no occasion either to approve or disapprove in an establishment clause case the use of legislators' testimony directly[179] bearing on the purposes or motives behind a

172. Epperson v. Arkansas, 393 U.S. 97 (1968); McGowan v. Maryland, 366 U.S. 420 (1961).

173. Stone v. Graham, 449 U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968); School Dist. v. Schempp, 374 U.S. 203 (1963).

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

175. School Dist. v. Schempp, 374 U.S. 203 (1963); McGowan v. Maryland, 366 U.S. 420 (1961).

176. Stone v. Graham, 449 U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968); School Dist. v. Schempp, 374 U.S. 203 (1963).

177. School Dist. v. Schempp, 374 U.S. 203 (1963).

178. Stone v. Graham, 449 U.S. 39 (1980); School Dist. v. Schempp, 374 U.S. 203 (1963).

179. There is properly a distinction between direct testimonial inquiry into personal mo-

statute. Extension of this part of the *Arlington Heights* prescription cannot be casually assumed, and an otherwise strong similarity among particular sources does not necessarily mean that such testimony would be an acceptable avenue of judicial inquiry in the establishment clause context. Apart from the broader reasons against the use of such testimony, which are discussed elsewhere in this article,[180] the compatibility of this aspect of the *Arlington Heights* prescription with establishment clause principles is somewhat doubtful. In order to assess the appropriateness of using the testimony of legislators as a source of direct evidence relative to secular legislative purpose, it is necessary to go beyond particular "sources" and to consider this issue against the background of a more general perspective.

On a general level, the Supreme Court's inquiry into secular legislative purpose is, in the majority of establishment clause cases, rather brief. For example, the Court appears satisfied with a mere statutory recital or the apparent presence of a secular legislative purpose in cases involving financial aid to private sectarian schools, even though such financial aid would, presumably, never be legislated without substantial lobbying (and hence, motivation) from groups which are furthering the interests of religious schools. To some degree, these financial aid cases are representative of a larger body of precedents involving statutes which, despite religious overtones or influences, meet the requirement of secular legislative purpose with relative ease.[181] The only case in this genre which seemed to require extensive discussion of secular legislative purpose was *McGowan*.[182] There, despite the undoubted religious origins of Sunday closing laws, and notwithstanding a rather clear continuing influence of religious motives on the enactment of such laws, sufficient secular legislative purpose was found in the provision of a uni-

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tives (or into the motives of legislative colleagues) and testimony regarding what transpired during the legislative process. The former is questionable. The latter may be not only appropriate but necessary, particularly when a legislature does not maintain detailed legislative histories in the form of transcribed or published committee hearings, committee reports, or verbatim records of floor debates. In such situations, there is justification for calling legislators to testify regarding the "specific sequence of events" leading to enactment, Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977) (citing Reitman v. Mulkey, 387 U.S. 369, 373-76 (1967) and Grosjean v. American Press Co., 297 U.S. 233, 250 (1936)), or for other testimony bearing on the operation of the legislative process.

180. *See supra* text accompanying notes 72-84.

181. *See supra* text accompanying notes 117-33.

182. *See supra* text accompanying notes 117-22.

form day of rest even though it also coincided with the Sabbath of dominant Christian sects.

In the majority of Supreme Court cases, the secular legislative purpose facet of the tripartite test does seem to play a distinctly secondary role. The tendency of the Supreme Court to find an acceptable secular legislative purpose has led at least one federal district court[183] to conclude that the primary focus in most establishment clause cases is on the effects of a statute, and to mention, without elaboration, the "problems inherent in putting legislative purpose in this context under the microscope."[184] Those inherent "problems," when examined more closely, provide some insights into the reasons why secular legislative purpose plays a secondary role in the general run of establishment clause cases. Those reasons, in turn, are relevant to the narrower issue of using legislators' testimony in establishment clause litigation.

The secondary role of secular legislative purpose in the general run of establishment clause cases stems from a number of related factors. Religious institutions are intertwined with a society governed by laws which, in one way or another, impose restrictions, mandate conduct, or bestow benefits. Those laws, enacted for a wide variety of purposes and reasons, may affect religious and secular institutions in various ways, both favorable or unfavorable, or in a manner consistent or inconsistent with religious doctrines or secular ideologies. Moreover, legislatures are lobbied by many groups, among them the religiously motivated. Legislators themselves may be motivated by personal convictions grounded in religious beliefs. A recent study of the influence of personal religious beliefs on the voting behavior of members of Congress suggested some "striking connections between political world view and religious world view . . . ."[185] More fundamentally, any distinctions between religious motives and ethical or moral impulses rooted in human conscience may be too elusive for legalistic definitions. The Supreme Court itself has demonstrated considerable reluctance to attempt any definition of "religion."[186]

Thus, in a society permeated by religious forces and by traditions rooted in religious doctrines, extricating religious from other-than-religious purposes and motives may be humanly, and therefore

183. *See supra* text accompanying note 133.

184. Women's Services, P.C. v. Thone, 483 F. Supp. 1022, 1038 (D. Neb. 1979).

185. Benson, *Religion on Capitol Hill*, PSYCHOLOGY TODAY, Dec. 1981, at 53.

186. *See* Thomas v. Review Bd., 450 U.S. 707, 713-16 (1981); Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).

judicially, impossible. Rather clearly then, the kind and degree of governmental neutrality required by the establishment clause cannot contemplate realistically a legislature insulated from religious forces or motives. Legislation is too often a blend of secular and religious considerations which are not susceptible to later judicial unraveling. The question then becomes one of how to deal with this reality in terms of establishment clause requirements. One reflection of this reality has been to relegate considerations of legislative purpose to a distinctly secondary role, in the majority of cases.

As another reflection of this reality, the secular legislative purpose facet of the tripartite test is not even formulated in terms of the religious purposes or motives behind a statute. Rather, the key requirement is the existence of "a secular legislative purpose," not the absence or influence of religious motives. Unless the statute involves one of the "obvious abuses" mentioned but not amplified in *Gillette v. United States*,[187] the establishment clause policy of governmental neutrality requires that a court simply be able to discern a secular legislative purpose of genuine substance. In most establishment clause cases, before a statute can be vulnerable because of impermissible legislative purpose or motive, manifestly or inherently religious motives or purposes must virtually eclipse secular purposes. Even then, the statute may still satisfy the secular legislative purpose requirement.

However, as indicated earlier in this article,[188] the secular legislative purpose facet of the establishment clause test does seem elevated to greater prominence when the state fosters an intrusion of religion into the public primary and secondary schools. In such cases, the Supreme Court examines the purposes behind the challenged statutes with a more skeptical eye and customarily indicates that the statutes fail to satisfy even the secular legislative purpose requirement.

An attempt to completely and systematically reconcile the treatment of secular legislative purpose in this line of cases with the secondary role of secular legislative purpose in the rest of the establishment clause canon could warrant a separate article. For present purposes it is sufficient to recognize that these cases exist, that they are relevant to the statute at issue in *McLean*,[189] and that there are at least two possible approaches to analyzing them.

187. 401 U.S. 437, 452 (1971) (citing Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970)).

188. *See supra* text accompanying notes 135-71.

189. *See infra* text following note 220.

The first approach is to assume that, because of the special nature of the public school as an institution, intrusions of religion into the public schools are subject to something of a double standard as far as secular legislative purpose is concerned. The state's "coercive power" has been enlisted to aid religion,[190] to abet religious dogma, or to channel religious indoctrination into an institution which must be isolated very carefully from the "strife of sects"[191] because of its sensitive and vital role in a democratic society. Thus, more justification for any intrusions of religion into public schools may be demanded. The Court is not receptive to legislative disclaimers[192] and subsequent rationalizations suggested by counsel.[193] Indeed, the Court's approach in these cases is reminiscent of the "sharper focus" in gender-based classification decisions,[194] and the more intensive judicial assessments conducted in cases involving fundamental personal rights.[195] Although the Supreme Court has discerned the lack of secular purpose in various ways, there is a consistent undertone which goes deeper than mechanical applications of the tripartite test: when religious orthodoxy is channeled into the public schools, the basic policy of governmental neutrality in matters of religion is threatened by the use of the state's coercive power, and the state must justify its action by a stronger showing of secular legislative purpose than would be required in other establishment clause challenges.

The second approach is to regard intrusions of religious orthodoxy or indoctrination into public schools simply as being among those extreme situations which eclipse any asserted secular purposes,[196] or which constitute the sort of "obvious abuses" mentioned but not amplified in *Gillette*.[197] Certainly, religious purpose looms immediately and is strongly suggested by the very imposition, or authorization, of prayer, Bible readings, and the posting of the Ten Commandments. Such activities cannot easily be reconciled with a secular learning process. The existence of other-than-religious purposes for the state's exercise of its coercive power in this fashion has

190. McGowan v. Maryland, 366 U.S. 420, 453 (1961).

191. McCollum v. Board of Educ., 333 U.S. 203, 217 (1948) (opinion of Frankfurter, J., joined by Jackson, Burton, and Rutledge, J.J.).

192. *See* Stone v. Graham, 449 U.S. 39 (1980).

193. *See* School Dist. v. Schempp, 374 U.S. 203 (1963).

194. Michael M. v. Superior Court, 450 U.S. 464 (1980).

195. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Eisenstadt v. Baird, 405 U.S. 438 (1972).

196. *See supra* text preceding note 188.

197. 401 U.S. at 452.

at least never been established to the Supreme Court's satisfaction when a vehicle of undeniable religiosity is used for purportedly secular purposes.

2. General Perspectives and the Testimony of Legislators

In light of the general perspective afforded by Supreme Court establishment clause precedents, the propriety of considering legislators' testimony regarding motives in connection with the secular legislative purpose facet of the tripartite test is doubtful for a number of reasons.

First, even with respect to the cases involving intrusions of religious orthodoxy into public schools, legislators' testimony regarding purposes or motives is basically irrelevant, under either of the approaches discussed above. If these cases are sui generis, hinging on the nature of public schools as an institution, a hundred legislators attesting to secular motives or purposes not otherwise judicially discernible cannot contradict underlying violations of governmental neutrality. If, on the other hand, these cases represent extreme situations of "obvious abuse" with a lack of meaningful secular purpose, a hundred legislators testifying about latent purposes could not outweigh the fact that the vehicle chosen to implement such purportedly secular purposes is undeniably religious. Under either approach, the testimony of legislators would be indistinguishable from the efforts made in *Schempp* to argue a secular purpose of inculcating moral values through Bible readings and prayer.[198] Therefore, in the one category of cases in which the Supreme Court has actually found a lack of secular legislative purpose, the testimony of legislators regarding their personal motives or the motives of colleagues would be irrelevant at best.

Second, with respect to the general run of establishment clause cases, in which secular legislative purpose plays a distinctly secondary role, the use of legislators' testimony is not very compatible with establishment clause principles. If nothing else, practical considerations would militate against the use of such testimony. As previously discussed,[199] the extrication of religious from secular purposes and motives in a society permeated by religious influences would involve judicial line drawing which would be virtually impossible. Therefore, the mere presence of religious motives is insufficient to invalidate a statute on establishment clause grounds. On

198. School Dist. v. Schempp, 374 U.S. 203, 234 (1963).

199. *See supra* text accompanying notes 184-87.

more than one occasion, the Supreme Court itself implicitly has recognized that religious forces and motives were part of the reasons behind a statute which nevertheless satisfied the secular legislative purpose requirement.[200] Accordingly, the use of legislators' testimony about personal religious motives or the religious motives of colleagues would be probative only of something which was constitutionally permissible in any event. Further, if the statute represents a situation in which religious motives or purposes virtually eclipse the secular or in which there are "obvious abuses," legislators' testimony admitting religious motives is merely cumulative, and legislators' testimony directed toward demonstrating personal secular motives would be an institutionally self-serving attempt to contradict more objective indicia of purpose or motive. In short, the testimony of legislators regarding personal motives or the reasons behind a statute cannot be accomodated easily with the structure and application of the secular legislative purpose facet of the tripartite test.

In addition, the constitutional policies behind the establishment clause are even less compatible with the use of individual legislators' testimony as direct evidence of legislative motive or purpose. The touchstone of establishment clause jurisprudence has been governmental neutrality in matters of religion. The neutrality required by the establishment clause policy is not a one-way street which simply forbids favoring religion. Government can neither impermissibly advance religious interests nor impermissibily "inhibit,"[201] nor operate in a manner overtly hostile to, religion. Adjudging a statute unconstitutional merely because religious forces or motives had a role in its enactment would approach a level of hostility to religion which would be inconsistent with establishment clause neutrality. The kind and degree of governmental neutrality which is required in this context is the product of balancing the constitutional command that no law can be enacted "respecting the establishment of religion,"[202] with other, equally strong imperatives of the first amendment—free exercise of religion, free speech, and related associational rights.[203] That balance is upset if the validity of a statute is imperiled by legislators' testimony regarding their subjective religious motives or because some legislators attribute religious purpose

200. *See supra* notes 116, 181-82, and text accompanying notes 181-82.

201. *E.g.*, Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

202. U.S. CONST. amend. I.

203. *See, e.g.*, Widmar v. Vincent, 102 S. Ct. 269 (1981); Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).

or motive to the rest of the legislature. The very use of such testimony would entail a conception of neutrality at odds with a delicate balance among potentially conflicting constitutional values by implying that legislatures must manifest some degree of resistance to religious influences. If a statute can be jeopardized on the basis of legislators' subsequent testimony regarding religious motives, the situation would come closer to requiring some degree of hostility to religious influences than it would to requiring secular purpose or neutrality.

Finally, additional review of *Arlington Heights* indicates another, but related, set of reasons against the use of legislators' testimony in the establishment clause context. *Arlington Heights'* tentative approval of legislators' testimony as a source of purpose or motive may not be severable from another aspect of *Arlington Heights* which would be inconsistent with establishment clause principles. In *Arlington Heights*, the constitutionally prohibited purpose or motive at issue was invidious racial discrimination violative of the fourteenth amendment. Of itself, this difference in constitutional basis is not dispositive. However, the Court in *Arlington Heights* also modified the burden of proof in fourteenth amendment racial discrimination cases. If the evidence establishes that a governmental decision was "motivated *in part* by *a* racially discriminatory purpose,"[204] the burden shifts to the government to establish that "the same decision would have resulted even had the impermissible purpose not been considered."[205] In legislative terms, this would translate into a requirement that the government show the same statute would have been enacted even if racial considerations had not been a factor in its passage. Accordingly, in the context of *Arlington Heights'* potential for a shifting burden of proof based on a demonstration that racially discriminatory purposes were merely "a motivating factor,"[206] the testimony of legislators could be relevant. The testimony of legislators conceivably could demonstrate the "in part" degree of motive necessary to sustain plaintiff's burden of proof. Similarly, the government, seeking to redeem the statute, could resort to legislators' testimony to demonstrate that the same statute would have been enacted in any event. Although the soundness of parading legislators to testify in this fashion is questionable

204. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 n.21 (1977) (emphasis added).

205. *Id.*

206. *Id.* at 270.

on other grounds,[207] such testimony would at least appear to be relevant. Furthermore, the use of such testimony may be appropriate only when there is a burden of proof which shifts upon the showing of a tainted or unconstitutional motive or purpose.

However, as discusion elsewhere in this article indicates,[208] the establishment clause plaintiff has a heavier burden of proof, and that burden clearly is not satisfied by showing merely that "a motivating factor" behind the legislation was religious in nature.[209] In the general run of establishment clause cases, a challenger must establish the absence of secular legislative purpose in order to prevail on that facet of the tripartite test.[210] This burden does not seem to have been altered after *Arlington Heights*.[211] Even in *Stone v. Graham*,[212] decided three years after *Arlington Heights* and involving the intrusion of religious indoctrination into public schools, there was no indication of a shifting burden of proof. The Court in *Stone* did not offer the state any opportunity to establish that the same statute would have been enacted in the absence of religious purpose or motives.

In sum, there would seem to be no legitimate reason to resort to legislators' testimony directly bearing on personal motives or the reasons behind a statute challenged on establishment clause grounds. At best, such testimony is irrelevant and non-probative. At worst, such testimony is incompatible with both the secular legislative purpose facet of the tripartite test as it has been applied and with the concept of neutrality underlying establishment clause precedents.

V. CONCLUSION

A. *Hydraulic Pressures*

To return to the Holmesian metaphor contained in the quotation at the beginning of this article, there were clearly a number of influences at work in *McLean* which exercised "a kind of hydraulic

207. *See supra* text accompanying notes 72-84.

208. *See supra* text accompanying notes 130-32.

209. *See supra* text accompanying note 200.

210. *See supra* notes 130-32 and accompanying text.

211. In two financial aid cases, for example, Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980), and Wolman v. Walter, 433 U.S. 229, 236 (1977), a secular legislative purpose of educating children was found without any indication that plaintiffs could satisfy their burden of proof on this issue by demonstrating that religious motives or reasons played some part in enacting the legislation.

212. 449 U.S. 39 (1980).

pressure"[213] on that decision. The notoriety of the case was only one of those influences, and probably a minor influence at that. The more significant influences stemmed from the problems inherent in assessing legislative purpose or motive in the face of statutory recitals of a permissible purpose.

Judicial consideration of the reasons underlying legislative action, whether those reasons are expressed in terms of motive, purpose, or intent, does pose a dilemma in constitutional adjudication. On the one hand, judicial inquiry into the reasons behind an enactment are, as Chief Justice Warren counseled, "a hazardous matter."[214] Even Chief Justice Marshall was deterred by the practical hazards, as well as the constitutional implications, of considering the motives of legislators.[215] If nothing else, the judiciary might be confronted with the necessity of determining what kinds of motives were impermissible, and how many legislators would have to be impermissibly motivated before a statute would become invalid.[216] At a constitutional level, there is also a substantial potential in such an undertaking for judicial intrusion into the details of the lawmaking process, either by subsequent prying into the mental processes of members or by attributing impermissible motivations to members of political institutions, national and state, which have constitutional origins equal in dignity to those of the judiciary.

On the other hand, there are equally serious hazards entailed in totally foreclosing judicial consideration of the reasons behind an enactment. If legislative purposes or motives were totally immune from judicial scrutiny, the balance among branches of government would distinctly tilt toward the legislature, which could in some instances virtually ignore the Constitution. Hiding behind recitals of permissible purposes, secure from judicial inquiry into the reasons behind a statute, the legislative branch could be elevated on some matters into de facto supremacy over the Constitution itself.

The Supreme Court, although historically disclaiming the power to consider the motives of legislators, had never really taken this position to the extreme of totally abdicating judicial scrutiny, as Professors Brest and Ely demonstrated.[217] Ultimately, the tension between extremes of interference and abdication was implicitly rec-

213. Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

214. United States v. O'Brien, 391 U.S. 367, 383 (1968).

215. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

216. *Id.* at 130.

217. *See supra* text accompanying notes 58-60.

ognized in *Arlington Heights*. In that case, the Court sought to strike a proper balance and to articulate a proper role for the judiciary in probing legislative purpose and motive. *Arlington Heights* developed a prescription which, for the most part, was sound and workable, although demanding on the lower courts. In essence, *Arlington Heights* allows the courts to attribute unconstitutional motives or purposes to legislatures. To the extent that *Arlington Heights* allows a court to make such determinations on the basis of objective factors, the decision represents no major qualitative departure from the scope of judicial inquiry into legislative purpose or intent long observed by the courts in interpreting statutes.[218] *Arlington Heights*, however, by suggesting, albeit tentatively, that direct testimony regarding subjective motives and purposes was a possible avenue of inquiry, seemed to open the door to judicial intrusions of a questionable kind, carried out in a questionable manner.

The *McLean* court, confronted with the problems inherent in judicially assessing legislative motive or purpose, apparently[219] was influenced not only by the sounder portions of *Arlington Heights*, but also by the tentative suggestion that legislative purpose or motive could be adduced directly from the testimony of legislators, after the fact, on the witness stand.

B. *The Bent Principle*

Continuing with the Holmesian metaphor, the principle of law "bent" in *McLean* was the prohibition, only hypothetically relaxed by *Arlington Heights*, against calling, or allowing, legislators to testify as to legislative purpose or motive. Arguably, a certain amount of bending had occurred already in *Arlington Heights*. Nevertheless, even there, the Court's suggestion was tentative, circumscribed by warnings that such testimony should be a rare exception, made in "extraordinary instances,"[220] and might be barred in any event by considerations of privilege.[221] At the very least, *McLean* represents a further, and probably unnecessary, bending of that principle, undertaken without an indication in the opinion itself of reservations, reluctance, or misgivings. Little or nothing in *McLean* indicates anything "extraordinary" about considering the testimony of a legis-

218. *See supra* notes 67-70 and accompanying text.

219. Although *McLean* did not cite *Arlington Heights* as its authority for considering a legislator's testimony regarding his personal motives, *Arlington Heights* was cited in connection with the scope of inquiry into legislative purpose. *See supra* text accompanying note 29.

220. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 (1977).

221. *Id.*

lator, and little or nothing in *McLean* indicates the need even to consider such testimony.

Despite an abundance of circumstantial evidence, expert testimony, direct evidence indicating the religiosity of "creation science," and other indications that Act 590 lacked a secular legislative purpose, a legislator's testimony about his religious motivations and beliefs was not only allowed, but also discussed in the *McLean* opinion. Act 590 did not, however, stand or fall on the testimony of its sponsor. Act 590 was found to offend the establishment clause in many ways, and it failed all three facets of the tripartite test. On the purpose facet of the test alone, the senator's testimony regarding his personal motives was merely one cumulative element in the analysis of secular legislative purpose.[222]

In a sense, this testimony was superfluous. Given the court's findings that creation science was not science, that its proponents admitted that it was not science, and that it was a subject permeated with religiosity, the situation in *McLean* seemed to fall within the establishment clause precedents involving prohibited intrusions of religious indoctrination into public schools. On the basis of such findings, creation science was only a more sophisticated vehicle, clothed in the trappings of science, to insinuate religious teachings into public schools. As such, it would differ only in degree from Bible readings and the posting of the Ten Commandments. Given the court's findings, the legislative purpose of requiring balanced treatment of creation science and evolution was nothing less than requiring balanced treatment of evolution and religious doctrines pertaining to creation. Whether couched in terms of effect or purpose, religious doctrines would have been injected into public school classrooms; religious doctrines of only one species of religious belief, at that—the beliefs of those who espouse a literal interpretation of the Bible.

Accordingly, *McLean's* consideration of the legislative sponsor's testimony would hardly constitute reversible error. In terms of results in the particular case, such testimony was at worst cumulative and harmless.

Unfortunately, judicial decisions do not exist in a vacuum. They are read; they influence other courts; they form part of the

222. *McLean*, 529 F. Supp. at 1258-64. It should be noted that, in other respects, the scope of *McLean*'s inquiry into purpose or motive seems generally consistent with the sources of "secular legislative purpose" which have been approved by the Supreme Court. *Compare* text, *supra*, at notes 172-78 and 15-37.

evolution of legal doctrines. The more visible and notorious the case, the more influence it may have, for better or worse. In *McLean*, a highly visible and notorious case, testimonial inquiry into the personal motives of a legislator not only occurred, but also found its way into the text of the decision. Whether *McLean* will influence the future development of the law on this subject is a function of many variables. However, when an action of precedential significance appears in an otherwise well-reasoned opinion of obvious judicial craftsmanship, that action, even if it is a negligible factor in the outcome of the case itself, may have greater influence than it otherwise would.

As precedent for entertaining legislators' testimony regarding their purposes and motives in supporting legislation, *McLean* contributes further to the erosion of proper boundaries between the various arms of government. The decision contains the seeds of future confrontations between judiciary and legislature. Moreover, if legislators can be summoned by the courts to testify regarding their personal motives, there arises the issue whether legislative committees have the power to summon judges to testify about the purposes or motives behind judicial decisions.

However, the point is not that a parade of horribles will begin after *McLean*. By itself, *McLean* will not provoke any constitutional crisis. The more troublesome aspect of *McLean's* use of a legislator's testimony concerning his personal motives is that it may be more a symptom than a disease. In terms of underlying constitutional structures, the use of such testimony is symptomatic of eroding judicial self-restraint when the courts approach the boundaries between judicial functions and the functions of the rest of government.

It is not without reason that the branches of government are separated from each other, not in air-tight compartments, but at least to the extent that they do not encroach upon one another in carrying out their respective constitutional roles.[223] In adjudicating cases and controversies, courts are vested with substantial powers which generate the potential for encroachment. There are direct and obvious powers to compel testimony and to hold in contempt. But there are also more subtle powers, such as the authority to determine the admissibility and competence of evidence, and, in non-jury cases, to determine the credibility of witnesses. Although, as Chief Justice Marshall long ago announced, it is emphatically the

223. *See* Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 443 (1977).

province of the courts to say what the law is,[224] sitting in judgment on motives, particularly the motives of members of other arms of government, calls for a delicate exercise of judicial power. After all, the same Chief Justice Marshall pointedly refused to consider the motives of a state legislature accused of corruption.[225] Direct testimonial inquiry into the motives and purposes of a legislator comes uncomfortably close to making legislators answerable to the courts for their subjective states of mind.

Ironcially, *McLean* itself also demonstrates that an able and perceptive judiciary, operating within the framework of adjudicating a case or controversy, need not resort to legislators' testimony bearing on personal motives and purposes. Judicial inquiry into legislative purpose or motive can be exhaustive, penetrating, and active, yet still take place in a manner which does not encroach on that particular boundary between coordinate bodies of government in a federal system.

224. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
225. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).