Volume 14
Number 3 *Spring 1980*

*pp.*487-526

Spring 1980

Abortion Laws, Religious Beliefs and the First Amendment

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NOTES

ABORTION LAWS, RELIGIOUS BELIEFS AND THE FIRST AMENDMENT

The constitutional controversies surrounding abortion-related legislation now include the Religion Clauses of the first amendment. The legislation being challenged, by either restricting the Medicaid funding of abortions or regulating the performance of abortions, embodies anti-abortion interests. Arguments have been advanced that religious beliefs and values have played a predominant role in the enactment of such legislation and that the legislation therefore violates the Establishment Clause.[1] Challengers have also argued that such legislation violates the Free Exercise Clause[2] by placing burdens on women with respect to any religious decision they may make to have an abortion.

These arguments raise new questions both as to the scope of the Establishment and Free Exercise Clauses as well as to the nature of the underlying legislative concerns regarding abortion. A threshold question is whether religious beliefs and values have in fact played a predominant role in the enactment of legislation reflecting anti-abortion sentiment. If legislators did have religious reasons for enacting such legislation, then the issue becomes whether underlying religious values entail a violation of the Establishment Clause. Another Establishment Clause question presented by the arguments is whether the politicial divisiveness test, which is concerned with the avoidance of political division along religious lines, is applicable in instances other than those involving the institutional entanglement of government and religion. Relating to the Free Exercise Clause, an inquiry is needed as to whether an indigent woman has a constitutional right to have an abortion governmentally funded because of the conscientious nature of the abortion decision.

This note seeks to articulate and analyze both the arguments being presented and the new questions these arguments raise. The

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1. "Congress shall make no law respecting an establishment of religion. . . ." U.S. CONST. amend. I.

2. "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I.

note, however, does not attempt to determine whether an anti-abortion view of the controversy is essentially a religious one, or whether legislators favoring restrictions on the funding or performance of abortions have been motivated primarily by religious concerns. Though the note mentions these considerations,[3] the emphasis of the note is centered on the question of whether the Religion Clauses are violated when the beliefs involved are predominantly religious. The note reaches two conclusions. First, the Religion Clauses as they have been applied do not demand a finding of unconstitutionality in this context. Second, to extend the Religion Clauses to invalidate the types of legislation considered herein would be inconsistent with their concerns.

BACKGROUND TO THE ABORTION-FIRST AMENDMENT CONTROVERSY

The Abortion Controversy

Roe v. Wade[4] set the stage for the present first amendment controversies by ruling that states can neither prohibit women from electing an abortion for pregnancies in the first trimester nor adopt regulations other than those related to maternal health for pregnancies between the first trimester and viability.[5] The decision in *Roe* was based on a woman's right of privacy which the Supreme Court found to be guaranteed by the fourteenth amendment's concept of personal liberty.[6] This right of privacy, being a fundamental right, requires a compelling state interest to justify any imposition of limitations.[7] Because the Court found no such state interest during the first trimester, it struck down as unconstitutional a criminal statute which prohibited abortions except when the mother's life was endangered.[8]

Since *Roe v. Wade*, the question has arisen whether this right to have an abortion encompasses a right for an indigent woman to

3. The allegations of those challenging legislation tending towards anti-abortion interests will be stated throughout this note with no attempt to ascertain their factual basis except insofar as reflected in judicial determinations. Some of the complexities of ascertaining whether the pro-life view of abortion is essentially religious will, however, be noted. *See* notes 64-67 *infra* and accompanying text.

4. 410 U.S. 113 (1973).

5. *Id.* at 163, 164.

6. *Id.* at 153.

7. *Id.* at 154-55.

8. *Id.* at 162-64; *see also* Doe v. Bolton, 410 U.S. 179 (1973).

have an abortion funded by Medicaid. Riders[9] to the federal appropriations bills for Medicaid for the fiscal years of 1977 through 1979 have strictly limited the instances in which abortions may be funded.[10] In fiscal year 1977, funding for abortions was limited by the Hyde Amendment[11] to those cases in which the mother's life would have been endangered by carrying the fetus to term.[12] For fiscal years 1978 and 1979, the funding was expanded to also include victims of rape or incest and instances in which carrying the fetus to term would have resulted in "long-lasting physical health damage to the mother."[13] In cases pending before the Supreme Court the constitutionality of these provisions has been challenged.[14]

The Court has previously passed on a state's right, as a participant in the Medicaid program,[15] to exclude elective abortions from

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9. A rider is a section or clause added to a legislative bill which changes or supplements the original purport.

10. Act of Oct. 18, 1978, Pub. L. No. 95-480, § 210, 92 Stat. 1567 (fiscal year 1979); Act of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460 (fiscal year 1978); Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1418 (fiscal year 1977).

11. Act. of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1418 (fiscal year 1977). The Hyde Amendment is a rider which provides: "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." *Id.*

12. *Id.*

13. Act of Oct. 18, 1978, Pub. L. No. 95-480, § 210, 92 Stat. 1567; Act of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460. These riders, which are identical, provide:

> None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and longlasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians."

Id. These riders are also often referred to as the Hyde Amendment, though Congressman Hyde does not support their broader categories for abortion funding.

14. McRae v. Califano, No. 76 Cir. 1804 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268); Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill.), *prob. juris. noted mem., sub nom.* Williams v. Zbaraz, 100 S. Ct. 447 (1979) (No. 79-4). The cases present both first and fifth Amendment challenges to Medicaid's restrictive funding of abortions. *See* notes 23-27 *infra* and accompanying text.

15. For an explanation of the relationship between the federal and state governments in the Medicaid program, *see* Note, *Abortion, Medicaid, and the Constitution*, 54 N.Y.U.L. REV. 120, 132-34 (1979).

its funding.[16] In *Maher v. Roe*[17] the Court upheld a state statute which limited Medicaid benefits for the first trimester abortions to those medically or psychiatrically necessary.[18] Opponents of the legislation challenged it as being violative of the Equal Protection Clause of the fourteenth amendment by its funding of childbirth but not abortion.[19] The Court, however, found "a basic difference between direct state interference with a protected activity [as was present in *Roe v. Wade*] and state encouragement of an alternative activity consonant with legislative policy."[20] Thus, since no suspect classes were involved,[21] all that was required was a rational relation to a legitimate state interest, which the Court found in the state's interest in the protection of potential human life.[22]

Since *Maher*, new challenges have been made to legislation denying Medicaid funds for abortions. These challenges have included both a new equal protection argument[23] and the claim of a violation of the Religion Clauses.[24] The more recent equal protection attack has pointed to the fact that while Medicaid funds all other medically necessary surgical procedures, it will only fund those medically necessary abortions which endanger a woman's life or threaten long

16. Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977). In *Beal*, the Court held that a state statute limiting abortions to those medically necessary, which included those threatening a woman's mental health, was not violative of the statutory obligations imposed upon the state by virtue of its participation in the Medicaid program. *Id.* at 443-47.

17. 432 U.S. 464 (1977).

18. *Id.* at 480.

19. *Id.* at 470.

20. *Id.* at 475. The Court drew the analogy that the state's inability to deny the constitutional right to a private education does not then foreclose the state from adopting a policy choice which favors public education by funding only it. *Id.* at 476-77.

21. *Id.* at 470.

22. *Id.* at 478-79.

23. *See* McRae v. Califano, No. 76 Civ. 1804, slip op. at 298-323 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268); Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill.), *prob. juris. noted mem., sub nom.* Williams v. Zbaraz 100 S. Ct. 447 (1979) (No. 79-4).

24. *See* McRae v. Califano, No. 76 Civ. 1804, slip. op. at 323-328 (E.D.N.Y. Jan. 15, 1980), *prob. juris noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268); Woe v. Califano, 460 F. Supp. 234 (S.D. Ohio 1978); Right to Choose v. Byrne, 165 N.J. Super. 443, 398 A.2d 587 (Super. Ct. Ch. Div. 1979). The Religion Clauses arguments were suggested at least as early as April, 1975, when the U.S. Commission on Civil Rights argued that a constitutional amendment designed to nullify Roe v. Wade and Doe v. Bolton would create a conflict with the first amendment. U.S. COMMISSION ON CIVIL RIGHTS, CONSTITUTIONAL ASPECTS OF THE RIGHT TO LIMIT CHILDBEARING (1975).

lasting physical health damage.[25] Two district courts have found this practice violative of the Equal Protection Clause.[26] One of these two courts has also found the restrictive funding of abortions to unconstitutionally infringe upon the right of indigent women to the free exercise of religion.[27]

Legislation restricting Medicaid's funding of abortions is not the only type of abortion-related legislation which has been attacked on first amendment grounds. Opponents of laws regulating the performing of abortions have likewise argued a violation of the Religion Clauses.[28] This type of challenged legislation has, for example, required informed consent and a waiting period between the time a woman gives written consent and the time of her abortion.[29] An

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25. The argument rests upon the premise that medically necessary abortions are a broader class than those which threaten long lasting physical health damage to the pregnant woman. *See* Zbaraz v. Quern, 469 F. Supp. 1212, 1219-20 (N.D. Ill.), *prob. juris. noted mem., sub nom.* Williams v. Zbaraz, 100 S. Ct. 447 (1979) (No. 79-4).

26. *See* cases cited note 23 *supra.*

27. McRae v. Califano, No. 76 Civ. 1804, slip. op. at 328 (E.D.N.Y. Jan. 15, 1980) *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268).

28. *See* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172 (N.D. Ohio 1979); Womens Services v. Thone, 48 U.S.L.W. 2392 (D. Neb. Nov. 9, 1979).

29. *See* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1186 (N.D. Ohio 1979); Womens Services v. Thone, 48 U.S.L.W. 2392-2393 (D. Neb. Nov. 9, 1979). Among the provisions attacked in *Akron Center* were the following:

> 1870.05 NOTICE AND CONSENT
>
> A. No physician shall perform or induce an abortion upon an unmarried pregnant woman under the age of 18 years without first having given at least twenty-four (24) hours actual notice to one of the parents or the legal guardian of the minor pregnant woman . . . .
>
> 1870.06 INFORMED CONSENT
>
> A. An abortion otherwise permitted by law shall be performed or induced only with the informed, written consent of the pregnant woman . . . .
>
> B. In order to assure that the consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she . . . [has] been orally informed by her attending physician of the following facts . . . :
>
> . . . .
>
> 3. That the unborn child is a human life from the moment of conception . . . .
>
> 4. That her unborn child may be viable, and thus capable of surviving outside of her womb, if more than twenty two (22) weeks have elapsed from the time of conception . . . .
>
> 5. That abortion is a major surgical procedure . . . .
>
> . . . .
>
> 7. That numerous public and private agencies and services

Establishment Clause attack on such legislation raises the same issues as those presented with respect to legislation restricting the government's funding of abortions.[30]

The Religion Clauses

The Supreme Court has stated that the premise underlying the Religion Clauses is "that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[31] In attempting to determine the nature of the separation between government and religion intended by these clauses, the Court has investigated the history surrounding their drafting.[32] Though the intention is not easily gleaned from this history,[33] the Court in an early[34] consideration of the Establishment Clause concluded that neither the federal nor state governments "can pass laws which aid one religion, aid all religions, or prefer one

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> are available to assist her during her pregnancy and after the birth of her child if she chooses not to have the abortion . . . .

Arkon, Ohio, Ordinance 160-1978 (Feb. 28, 1978), *reprinted in Akron Center*, 479 F. Supp. at 1210-11 app.. Of these provisions, the court found sections 1870.05(A) and 1870.06(B) violative of due proces. *Akron Center*, 479 F. Supp. at 1201-03. Section 1870.06(A) was upheld. *Id.* at 1202.

30. The Free Exercise Clause issues differ somewhat between the two types of legislation because of their different effects. While a lack of govenmental funding may mean some indigent woman may be unable to obtain an abortion, the requirements of informed consent and a waiting period could only very indirectly have that same result. In Womens Services v. Thone, 48 U.S.L.W. 2392 (D. Neb. Nov. 9, 1979), the court rejected the argument that the requirements of informed consent and a waiting period deny the free exercise of religion on the ground that the absence of such requirements would not further the tenets of any religion. *Id.* at 2392.

In Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172 (N.D. Ohio 1979), the court made no finding as to whether the informed consent provision attacked therein violated the free exercise right because the court found the provision violative of a woman's right to privacy. *Id.* at 1203; *see also* note 29 *supra*.

31. McCollum v. Board of Educ., 333 U.S. 203, 212 (1948). Actually this was but one of three separate views amongst the Founding Fathers, and represented somewhat the middle ground. The other two were, first, that the church must be free from the state in order to avoid its corruption, and, second, that there must be a wall separating church and state in order to safeguard secular interests. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 816-17.

32. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 8-16 (1947); *Id.* at 31-43 (Rutledge, J., dissenting); McCollum v. Board of Educ., 333 U.S. 203, 244-48 (1948); Walz v. Tax Comm'n of New York, 397 U.S. 664, 681-87 (1970) (Brennan, J., concurring).

33. L. TRIBE, *supra* note 31, at 816-19.

34. Though early in the development of the doctrines of the Establishment Clause, the case was as recent as 1947. Everson v. Board of Educ., 330 U.S. 1 (1947). *See also* Reynolds v. United States, 98 U.S. 145, 163-64 (1879).

religion over another."[35] The Court has since sought to adopt a position of neutrality toward religion,[36] yet recognizing that the first amendment does not require in each and all respects a separation of church and state.[37]

In seeking to implement this requirement of neutrality the Court has developed a three-prong test. "[T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and third, must avoid excessive entanglement with religion. . . ."[38] Legislation tending to support anti-abortion interests allegedly fails all three of these tests, in addition to violating the Free Exercise Clause. First, such legislation has no secular purpose because it reflects, and is motivated by, a religious belief that the fetus is human.[39] Second, the legislation purportedly has both a primary effect which advances religion by putting the power and prestige of government behind one religious view of abortion, and a primary effect of inhibiting religion by burdening women in their religious and conscientious liberty to terminate an unwanted pregnancy.[40] Third, the legislation causes political division along religious lines, and hence, excessive entanglement between government and religion.[41] The Free Exercise Clause is also allegedly violated by legislation restricting the Medicaid

35. Everson v. Board of Educ., 330 U.S. 1, 15 (1947). Mr. Chief Justice Burger later expressed some doubt as to the accuracy of this statement. Walz v. Tax Comm'n of New York, 397 U.S. 664, 670 (1970).

36. *See, e.g.*, School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

37. *See* Zorach v. Clauson, 343 U.S. 306, 312 (1952); *see also* Walz v. Tax Comm'n of New York, 397 U.S. 664, 670 (1970).

38. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 773 (1973).

39. *See* McRae v. Califano, No. 76 Civ. 1804, slip op. at 323 (E.D.N.Y. Jan 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268); Womens Services v. Thone, 48 U.S.L.W. 2392 (D. Neb. Nov. 9, 1979); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1189 (N.D. Ohio 1979); Right to Choose v. Byrne, 165 N.J. Super. 443, 398 A.2d 587, 595 (Super. Ct. Ch. Div. 1979).

40. *See* McRae v. Califano, No. 76 Civ. 1804, slip op. at 324-25 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268); Womans Services v. Thone, 48 U.S.L.W. 2392 (D. Neb. Nov. 9, 1979); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1194 (N.D. Ohio 1979).

41. *See* McRae v. Califano, No. 76 Civ. 1804, slip op. at 325 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1195 n.15 (N.D. Ohio 1979); Right to Choose v. Byrne, 165 N.J. Super. 443, 398 A.2d 587, 595 (Super. Ct. Ch. Div. 1979).

funding of abortions because it denies indigent women the ability to make a religious or conscientious choice to have an abortion.[42]

THE SECULAR PURPOSE REQUIREMENT

Opponents of legislation restricting the funding or performance of abortions argue that such legislation does not possess the secular legislative purpose required by the Establishment Clause. The argument that these abortion laws lack the required purpose begins by seeking to show that the purpose of the laws is that of protecting the lives of full human beings.[43] The belief that the fetus is a full human being, the argument continues, is a religious belief, and as such, the purpose of these laws is rooted in religious belief.[44] Therefore, challengers contend, because there is no secular justification for the legislation, it has no secular purpose.

Central to this argument is the proposition that when legislation has a purpose rooted in religious beliefs and values, and the legislation is the result of support from religious groups, the legislation has no secular purpose. The inquiry into religious motivation called for by this proposition finds support as being pertinent to the search for a secular purpose in a statement made by Justice Brennan:

> Appellant has raised doubt that the purpose ascribed to the provision by the State is, in fact, its actual purpose. . . . Although the State's ascribed purpose is conceivable, . . . if it were necessary to address appellant's contention we would determine whether that purpose was, in fact, what the provision's framers sought to achieve. In contrast to the general rule that legislative motive or purpose is not a relevant inquiry in determining the constitutionality of a statute, . . . our cases under the Religion Clauses have uniformly held such an inquiry necessary because under the Religion Clauses government is generally prohibited from seeking to advance or inhibit religion.[45]

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42. *See* McRae v. Califano, No. 76 Civ. 1804, slip op. at 326-28 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268); Right to Choose v. Byrne, 165 N.J. Super. 443, 398 A.2d 587, 596 (Super. Ct. Ch. Div. 1979).

43. *See* cases cited note 39 *supra.*

44. *See* cases cited note 39 *supra.*

45. McDaniel v. Paty, 435 U.S. 618, 636 n.9 (1978) (Brennan, J., concurring) (citations omitted). A determination as to secular purpose was unnecessary because the case was decided on free exercise grounds. *Id.* at 629.

Similarly, with respect to the abortion legislation, the inquiry into the legislative motive is arguably necessary in order to ascertain whether a plausible secular purpose is, in fact, the actual purpose.

Those challenging abortion legislation that reflects anti-abortion concerns have argued that the actual purpose of such legislation is not that of protecting potential human life, as the Supreme Court has hypothesized.[46] Rather, opponents contend, the purpose is to protect what is viewed as actual human life.[47] Thus, on the basis of this claim that a plausible secular purpose is not the actual purpose, Justice Brennan's statement[48] tends to indicate that an investigation of the legislative motive is appropriate.

Two cases[49] in particular, cited by Justice Brennan,[50] could be interpreted as supporting the need for an examination of the legislative motive for abortion legislation. In *Epperson v. Arkansas*,[51] the Court looked to the motivation of a statute which prohibited the teaching of evolution in the public schools.[52] Finding "no doubt that the motivation for the law was . . . to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man,"[53] the Court held the statute to be in violation of the Establishment Clause.[54] Likewise, motivation was considered in *McGowan v. Maryland*,[55] in which Sunday Closing Laws were challenged as violative of the Establishment Clause. The challengers

46. The Supreme Court in both Maher v. Roe, 432 U.S. 464 (1977), and Roe v. Wade, 410 U.S. 113 (1973), recognized "the State's strong interest in protecting the potential life of the fetus." Maher, 432 U.S. at 478; Roe, 410 U.S. at 154, 162.

47. Plaintiffs' First Amendment Brief at 234, McRae v. Califano, No. 76 Cir. 1804 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268). The other first amendment-abortion cases do not disclose whether challengers sought to distinguish between the purpose they alleged and this recognized state interest.

48. *See* text accompanying note 45 *supra*.

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

50. McDaniel v. Paty, 435 U.S. 618, 636 n.9 (1978) (Brennan, J., concurring).

51. 393 U.S. 97 (1968).

52. *Id.* at 107-09.

53. *Id.* at 109.

54. *Id.* The Court looked to the popular movement in making its determination that "fundamentalist sectarian conviction was and is the law's reason for existence." *Id.* at 108. A typical advertisement read: "All atheists favor evolution. If you agree with atheism vote against Act No. 1. If you agree with the Bible vote for Act No. 1. . . . Shall conscientious church members be forced to pay taxes to support teachers to teach evolution which will undermine the faith of their children?" *Id.* at 108, n.16.

55. 366 U.S. 420 (1961).

alleged that the purpose of the laws was to encourage church attendance and membership.[56] The Court, after an examination of the history of Sunday Closing Laws,[57] found that though the original laws "were motivated by religious forces,"[58] the laws had later obtained the secular purpose of setting aside a day of rest and recreation.[59] Thus, opponents of certain abortion legislation argue, just as the Supreme Court has previously sought to ascertain legislative motive in its Establishment Clause considerations, such a determination is required with respect to abortion laws.

The challengers contend that the motive underlying laws which restrict the funding or performance of abortions is found in the opinion that the fetus is a person, and that this opinion is a religious belief.[60] Generally, defenders of the legislation would not deny that the opinion of the fetus as a person was a motivating factor.[61] The basis for claiming this opinion to be a religious belief rests in the observation that the personhood of the fetus is not a scientific question, but rather a question of values. Challengers have argued, for example, that "it is axiomatic that science cannot decide when the

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56. *Id.* at 431.

57. *Id.* at 431-40.

58. *Id.* at 431.

59. *Id.* at 449.

60. *See* McRae v. Califano, No. 76 Civ. 1804, slip op. at 323 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae 48 U.S.L.W. 3514 (1980) (No. 79-1268); Womens Services v. Thone, 48 U.S.L.W. 2392 (D. Neb. Nov. 9, 1979); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1189 (N.D. Ohio 1979).

61. The ordinance under attack in Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172 (N.D. Ohio 1979) was prefaced by a number of "whereas" clauses, one of which stated:

> WHEREAS, it is the finding of Council that there is no point in time between the union of sperm and egg, or at least the blastocyst stage and the birth of the infant at which point we can say the unborn child is not a human life, and that the changes occurring between implantation, a six-weeks embryo, a six-month fetus, and a one-week-old child, or a mature adult are merely stages of development and maturation; . . . .

Id. at 1189.

Congressional speakers in behalf of the strict federal restrictions on Medicaid's funding of abortion were similarly unsecretive of their view of the fetus. Congressman Hyde, though denying that his view was essentially religious, clearly believed the fetus to be a person:

> What is it that is being aborted? Is it a chicken? Is it a vegetable? . . . No, it is a human being.
>
> Theology does not say it is a human being; biology says it is a human being. Theology does not say, "Thou shalt not kill a fetus"; it is biology that says, "Thou shall not kill a fetus".

123 Cong. Rec. H6084 (daily ed. June 17, 1977).

value of 'person' should be ascribed to prenatal life. . . . Science deals in discovery and description of objective data. Value is derived from that which a person holds to be of importance, in this case of ultimate importance."[62] Pertinent to this line of reasoning, Justice Frankfurter stated:

> The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation. . . .[63]

Thus, the argument concludes, the transcendental nature of the belief that the fetus is human makes it religious and puts the legislation it motivates outside the sphere of legitimate legislative concern.

An Analysis of the Secular Purpose Argument

In the decisions addressing this argument the courts have not been convinced that the opinion that the fetus is a person is solely a religious belief.[64] Scientific-philosophical reasons for this view of the

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62. Plaintiffs' First Amendment Brief at 250-51, McRae v. Califano, No. 76 Civ. 1804 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268). Plaintiffs quoted from the trial testimony of Dean Wogman: "I think I speak for virtually all theologians and ethicists at this point in saying a descriptive science cannot establish the value of an entity. In order to establish the value of an entity you have to establish its relationship to ultimate reality." Plaintiffs' Brief at 251.

63. McGowan v. Maryland, 366 U.S. 420, 465-66 (1961) (Frankfurter, J., concurring).

64. McRae v. Califano, No. 76 Civ. 1804, slip op at 323-24 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268); Womens Services v. Thone, 48 U.S.L.W. 2392 (D. Neb. Nov. 9, 1979); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1189 (N.D. Ohio 1979); Right to Choose v. Byrne, 165 N.J. 443, 398 A.2d 587, 595 (Super. Ct. Ch. Div. 1979).

In *McRae*, the court stated:

> That the enactments reflect, if imperfectly, one religious view, if it were true, would not be decisive. The enactments deal with human conduct, and that conduct in an area related to human life. They reflect a traditionalist view more accurately than any religious one, a view that was reflected in most state statutes of a generation ago. The purpose of the "Hyde amendments" [is] the prevention of abortions, not an identifiably religious purpose, or one that became religious because, after 1973, the most vigorous spokesman for it put their case in religious terms, and grounded them in religious reasons.

McRae, slip op. at 323-24.

fetus also being possible,[65] there has generally been a failure to prove that religious, as opposed to philosophical, beliefs provided the actual motivation.[66] Given the possibility, however, of a greater showing of the involvement of religious beliefs, or different inferences being drawn from the facts which have been adduced,[67] some broader considerations become necessary.

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65. A noteworthy example of non-religious reasons being advanced in behalf of the personhood of the fetus is found in the West German abortion decision. Judgment of Feb. 25, 1975, 39 BVerfGE 1, *translated in* 9 J. MAR. J. PRAC. & PROC. 605 (1976) (trans. by R. Jonas and J. Gorby) [hereinafter Translation]. The case arose after the West German legislature passed laws which would allow abortions during the first twelve weeks of pregnancy, and abortions thereafter when the continuation of the pregnancy would present a serious threat to a woman's health. *See* Translation at 611-12. These laws were challenged as being violative of the German constitutional provision: "Everyone has a right to life . . . ." *See* Translation at 638. The German Court in seeking to ascertain whether the fetus fit within the category of "everyone", stated:

> Life, in the sense of historical existence of a human individual, exists according to definite biological-physiological knowledge, in any case, from the 14th day after conception (nidation, individuation) . . . . The process of development which has begun at that point is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of human life. The process does not end even with birth; the phenomena of consciousness which are specific to the human personality, for example, appear for the first time a rather long time after birth. Therefore, the protection of [the constitutional provision] cannot be limited either to the "completed" human being after birth or to the child about to be born which is independently capable of living. The right to life is guaranteed to everyone who "lives"; no distinction can be made here between various stages of the life developing itself before birth, or between unborn and born life.

Translation at 638.

66. *See* cases cited note 64 *infra*.

67. For example, Judge Dooling makes the factual determination that "the pro-life effort, of which the organized Roman Catholic effort has been the most active component, has made use of the political process, and played a significant part in bringing about Congressional legislation on the subject [of the funding of abortions.]" McRae v. Califano, No. 76 Cir. 1804, slip. op. at 281 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268). He nevertheless concludes that the pro-life view is more of a traditional view, than a religious one. *See* note 64 *supra*. Some, on the other hand, might contend that if a church has played an active role in the pro-life movement, at least that church's view of the fetus is a religious one. Under this reasoning, a determination would be required as to whether the view held by any active church was predominant. If so, then the predominant view would be religious.

This reasoning, however, raises some very complex questions concerning what makes a certain belief religious. It is entirely possible that a church might claim divine revelation for the proposition that to murder a person is sinful, but claim no such revelation for the question of whether the fetus is a person. The church might then

Two fundamental questions, not yet directly addressed by the Supreme Court, are raised by the argument that the challenged abortion legislation has no secular purpose. These are the related questions of what distinguishes a secular purpose from a non-secular purpose and what role does legislative motivation have in the determination of a secular purpose. Opponents' arguments, if they are to succeed, must obtain the Court's acceptance of two propositions: first, that underlying religious beliefs and religious support are alone sufficient to render a purpose non-secular; second, that an inquiry into legislative motivation is then permissible for the purpose of finding such religious belief and support.

The purpose argued to be non-secular in the abortion context differs significantly from the non-secular purposes which the Supreme Court has thus far considered. Most of the Establishment Clause cases that the Court has addressed have dealt with education.[68] In such cases, the alleged non-secular purpose generally would be that of aiding, in one way or another, the advancement of religious beliefs through teaching.[69] In other cases, purposes such as the encouragement of Sunday worship,[70] or the aiding of churches through tax exemptions,[71] were alleged.

The purpose, however, of the abortion legislation being attacked is contended to be the protection of what is viewed as actual human beings.[72] As such, the purpose is not alleged to be the advancement of religious belief or the encouragement of worship. Religious belief is implicated only by being the basis from which the concern for the fetus has arisen. Thus, the question presented in this context is whether purposes which are not orientated towards the advance-

look to philosophic or scientific arguments concerning the personhood of the fetus. It could thereafter conclude that either the fetus is a person, or if there is doubt, it is better to consider the fetus as such in order not to transgress the command not to kill. Though the importance of the question of the personhood of the fetus would be rooted, for that church, in a religious belief, the answer would not be so clearly religious. Arguably at least, the church has merely adopted an interpretation of scientific and philosophic considerations. Congressman Hyde, for similar reasons, has argued that his view of the fetus is non-religious. *See* note 61 *supra*.

68. *See, e.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971); Epperson v. Arkansas, 393 U.S. 97 (1968); Board of Educ. v. Allen, 392 U.S. 236 (1968); School Dist. v. Schempp, 374 U.S. 203 (1963); Everson v. Board of Educ., 330 U.S. 1 (1947).

69. *See* generally cases cited in note 68 *supra*.

70. McGowan v. Maryland, 366 U.S. 420, 431 (1961).

71. Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970).

72. *See* text accompanying note 43 *supra*.

ment of religious belief or worship are non-secular by virtue of their having been motivated by religious belief.

The motivational aspect of the present claim of no secular purpose is further disclosed by the Supreme Court's recognition of a strong state interest in the protection of the potential life of the fetus[73] and in the encouragement of childbirth.[74] Though litigants have implicitly argued that this state interest recognized by the Court is legitimate only when the state views the fetus as potential, not actual, human life,[75] this proposition is not supported by the Court's decisions. The Court's emphasis has been that since at least potential life is involved, the state has a legitimate interest in the fetus.[76] In the cases in which this state interest was recognized,

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73. Maher v. Roe, 432 U.S. 464, 478 (1977); Roe v. Wade, 410 U.S. 113, 154, 162 (1973).

74. Beal v. Doe, 432 U.S. 438, 446 (1977); Poelker v. Doe, 432 U.S. 519, 521 (1977).

75. *See* notes 46-47 *supra* and accompanying text.

76. In Roe v. Wade, 410 U.S. 113 (1973), the Court, in considering the state's position that the fetus is human life, stated:

> Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert the interests beyond the protection of the pregnant woman alone.

Id. at 150 (emphasis in original). Whether the fetus is more than potential human life, the Court refused to decide:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Id. at 159. In that the Court refused to decide whether the fetus is actual human life, the implications of the Court's position cannot plausibly be that legislators must decide that the fetus is not actual human life, but only potential life, before the legislation they enact represents a legitimate state interest.

In McRae v. Califano, No. 76 Civ. 1804, (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268), Judge Dooling found the secular purpose argument to be foreclosed at this point:

> The underlying difficulty with the plaintiffs' argument that there is here no clearly secular legislative purpose . . . is that the argument treats *Roe v. Wade* as removing the issue from the field of secular action, and as forbidding reference to a purpose conceptionally at war with *Roe v. Wade* as a secular purpose. While *Roe v. Wade* argues for the measures' invalidity under the Fifth Amendment at least, it does not make the enactments any less secular in their legislative purpose. On its face such legislation, marking explicit disapproval of abortion in most cases, reflects a general and long held social view . . . .

McRae, slip op. at 324.

however, the Court did not consider the claim of an Establishment Clause violation by virtue of the impermissible intervention of religious belief. Thus, the question restated becomes whether legislation that represents an otherwise legitimate state interest can fail the secular purpose test because religious beliefs have been a primary motivational factor.

The Court has not yet given a clear answer to this question. Though the previously noted statement by Justice Brennan[77] could be interpreted as indicating that underlying religious beliefs could render a purpose non-secular, the cases which he cited do not clearly represent this proposition.[78] In the cited cases of *Epperson v. Arkansas* and *McGowan v. Maryland*, the Court did consider religious motivation in its determination as to secular purpose.[79] However, the consideration was not necessarily for the purpose of discovering religious motivation *per se*.[80] The Court's investigation alternatively

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77. *See* text accompanying note 45 *supra*.

78. The cases cited by Justice Brennan were Epperson v. Arkansas, 393 U.S. 97, 109 (1968), McGowan v. Maryland, 366 U.S. 420, 431-45 (1961), and Grosjean v. American Press Co., 297 U.S. 233, 250-51 (1936). McDaniel v. Paty, 435 U.S. 618, 636 n.9 (Brennan, J. concurring). For a discussion of *Grosjean*, *see* United States v. O'Brien, 391 U.S. 367, 384-85 (1968).

79. Epperson v. Arkansas, 393 U.S. 97, 109 (1968); McGowan v. Maryland, 366 U.S. 420, 431 (1961). *See* notes 51-59 *supra* and accompanying text.

80. *See* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1190-94 (N.D. Ohio 1979).

The text presupposes that it is possible to draw a meaningful distinction between religious motivation and nonsecular purposes. This distinction would parallel the difference between the question "what is the law intended to do?" and the question "why did the law's supporters value the intended result?" The secular purpose test might be identified, consistent with its application to the present, with the former question and its concern limited to the inquiry of whether a law is directly or indirectly intended to aid in the propagation of religious beliefs or the advancement of religious institutions. *See* text accompanying notes 68-71 *supra*, and 82-83 *infra*; *see also* School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (indicating that the question under the secular purpose test is whether the purpose of the law is to advance religion). Religious motivation could be identified with the second question, and as such, a determination as to whether a law is religiously motivated would be concerned with identifying not the intended effect of a law, but rather the nature of the reasons why legislators desired the intended effect. If such distinction is drawn, then although religious motivation might be probative of a non-secular purpose when the nature of a law's purpose is uncertain, it would not necessarily imply such a purpose. This note argues that there are at least two problems with the contrary position that religious motivation is *per se* impermissible. First, because of the difficulty in arriving at a judicial definition of religion, to deem religious motivation impermissible would make the identification of legitimate motives for legislative action difficult, if not impossible. *See* text accompanying notes 184-95 *infra*. Second, such treatment of religious motives would do violence to the framers' intent. *See* text accompanying notes 196-208 *infra*.

could be understood as an attempt to discern whether there were any plausible secular purposes.[81] In both cases the alleged non-secular purposes involved the advancement of religious beliefs or worship. In *Epperson v. Arkansas*, a statute prohibiting the teaching of evolution was alleged to be for the purpose of preventing the teaching of a theory which denied the Genesis story of creation.[82] In *McGowan v. Maryland*, a Sunday Closing Law was alleged to be for the purpose of encouraging church membership and worship.[83] Such purposes on their face clearly are concerned with the advancement of religious beliefs and worship. Thus, a consideration of the legislative motives would be pertinent to a determination of whether these facially religious purposes were, in fact, the actual purposes.

The abortion legislation being challenged, however, does not have a facially religious purpose. The purpose of protecting the fetus or encouraging childbirth is claimed to be non-secular only by virtue of the motivation provided by the allegedly religious belief that the fetus is a person. Therefore, the religious motivation underlying abortion legislation is relevant only if the proposition is accepted that a purpose, not facially religious, could be deemed to be non-secular by the fact that the motivation for that purpose found its source in religious beliefs.

To adopt this proposition, however, would be to create an exception to the fundamental principle that the Court "will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive."[84] Though Justice Brennan suggests that this excep-

81. *See* note 80 *supra*. *See also* L. TRIBE, *supra* note 31, at 835-37.

82. *See* Epperson v. Arkansas, 393 U.S. 97, 109 (1968).

83. *See* McGowan v. Maryland, 366 U.S. 420, 431 (1961).

84. United States v. O'Brien, 391 U.S. 367, 383 (1968). The Court reasoned:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators 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.

Id. at 383-84. The inquiry into motives sought with respect to abortion legislation is

tion has already been made,[85] the cases he cites do not clearly represent this.[86] Therefore, not yet directly answered are the questions of whether a statute not facially presenting a religious purpose can be declared to have no secular purpose because of underlying religious beliefs, and whether an investigation of legislative motives is then appropriate to ascertain the presence of such beliefs.[87]

THE NON-RELIGIOUS EFFECT REQUIREMENT

The Establishment Clause requires not only that a law have a secular purpose, but also that it have "a primary effect that neither advances nor inhibits religion."[88] This test is independent of the secular purpose requirement. Thus, it is possible, in fact not uncommon, for a law to have a secular purpose and yet an effect which advances or inhibits religion.[89] Though the test is stated as prohibiting "primary" religious effects, actually the test is stricter than the term "primary" indicates. The inquiry may continue past a primary secular effect to determine whether there is a non-primary direct effect of advancing religion.[90] Only effects which remotely or incidentally advance or inhibit religion are clearly safe.[91]

The requirement of non-religious effect cuts two ways. The effect cannot advance religion and it cannot inhibit religion. As such, this test embodies the co-guarantees of the Religion Clauses and emphasizes that the prohibitions against either establishing religion or denying its free exercise are ultimately concerned with religious liberty.[92] The Establishment Clause works together with the Free Ex-

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perhaps even more problematic than the inquiry sought in *O'Brien*. In *O'Brien* the Court was asked to determine whether the "purpose" of Congress was 'to suppress freedom of speech.'" *Id.* at 382-83. The purpose of the abortion laws being challenged, however, is quite clear, *i.e.*, to discourage abortions. The controversy under the Establishment Clause, then, concerns why this purpose was important to the legislatures who enacted such laws. In that even within the value structure of any given legislator there may be numerous influences, any such inquiries might prove to be extremely complex.

85. *See* text accompanying note 45 *supra*.

86. *See* text accompanying notes 77-83 *supra*; *see also* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1189-94 (N.D. Ohio 1979).

87. Some implications of these questions are considered below. *See* notes 183-208 *infra* and accompanying text.

88. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 774 (1973).

89. *See, e.g., id.*; Tilton v. Richardson, 403 U.S. 672, 678-79, 682-84 (1971).

90. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 783 n.39 (1973).

91. L. TRIBE, *supra* note 31, at 840.

92. *See* School Dist. v. Schempp, 374 U.S. 203, 256 (1963) (Brennan, J., concur-

ercise Clause to preserve religious liberty in that the State is just as unable to disparage one religion by establishing another as it is to interfere with the free exercise of a religion.[93]

The overlap of the Free Exercise Clause with the requirement that a law not have an effect which inhibits religion is readily apparent. To have an effect which inhibits a religion is to deny the free exercise of that religion. Thus, the argument that some abortion legislation has an effect of inhibiting religion will be left, not inappropriately, to the discussion of the argument that the legislation impermissibly interferes with the free exercise of religion.[94]

The Argument of a Religious Effect

Those attacking the constitutionality of laws restricting the funding or performance of abortions have contended that such laws have the effect of advancing one religious view of abortion.[95] This effect purportedly results because through such laws the government gives symbolic support to the religious view that the fetus is a person. Further, challengers assert, such laws have the effect of coercing pregnant women into conformity with this religious view.[96]

Underlying the requirement that a law have an effect which does not advance religion is the principle that the Establishment Clause prohibits the state from becoming actively involved in religious activity.[97] Thus, public school facilities cannot be used for religious education.[98] Nor can a state or school board require daily Bible readings or prayers in the schools, even though students who

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93. *See* note 92 *supra.*

94. *See* notes 140-82 *infra* and accompanying text.

95. *See* McRae v. Califano, No. 76 Civ. 1804, slip op. at 324-25, (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268); Womens Services v. Thone, 48 U.S.L.W. 2392 (D. Neb. Nov. 9, 1979); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1194-95 (N.D. Ohio 1979).

96. *See, e.g.*, McRae v. Califano, No. 76 Civ. 1804, slip op. at 324-325 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268).

97. Chief Justice Burger stated: "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Comm'n of New York, 397 U.S 664, 668 (1970).

98. Illinois *ex. rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948). The Court found the use of the school's facilities for voluntary religious classes "beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." *Id.* at 210.

do not wish to participate are excused.[99] Likewise, financial assistance which works as an incentive to parents to send their children to sectarian schools is prohibited because of the effect of advancing the religious mission of those schools.[100] Even the federal financing of a structure which twenty years in the future might be used for religious purposes is unconstitutional because of the effect it might have for advancing religion.[101]

Challengers have contended that by subjecting legislation restricting the funding or performance of abortions to this close scrutiny, such legislation is seen to have the effect of advancing one religious view of abortion. In one case litigants noted the Congressional concern over which way the record would stand in the abortion debate and alleged that the sponsors of the legislation were concerned not with its impact, but rather with principles of life and death, as well as legitimizing their own religious belief.[102] The litigants contended that pro-choice theologians saw their religious beliefs deprecated and perceived the law as advancing the tenets of an opposing religion, and that this signaled an impermissible effect.[103] Therefore, because the issue was perceived as religious, state entanglement with that issue destroyed the required neutrality and impermissibly put the power and prestige of government behind the religious belief that the fetus is a person.[104]

This symbolic impact is not the only alleged prohibited effect of legislation embodying anti-abortion interests for it also coerces pregnant women into conformity with one religious view of abortion.[105] Due to the restrictions on the Medicaid funding of abortion, many in-

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99. School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

100. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 786 (1973).

101. Tilton v. Richardson, 403 U.S. 672, 683 (1971).

102. Plaintiffs' First Amendment Brief at 268-69, McRae v. Califano, No. 76 Civ. 1804 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268).

103. *Id.*

104. In Engel v. Vitale, 370 U.S. 421 (1962), the Court stated:

> The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office.

Id. at 429-30.

105. *See, e.g.*, Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1194 (N.D. Ohio 1979).

digent women are discouraged, and at times prevented, from obtaining an abortion. As such, just as tuition grants are an impermissible incentive to parents to sent their children to sectarian schools,[106] opponents contend that the Medicaid funding of only childbirth works as an impermissible incentive to conform to the state-sponsored religious view and to forego the abortion choice.[107]

An Analysis of the Religious Effect Argument

The primary obstacle to arguing that abortion-related legislation advances religion is the difficulty in showing how such legislation tends to cause anyone to adopt any religious belief.[108] In other words, the problem is to show that there is more than an incidental or remote advancement of religion in any identifiable way. Challengers have sought to show such an advancement by contending, first, that there was a legislative attempt to use the legislation to symbolically take a religious stand on the abortion issue, and, second, that the legislation has provided an incentive to women to conform their conduct to this religious view.

Opponents to the legislation restricting the Medicaid funding of abortion have contended that there existed a Congressional concern to legitimatize one religious view of abortion by the enactment of the legislation, and that therefore the legislation represents a symbolic preference for that religious view.[109] However, because the legislation does not on its face implicate religion,[110] the question of whether an inquiry into legislative motivation is appropriate becomes once again a threshold question. If such an inquiry is not permissible for the purpose of determining whether an alleged im-

106. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 786 (1973).

107. *See, e.g.*, Plaintiffs' First Amendment Brief at 274, McRae v. Califano, No. 76 Cir. 1804 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268).

108. In the decisions rendered addressing arguments that abortion-related legislation advances religion, the courts rejected the arguments primarily on the ground that such legislation would have only a remote effect, if any, of causing anyone to adopt any religious beliefs. Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1194-95 (N.D. Ohio 1979); Womens Services v. Thone, 48 U.S.L.W. 2392 (D. Neb. Nov. 9, 1979); cf. McRae v. Califano, No. 76 Civ. 1804, slip op. at 324-25 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W 3514 (1980) (No. 79-1268) (The court found the conduct exacted by the law to be the traditional submission to childbirth and that "no connection to establishmentarianism is present in the kind of effect on conduct that the enactments were intended to have." *Id.*).

109. *See* notes 102-03 *supra* and accompanying text.

110. *See* notes 11 and 13 *supra.*

permissible motive was present, then the claim of a religious symbolic effect is foreclosed. Thus, though it might be argued that laws reflecting an anti-abortion sentiment put the power and prestige of government behind one view of abortion, there is no basis for finding this view to be a religious view without delving into legislative motivation.

However, even if such a Congressional concern were to be taken into account, there still may not be more than an incidental or remote effect of advancing religion. Only those who were aware of the nature of the Congressional debates would have any knowledge of any religious beliefs that were involved. Further, mere knowledge of any underlying religious concerns that existed in Congress, or even of a Congressional attempt to take a symbolic stance, would very likely have little tendency to advance the same beliefs. Thus, the effect of any such symbolic Congressional stance may be very limited.

Similar problems exist with the argument that the incentive to forego an abortion provided by the legislation which prohibits Medicaid from funding it works to advance religion. While it may be true that some women will have to forego an abortion because Medicaid will only fund childbirth, this fact alone will not advance a religious belief about abortion in those women. Indeed, they probably would not know that any religious concern was present with respect to the enactment of the legislation. The contention, then, in essence is that the sole fact that women may have to forego the abortion choice in itself advances religion. A woman by making the choice to forego abortion is thereby acquiescing in "state-sponsored religion."[111]

To speak of abortion legislation as "state-sponsored religion," however, is to again implicate legislative motivation. Apart from such motivation, the legislation at most discloses a state-sponsored preference for childbirth. In order, then, to argue that these laws advance religion the premise would have to be accepted that religious motivation for a statute is sufficient to render the implementation of the dictates of the statute an advancement of religion, regardless of whether the statute has the effect of prompting any one to adopt the religious beliefs which provide the motivation.

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111. *See, e.g.*, Plaintiffs' First Amendment Brief at 270, 274, McRae v. Califano, No. 76 Civ. 1804 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268).

The Supreme Court has not yet addressed such an argument. Most often, the claim of an effect advancing religion has pointed to the financing, directly or indirectly, of the teaching or propagation of religious beliefs.[112] The Court in evaluating the effects of such financing has indeed employed a very close scrutiny.[113] However, even in the midst of such claims, the Court has recognized that the separation of church and state is not required in all respects.[114]

A finding, though, that legislation restricting the funding or performance of abortion can advance religion, would require a new conceptualization of the prohibition against laws advancing religion. The prohibition would have to be expanded to include laws which do not work towards the propagation of religious belief. As with the inquiry into whether these laws have a secular purpose, the inquiry into legislative motivation would have to be deemed appropriate in order for religion to be implicated at all.

THE REQUIREMENT OF NO EXCESSIVE ENTANGLEMENT

Similar to the other Establishment Clause requirements, the prohibition against government becoming excessivly entangled with religion is based upon the proposition that both religion and government work best when free from the others' interference.[115] The Founding Fathers knew of the strife that results when religious sects seek to establish absolute supremacy.[116] James Madison wrote: "Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all differences in Religious opinions."[117] Recognition is given to these concerns of the Founding Fathers by the requirement that there be no excessive entanglement between government and religion.

The Argument of Excessive Entanglement

Opponents to legislation reflecting anti-abortion interests contend that such legislation has resulted in the excessive entangle-

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112. Such financing may be in the form of aid to church-related schools. *See e.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson, 403 U.S. 672 (1971). Alternatively, the financing might be in the form of religious activities in the public schools. *See, e.g.*, School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

113. *See, e.g.*, note 101 *supra* and accompanying text.

114. *See* Zorach v. Clausen, 343 U.S. 306, 312 (1952).

115. Illinois *ex. rel.* McCollum v. Board of Educ., 333 U.S. 203, 212 (1948).

116. *See* Everson v. Board of Educ., 330 U.S. 1, 8-9 (1947).

117. J. Madison, Memorial and Remonstrance Against Religious Assessments, II Madison 183, *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 69 app. (1947).

ment of religion with the legislative process.[118] Religious groups have allegedly entangled themselves in the political process, pressuring for the enactment of anti-abortion legislation.[119] As such, challengers argue, the resulting divisiveness is within the scope of that which the requirement of no excessive entanglement prohibits.

The Supreme Court has noted the danger of political divisiveness.[120] In *Lemon v. Kurtzman*,[121] in which statutes involving state aid to church-related schools were challenged, the Court stated:

> Ordinary political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was designed to protect. . . . The potential divisiveness is a threat to the normal political process. . . . To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government.[122]

Challengers of abortion-related legislation have argued that the political divisiveness resulting from the religious concern on the abortion issue fits squarely within the description given in *Lemon*.

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118. *See* McRae v. Califano, No. 76 Civ. 1804, slip op. at 325-26 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268); Womens Services v. Thone, 48 U.S.L.W. 2392 (D. Neb. Nov. 9, 1979); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1195 n.15 (N.D. Ohio 1979); Right to Choose v. Byrne, 165 N.J. Super. 443, 398 A.2d 587, 595 (Super. Ct. Ch. Div. 1979).

119. *See generally* McRae v. Califano, No. 76 Civ. 1804, slip op. at 241-80 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268).

120. Meek v. Pittenger, 421 U.S. 349, 372 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 794-98 (1973); Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971); *see also* Walz v. Tax Comm'n of New York, 397 U.S. 664, 695 (1970) (Harlan, J., concurring).

121. 403 U.S. 602 (1971).

122. *Id.* at 622-23 (citations omitted).

Organized religion, the litigants argue, intervened in behalf of legislation embodying anti-abortion interests and diligently worked towards its enactment.[123] Strong opposition developed amongst various groups, including pro-choice religious groups.[124] As a result, in conjunction with threats of opposition at the polls to opponents of such legislation,[125] abortion has allegedly become a "single issue" election concern drawing attention from other important and urgent legislative issues.

An Analysis of the Excessive Entanglement Argument

The success of the claim that legislation tending towards anti-abortion interests involves excessive entanglement between government and religion depends upon the acceptance of the proposition that political divisiveness is sufficient by itself to show impermissible entanglement.[126] The carrying out of the provisions of such legislation does not involve any entanglement between government and religious institutions. In this way, the claim of entanglement here differs from those which the Supreme Court has thus far considered.

The Court has addressed the question of excessive entanglement only in the context of the institutional entanglement of government and religion.[127] In such a context the requirement that there be no excessive entanglement works to prevent the government from adopting a role where it would have to maintain a continuing surveillance of religious institutions and their activities.[128] The reason such a surveillance would be needed at all would be to assure

123. *See, e.g.*, Right to Choose v. Byrne, 165 N.J. Super. 443, 398 A.2d 587, 595 (Super. Ct. Ch. Div. 1979).

124. *See, e.g.* Plaintiff's First Amendment Brief at 291, McRae v. Califano, No. 76 Cir. 1804 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268).

125. *See, e.g.*, Right to Choose Byrne, 165 N.J. Super. 443, 398 A.2d 587, 596 (Super. Ct. Ch. Div. 1979).

126. The rejection of this proposition in Womens Services v. Thone, 48 U.S.L.W. 2392 (D. Neb. Nov. 9, 1979), and Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1195 n.15 (N.D. Ohio 1979), led the courts to find against the entanglement argument.

127. *See, e.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970).

128. In Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970), the Court stated: "[T]he questions are whether the involvement is excessive, and whether it is continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Id.* at 675. *See* Meek v. Pittenger, 421 U.S. 349, 371 (1975); Lemon v. Kurtzman, 403 U.S. 602, 614-22 (1971).

that some benefit conferred by the government on the institution would not be used for the advancement of religion.[129] Political divisiveness presents a threat in such a situation because of the potential for political division along religious lines in disputes both as to whether more or less of the benefit should be conferred, and as to whom the benefit should go.[130]

The abortion legislation in controversy, by relating only to the funding or performing of abortions, does not cause any entanglement between the government and religious institutions. The contention, however, has been made that the legislation limiting Medicaid's funding of abortions results in an administrative entanglement between the government and the religious decision of whether to have an abortion.[131] The meaning and significance of this assertion, though, is unclear. If it means that the government is exercising surveillance over any religious decision that a woman might make as to whether she desires an abortion, the assertion is clearly false. Any administrative decision which the government might make as to whether she fits into one of the limited categories in which the legislation allows funding is made without regard to any religious convictions she may or may not have.[132] Alternatively, if the assertion is that the limited categories provided by the legislation inhibit a woman in making a religious decision to have an abortion, then what is claimed is not excessive entanglement, but rather a violation of her right to the free exercise of her religion. As such, there is no administrative entanglement between government and religion, at least not as the term has commonly been used,[133] and the claim of entanglement rests solely on the allegation of political divisiveness.

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129. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 614-22 (1971).

130. *Id.* at 622-24. The Court in *Lemon* wrote:

> Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.
>
> The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow.

Id. at 623.

131. Plaintiffs' First Amendment Brief at 282-83, McRae v. Califano, No. 76 Civ. 1804 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268).

132. *See* notes 11 and 13 *supra* for the text of the legislation.

133. Administrative entanglement has referred to a relation between government and religious institutions. *See* notes 127 and 128 *supra* and accompanying text.

The Supreme Court has not directly addressed the question of whether a statute might be invalidated on the basis of political divisiveness alone.[134] If it were possible to so invalidate a statute, then Justice Harlan has already noted that abortion-related legislation might be within the purview of a political divisiveness inquiry: "[R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortions laws. Yet history cautions that political fragmentation along religious lines must be guarded against."[135] The context of Justice Harlan's statement, however, leaves doubt as to whether he was advocating an independent political divisiveness test.[136] Chief Justice Burger, however, has stated: "Adherents of particular faiths and individual churches frequently take strong positions on public issues. . . . Of course, churches as much as secular bodies and private citizens have that right."[137] Though the Chief Justice was not directly addressing the question of whether political divisiveness is a sufficient basis by itself for overturning a statute, the implication of his statement is that it is not. This follows because the adoption of an independent political divisiveness test would work to deny churches and

134. Justice Powell, however, suggests that political divisiveness alone may not be enough: "[W]here the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration. And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored." Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 798 (1973).

135. Walz v. Tax Comm'n of New York, 397 U.S. 664, 695 (1970) (Harlan, J., concurring).

136. Justice Harlan continued: "[G]overnment participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation." *Id.* Thus, he may have been viewing political divisiveness as relevant only in the context of administrative entanglement. It is possible, then, that Justice Harlan mentioned the activity of religious groups with respect to abortion legislation as an example of the presence of religious concerns in the political arena, without intending to suggest that this activity in itself raises constitutional problems. *See* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1195 n.15 (N.D. Ohio 1979).

Further, Justice Harlan stated that the tax exemption for churches challenged in the case "neither encourages nor discourages participation in religious life and thus satisfies the voluntarism requirement of the First Amendment. Unlike the instances of school prayers, . . . the State is not 'utilizing the prestige, power and influence' of a public institution to bring religion into the lives of its citizens." Walz v. Tax Comm'n of New York, 397 U.S. 664, 696 (1969) (Harlan, J., concurring) (citations omitted). Like tax exemptions for churches, and unlike school prayers, abortion legislation can be argued to have nothing to do with bringing religion into the lives of citizens.

137. Walz v. Tax Comm'n of New York, 397 U.S. 664, 670 (1970).

adherents of particular faiths the right to take positions on public issues when their positions result in political division along religious lines.

This question of whether political division along religious lines is a sufficient basis for overturning a statute is closely related to the question of whether a statute's purpose can be rendered nonsecular by virtue of underlying religious motivation. Statutes overturned on the grounds of either political divisiveness or religious motivation would not be rendered invalid because of what the statutes do, but rather because of how or why they were enacted. The arguments presented with respect to abortion legislation illustrate this. The arguments do not point to the legislation advancing religious belief or entangling religious institutions with governmental operations, they instead point to the religious beliefs held by those who supported their enactment. If, as Justice Burger has suggested, persons of particular faiths have a right to take a stand on public issues,[138] then religious motivation and political divisiveness alone would seemingly not be sufficient to present Establishment Clause problems.[139]

THE FREE EXERCISE OF RELIGION

The religious beliefs of those who have supported the enactment of laws embodying anti-abortion interests are not the only religious beliefs pertinent to the arguments surrounding the constitutionality of such laws. Those seeking to invalidate laws which put restrictions upon Medicaid's funding of abortion claim that these

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138. *See also* McDaniel v. Paty, 435 U.S. 618 (1978) (clergy have a free exercise right to run for public office).

139. The possibility of the adoption of an independent political divisiveness test will probably be influenced by whether religious motivation is deemed to be a sufficient basis by which to find a statute to have no secular purpose. The Supreme Court's consideration of political divisiveness has been in the context of legislation already on the borderline of the Establishment Clause problems, and the concern has been, at least in part, that legislators not spend important time on legislation of questionable constitutionality. *See, e.g.*, note 122 *supra* and accompanying text. When the issue is not one such as state aid to parochial schools, political division along religious lines would be a poor indicator of the importance of the issue. Very possibly, there was political divisiveness concerning slavery, or various wars. *See* L. TRIBE, *supra* note 31, at 867. Likewise, probably neither side of the debate concerning the governmental funding of abortions would contend that the issue is unimportant. Additionally, when the issue is unrelated to the advancement of religious beliefs or institutions, political divisiveness may merely show that the legislative decision is of public importance and has inextricable philosophical-theological implications.

restrictions infringe upon the religious beliefs of indigent women and deny these women their right to religious liberty.[140]

The protection offered by the Free Exercise Clause is broad. It extends not only to religious belief, but also to actions rooted in religious belief.[141] The religions protected are limited neither to traditional theistic religions,[142] nor by judicial determination of the truth or falsehood of their tenets.[143] Further, the protection extends not only to direct interference of government in the beliefs or practices of religion, but may also extend to governmental schemes which indirectly burden the practice of one's religion.[144]

The Argument of a Denial of the Free Exercise of Religion

There are theologians from various religious backgrounds who believe that women have a religious duty to make a conscientious decison about abortion.[145] At least some theologians believe that under certain circumstances women may have even a mandatory duty to have an abortion.[146] This being so, the decision to terminate a pregnancy is contended to be a matter of conscience and religious liberty which the Religion Clauses put outside the scope of governmental authority.[147]

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140. Though the claim of a violation of the Free Exercise Clause has also been raised with respect to laws regulating the performance of abortions, the discussion presented here will be limited to laws restricting Medicaid's funding of abortion. *See* note 30 *supra*.

141. McDaniel v. Paty, 435 U.S. 618, 626-29 (1978); *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972).

142. *See* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

143. *See* United States v. Ballard, 322 U.S. 78, 86 (1944).

144. Sherbert v. Verner, 374 U.S. 398 (1963). *But see* Braunfeld v. Brown, 366 U.S. 599 (1961).

145. Theologians have given testimony concerning this in at least two cases. *See* McRae v. Califano, No. 76 Civ. 1804, slip op. at 178-199 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268); Right to Choose v. Byrne, 165 N.J. 443, 398 A.2d 587, 596 (Super. Ct. Ch. Dir. 1979).

146. *See* McRae v. Califano, No. 76 Civ. 1804, slip op. at 180-81 (E.D.N.Y. Jan. 15, 1980) *prob. juris noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268). Testimony in *McRae* that abortion may in certain instances be a mandatory duty was from the Conservative and Reformed branches of the Jewish tradition. The mandatory nature of the duty was perhaps tempered somewhat by recognition that the decision finally rests with the woman. Slip op. at 181. The orthodox Jewish tradition generally believes that abortion is permissible only when the mother's life is endangered. Slip op. at 175-76.

147. *Id.*, slip op. at 326-28.

The protection afforded by the Free Exercise Clause arguably extends not only to the obedience of doctrinal faiths, but also to such conscientious decisions as that concerning abortion. The conscientious nature of religious belief has been recognized in conscientious objector cases.[148] Judge Augustus Hand stated:

> [Religious belief] is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenents.
>
> . . . [C]onscientious objection to participation in any war under any circumstances. . . . may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.[149]

A similar understanding of the nature of religious belief has been reached by the Supreme Court.[150] In interpreting the requirement that an objector to military service has beliefs relating to a Supreme Being, the Court included within such beliefs "all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."[151] These beliefs are those that occupy a place in the life of the believer parallel to that which God occupies in orthodox faiths.[152] Thus, exempted from military service are "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become part of an instrument of war."[153] Opponents to the Medicaid restrictions argue that in the same way as the conscientious objection to military service is religious, so too the conscientious decision not to bring an unwanted child into the world is religious.[154]

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148. *See, e.g.*, Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965); United States v. Kauten, 133 F.2d 703 (2d Cir. 1943).

149. United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943).

150. *See* Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

151. United States v. Seeger, 380 U.S. 163, 176 (1965).

152. *Id.*

153. Welsh v. United States, 398 U.S. 333, 344 (1970).

154. *See, e.g.*, Plaintiffs' First Amendment Brief at 279-80, McRae v. Califano, No. 76 Cir. 1804 (E.D.N.Y. Jan. 15, 1980), *prob. juris. noted mem., sub nom.* Harris v. McRae, 48 U.S.L.W. 3514 (1980) (No. 79-1268).

The protection a woman is given to make a religious choice about abortion is not defeated by the fact that abortion legislation affects only the act of abortion and not beliefs about abortion. Acts grounded in religious belief may be protected just as the beliefs are.[155] Thus, the Amish way of life, being rooted in religious belief, is protected from such state interference as requiring attendance at secondary schools.[156] Likewise, the religious-based action of becoming a minister cannot be burdened by exclusion from legislative positions.[157] Therefore, though the restrictions upon the Medicaid funding of abortion affects only the ability to obtain an abortion, they still burden a woman's conscientious and religious liberty.

Further, though the burden is not direct in the same way criminal sanctions would be, nevertheless, because the Medicaid nonfunding of most abortions forces a woman to choose between her religious beliefs and receiving benefits, the burden is arguably too great. In this context *Sherbert v. Verner*[158] is important. In *Sherbert*, a Seventh Day Adventist was denied unemployment compensation because of her refusal, due to religious beliefs, to take a job where she would have to work Saturdays.[159] Her ineligibility was thus due to the practice of her religion and she was forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[160] Such a burden on her religious practice is of the same sort as that imposed by a fine.[161]

The legislation restricting the Medicaid funding of abortion is argued to place this type of a burden upon a woman's conscientious and religious liberty to terminate a pregnancy. When a woman makes religious or conscientious determination that abortion is the moral choice, she is forced to choose between abandoning what her conscience dictates and receiving the Medicaid benefits for continuing the pregnancy, on the one hand, and following her conscientious decision and forfeiting the benefits, on the other hand. Therefore, challengers contend, because there is no compelling state interest to

155. McDaniel v. Paty, 435 U.S. 618, 626-29 (1978); Wisconsin v. Yoder, 406 U.S. 205 (1972).

156. Wisconsin v. Yoder, 406 U.S. 205 (1972).

157. McDaniel v. Paty, 435 U.S. 618, 626-29 (1978).

158. 374 U.S. 398 (1963).

159. *Id.* at 401.

160. *Id.* at 404.

161. *Id.*

justify this burden, the restrictions on the Medicaid funding are claimed to be unconstitutional as violative of the Free Exercise Clause.[162]

An Analysis of the Free Exercise Argument

Apart from any questions which may arise as to the religious nature of the abortion decision, granting such a religious nature, there is a basic problem with the argument that the funding of abortion is then constitutionally mandated. The difficulty arises in that essentially what is being argued is that the Free Exercise Clause is being violated by not providing an indigent woman the funding necessary to effectuate a religious decision. Such a claim of a Free Exercise Clause violation is very different from one in which a person has been denied benefits, to which he or she is otherwise entitled, due to the exercise of his or her religion. Here benefits have not been denied due to religious practices, rather they are being sought to enable one to carry out a religious decision.

The Supreme Court has recognized in the abortion context that the state is not obligated to fund the exercise of constitutional rights. In *Maher v. Roe*,[163] the Court held that though a state may not prohibit a woman from exercising the constitutional right to have an abortion, the state is not then obligated to provide equal funding for both abortion and childbirth.[164] The State may adopt a policy preference for childbirth[165] and, therefore, is not required to assure that a woman's alternative choices of abortion and childbirth are equally protected. The present argument differs from that in *Maher* in that the funding is argued to be necessary not to effectuate equal protection, but to effectuate a religious decision.

The implications of this type of reasoning, however, can be seen by an analogy, utilized in *Maher*,[166] to private and public schools. Parents have a constitutional right to send their children to private schools.[167] In *Maher*, the court recognized that by the same

162. One district court has agreed and found the non-funding of abortions to violate the Free Exercise Clause. *See* note 27 *supra* and accompanying text.

163. 432 U.S. 464 (1977).

164. *Id.* at 474. The Court noted that though the constitutional right to travel prohibits durational requirements for public benefits, obviously the constitutional right is not impinged upon by a state's refusal to pay bus fares for indigent travelers. *Id.* at 474 n.8.

165. *Id.* at 475-78.

166. *Id.* at 476-77.

167. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

reasoning used to argue that the funding of abortion is necessary to give equal protection to an indigent woman's alternative choices of abortion and childbirth, one could argue that public funding of private schools is necessary to give indigent parents equal protection in their alternative choices of whether to send their children to public or private schools.[168] Likewise, one could argue using the same reasoning employed in the free exercise claim here, that the state is required to fund private schools in order to allow parents the religious liberty to choose a religious education for their children.[169] Apart from any Establishment Clause problems,[170] the argument clearly goes outside the scope of the Free Exercise Clause as it has thus far been applied.

This is readily apparent by making a comparison of the instant situation to one in which an indirect burden is placed upon religious beliefs through the withholding of public benefits due to religious practices. In *Sherbert v. Verner*,[171] a woman's religious practice of not working Saturdays led to a ruling that she was not eligible for unemployment compensation.[172] As such, she was denied benefits to which she was otherwise entitled due to her religious practices.[173] The instant situation differs from that in *Sherbert* in that while statutory benefits have been provided for unemployment compensation, no such benefits have been provided for abortions. Religious practices led to a loss of benefits in *Sherbert*, but here benefits are sought to carry out a religious decision.

Thus, a religious decision to have an abortion does not work to deny an indigent woman benefits to which she is otherwise entitled. The burden on religious liberty is caused, as was the inability to obtain an abortion in *Maher*,[174] by the indigence itself. Though the nonfunding of abortions may work to encourage a woman to choose

168. Maher v. Roe, 432 U.S. 464, 477 (1977).

169. Though clearly there would be Establishment Clause problems with such an argument because the government would be paying for a religious education, the problems go deeper than the Establishment Clause. Consider, for example, parents who for religious reasons believed their children ought to have no secondary education in the public schools, but only an education in farming. While the Free Exercise Clause might work to allow the children to be excluded from the public schools, *see* Wisconsin v. Yoder, 406 U.S. 205 (1972), it would be absurd to argue that the state is obligated to pay for the farming education.

170. *See* note 169 *supra*.

171. 374 U.S. 398 (1963).

172. *Id.* at 401.

173. *Id.* at 404.

174. Maher v. Roe, 432 U.S. 464, 474 (1977).

childbirth, the encouragement is no different from that which an indigent parent faces when deciding whether to send a child to the public schools. Neither the funding of childbirth nor the funding of public schools put any obstacles in the way of religious freedom. Clearly, the state may, in some instances, have the power to lift the burden which indigence places on religious freedom.[175] The question, however, is whether the state has the constitutional duty to do so. In that the Free Exercise Clause requires only that Congress not prohibit the free exercise of religion,[176] not that Congress effectuate its free exercise, the answer would seem to be no.

Two additional aspects of the Free Exercise Clause might be problematic. First, the argument seeks to invalidate an entire statute on the basis that it may violate the free exercise of religion of some women. As such, the argument is not seeking an exemption from the statute for certain identified women with specified religious beliefs.[177] Whether a statute not specifically aimed at religious conduct[178] might be so invalidated is, perhaps, questionable.[179]

A second uncertain aspect of the argument is whether the protection of the Free Exercise Clause would extend to a decision because of a religious duty to make it conscientiously. Though according to some theologians there are instances when the duty to obtain an abortion would be religiously mandatory, more commonly the religious duty would be to make a conscientious decison about abortion.[180] Although the conscientious objector cases involved statutory, not free exercise, determinations, perhaps significant is the fact that the beliefs protected in those instances were not of the same exact nature as a conscientious decision concerning abortion. The objectors who were granted military exemptions believed that all war was wrong.[181] Obviously, here the religious beliefs are not that all

175. Possibly, the State could fund both private education and abortions for indigents.

176. *See* note 2 *supra* for language of the Free Exercise Clause.

177. Thus, the relief sought here differs from the relief sought in Wisconsin v. Yoder, 406 U.S. 205 (1972), and Sherbert v. Verner, 374 U.S. 398 (1963).

178. *Compare* challenged state constitutional provision in McDaniel v. Paty, 435 U.S. 618, 621 n.1 (1978), *with* restrictive Medicaid provisions for abortions, notes 11 and 13 *supra*.

179. *See* Right to Choose v. Byrne, 165 N.J. Super. 443, 398 A.2d 587, 596-97 (Super. Ct. Ch. Div. 1979).

180. *See* notes 145-46 *supra* and accompanying text.

181. *Compare* Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965) (objectors opposed to all wars were granted exemptions), *with* Gillette v. United States, 401 U.S. 437 (1971) (objector opposed only to unjust wars was denied an exemption).

childbirth is wrong. At most, childbirth is only wrong in those limited instances when a woman believes that abortion is religiously mandatory and in other instances in which she decides that she ought to have an abortion.

Conceivably, there are many important decisions made in the course of the lifetime in which one might consider it a religious duty to make the decision conscientiously. Examples might include decisions concerning vocation and marriage. The ramifications of treating the decision finally reached as if it were a tenet of one's religion, and thus protected under the Free Exercise Clause, would be very unclear. Whether such decisions ought to be so protected because of a religious duty to make the decision conscientiously is, at least, doubtful.[182]

SOME BROADER IMPLICATIONS CONCERNING RELIGIOUS MOTIVATION

Though the Free Exercise Clause contention that the religious liberty of indigent women has been denied emphasizes the effects of the challenged legislation, the claim of a violation of the Establishment Clause is not based upon effects, but rather upon motivation. The constitutional significance of the fact that legislators may have had religious motives for supporting particular abortion laws is the central question underlying the possibility of abortion laws being invalidated on Establishment Clause grounds. Apart from the practical difficulties of ascertaining legislative motivation,[183] at least two other problems emerge with respect to deeming such religious motives suspect. First, because of a broadening constitutional definition of religion, a treatment of religious motives as illicit would threaten invalidation for laws reflecting moral, philosophical or humanitarian concerns. Second, such a treatment of religious motives finds no support as being intended by the framers of the Constitution.

Seeking a Definition of Religion

The ramifications of viewing religious motivation as constitutionally suspect must be viewed in the context of the attempt to find a judicial definition of religion. The conscientious objector

182. *See* Right to Choose v. Byrne, 165 N.J. Super. 443, 398 A.2d 587, 597 (Super. Ct. Ch. Div. 1979).

183. *See* note 84 *supra*.

cases,[184] though not actually determining a first amendment definition of religion,[185] interpreted beliefs relating to a Supreme Being as including "all sincere religious beliefs which are based . . . upon a faith . . . upon which all else is ultimately dependent."[186] If such a definition of religion is employed for Establishment Clause purposes, and that clause prohibits legislators from supporting legislation for religious reasons, then, in essence, the "ultimate" concerns of legislators become a constitutionally deficient basis for legislation. The unacceptability of such a result can be further illustrated by noting the Supreme Court's apparent recognition of Secular Humanism as a religion.[187] For the Secular Humanist who deems "human needs and ends" of ultimate importance,[188] the fact that certain legislation satisfies human needs would be an illicit religious motive for supporting such legislation. Obviously, this is untenable; no one could seriously contend that the Constitution requires legislators to ignore such values and seek justification for their positions elsewhere.

To avoid this conclusion, and the possibility that humanitarian laws be invalidated on Establishment Clause grounds, the suggestion has been made that what is needed is a definition of religion, which, for Establishment Clause considerations, would be limited to the more traditional religions.[189] However, at least two factors counsel against this suggestion. First, the drafting of the Religion Clauses themselves provides no support for such differing definitions. As Justice Rutledge has stated:

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184. Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965); *see also* United States v. Kauten, 133 F.2d 703 (2d Cir. 1943).

185. The cases were decided in terms of statutory construction, but the construction employed may have been constitutionally necessary. *See* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1064 (1978).

186. United States v. Seeger, 380 U.S. 163, 176 (1965).

187. Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961). Other nontheistic religions recognized by the Court were Buddhism, Taoism and Ethical Culture. *Id.*

188. "Human needs and ends" were what Welsh expressed to be his ultimate concerns in Welsh v. United States, 398 U.S. 333, 342 (1970). *See* note 184 *supra* and accompanying text. These ultimate concerns are perhaps consistent with one article's description of Secular Humanism:

> 'Secularism' is a doctrinal belief that all morality is based solely in regard to the temporal well-being of mankind to the exclusion of all belief in God, a supreme being, or a future eternity. 'Humanism' is a philosophy or attitude that is concerned with human beings, their achievement and interests, and the condition or quality of being human, rather than with the abstract beings and problems of theology.
>
> . . . Secular Humanism is a religion whose doctrine worships Man as the source of all knowledge and truth, whereas theism worships God as

> "Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.[190]

Thus, the adoption of differing definitions would have to be for reasons not disclosed by the wording of the Religion Clauses themselves.

Second, the first amendment principle of neutrality might be jeopardized by not subjecting nontraditional ultimate concerns to Establishment Clause restrictions. For example, though public schools can include a study of religion "when presented objectively as part of a secular program of education,"[191] they are clearly precluded from a policy of persuasively espousing that "[m]an's chief end is to glorify and enjoy God forever."[192] However, if Establishment Clause restrictions are applicable only to traditional religions, then schools would be free to openly advocate that Transcendental Meditation is "the universal basis of life . . . [and] the source, course, and goal of all existence."[193] More orthodox religions would be disparaged through this selective enforcement of the Establishment

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the source of all knowledge and truth.

Whitehead and Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH. L. REV. 1, 29-30 (1978) (footnotes omitted).

189. L. TRIBE, *supra* note 31, at 826-33. The apparent presupposition to this suggestion is that under the present requirements of the Establishment Clause, if an ultimate concern definition were adopted, legislation could be invalidated solely on the ground that it was motivated by the ultimate concerns of its supporters. *See* L. Tribe at 827-28, 831. Such a result, however, does not clearly follow. If legislation does not seek to instill the ultimate concerns of its supporters in those affected by the legislation, the fact that a legislator's ultimate concerns were a reason for the legislator to support the legislation is not yet of any certain constitutional significance. *See generally* notes 77-87 *supra* and accompanying text.

190. Everson v. Board of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).

191. School Dist. v. Schempp, 374 U.S. 203, 225 (1963).

192. Westminster Shorter Catechism, Question 1.

193. *See* Malnak v. Yogi, 440 F. Supp. 1284, 1292 (D.N.J. 1977), *aff'd* 592 F.2d 197 (3d Cir. 1979) (quoting from a textbook used in a course on Transcendental Meditation in public schools in New Jersey). The case held the teaching of Transcendental Meditation in public schools violative of the Establishment Clause, 440 F. Supp. at 1327.

Clause because the only answers which could receive a stamp of approval in the public schools concerning such questions as the nature of mankind and the meaning of life[194] would be the religiously unorthodox ones.[195]

Neutrality would similarly suffer in the political process. If, for example, only theistic religions were viewed as providing illicit motives, then only theists would have to find some other justification for their concerns. For theistic pacificists whose opposition to large defense appropriations stems from their belief that "God opposes violence," either such a belief would have to be hidden, or any attempt to stir a significant political movement abandoned. On the other hand, the belief that human life must be preserved at all costs because it represents the highest achievement of the evolutionary process could be legitimately advanced on behalf of the same pacificist cause. Such a distinction, however, between these two possible bases for political activity hardly seems constitutionally mandated. To preserve neutrality, then, and yet avoid the absurd result that legislation might be invalidated because its supporters acted in accord with their ultimate concerns, the religious reasons legislators may have had for supporting an enactment ought to be treated as constitutionally irrelevant.

The View of the Founding Fathers

The important role which religious convictions played for the Founding Fathers in their own political controversies tends to dispel any notion that they intended to remove such considerations from the political process. In declaring independence, they wrote: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable

194. The religious nature of such questions was noted in a Vatican II draft declaration from which the Supreme Court has quoted:

> Men expect from the various religions answers to the riddles of the human condition: What is man? What is the meaning, and purpose of our lives? What is the moral good and what is sin? What are death, judgment, and retribution after death?

Draft declaration on the Church's relations with non-Christians, Council Daybrook, Vatican II, 3d Sess. p. 282, N.C.W.C., Washington, D.C. (1965), *quoted in* United States v. Seeger, 380 U.S. 163, 182 (1965).

195. The Supreme Court perhaps recognized this problem when it wrote: "We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" School Dist. v. Schempp, 374 U.S. 203, 225 (1963).

rights; that among these are life, liberty, and the pursuit of happiness. . . ."[196] The basis for the unalienable rights claimed by those signing the Declaration of Independence was placed in the religious belief that they had been endowed by a Creator.

Similarly, and more pertinent, the drafters of the first amendment[197] themselves espoused, without timidity, *religious* reasons for the separation of church and state. Madison, in his famous Memorial and Remonstrance,[198] voiced adamant opposition to a bill proposing a tax for the support of Christian teachers.[199] Viewing the bill as violating the principle of religious freedom, he wrote: "If this freedom be abused, it is an offense against God, not against man: To God, therefore, not to men, must an account of it be rendered."[200] Madison's Memorial and Remonstrance led to the defeat of the religious tax bill, and in its stead the "Virginia Bill for Religious

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196. Declaration of Independence.

197. The Supreme Court has recognized that Madison and Jefferson played leading roles in the drafting of the First Amendment. *See* Everson v. Board of Educ., 330 U.S. 1, 13 (1947); *see also* Reynolds v. United States, 98 U.S. 145, 163-164 (1879).

198. J. Madison, Memorial and Remonstrance Against Religious Assessments, II Madison 183, *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 63 app. (1947). Mr. Justice Rutledge described this document as follows:

> This is Madison's complete, though not his only, interpretation of religious liberty. It is a broadside attack upon all forms of "establishment" of religion, both general and particular, nondiscriminatory or selective . . . . [T]he Remonstrance is at once the most concise and most accurate statement of the view's of the First Amendment's author concerning what is "an establishment of religion".

Everson, 330 U.S. at 37 (Rutledge, J., dissenting) (footnotes omitted).

199. The bill is reprinted in Everson v. Board of Educ., 330 U.S. 1, 72 app. (1947).

200. J. Madison, Memorial and Remonstrance Against Religious Assessments, II Madison 183, *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 66 app. (1947). Madison gave additional religious reasons for his opposition to the bill:

> [T]he policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of [revelation] from coming into the Region of it; and countenances, by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of levelling as far as possible, every obstacle to the victorious progress of truth, the Bill with an ignoble and unchristian timidity would circumscribe it, with a wall of defence, against the encroachments of error.

Memorial and Remonstrance, 330 U.S. at 70 app.

Liberty"[201] was enacted.[202] The original draft of this latter bill was written by Thomas Jefferson.[203] The bill contained within its preamble the following statement:

> Almighty God had created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . . ; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical. . . .[204]

Thus, for the state to exact taxes to pay Christian teachers was claimed to be both an "offense against God,"[205] and "a departure from the plan of the Holy author of our religion. . . ."[206] As such, the motivation underlying this effort to promote Establishment Clause principles in Virginia was not by any means clearly secular.

The conclusion which tends to follow is that for the Founding Fathers there was an important, though perhaps subconscious, distinction between those things that laws do, and the source of their motivation. Madison was firmly against the operation of laws directly working towards the propagation of religious belief. However, in his opposition, he freely explained how such laws would inhibit the spreading of the light of Christianity.[207] Madison could not, then, have plausibly understood religious concerns to be an illicit motive by virtue of the Establishment Clause for he himself invoked such concerns in behalf of Establishment Clause principles. Jefferson apparently did the same.[208] Therefore, to deem religious motivation as illicit would incorporate into the Establishment Clause a fear, seemingly unknown to the Founding Fathers, that legislators

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201. 12 Hening, Statutes of Virginia 84 (1823), *reprinted in part in* Everson v. Board of Educ., 330 U.S. 1, 12-13 (1947). *See also* McGowan v. Maryland, 366 U.S. 420, 492-494 (1961) (Frankfurter, J., concurring).

202. *See* Everson v. Board of Educ., 330 U.S. 1, 12-13 (1947).

203. *Id.*

204. Virginia Bill for Religious Liberty, 12 Hening, Statutes of Virginia 84 (1823), *reprinted in part in* Everson v. Board of Educ., 330 U.S. 1, 12-13 (1947). *See also* McGowan v. Maryland, 366 U.S. 420, 492-494 (1961) (Frankfurter, J., concurring).

205. *See* note 200 *supra* and accompanying text.

206. *See* note 204 *supra* and accompanying text.

207. *See* note 200 *supra.*

208. *See* notes 203-204 *supra* and accompanying text.

might look to their religious beliefs in making their legislative decisions. Such an incorporation might call into question a significant aspect of the motivation underlying the Establishment Clause itself.

CONCLUSION

Present abortion laws may or may not be the result of religious motivation.[209] The question, however, ought to have no constitutional significance. A policy of encouraging childbirth or discouraging abortions is not equivalent to a policy of instilling a belief in citizens that "God opposes abortion." Because it is the former policy, not the latter, which is effectuated through the abortion legislation being challenged, the fact that legislators may have had religious reasons for supporting that policy ought to be no more pertinent to constitutional considerations than the many other factors which might affect a legislator's vote.

The Founding Fathers created a government in which the people, with whatever religious beliefs they may or may not possess, have a right to exact an influence upon what are to be their laws. Although many important limitations have been put upon the types of laws which may be enacted, the Constitution has never mandated how the people are to conceptualize issues of public importance. Any requirement that persons in political positions think "secularly" before being free to state their views or place their vote, is a requirement of which the Founding Fathers seemingly had no knowledge.

The concern to maintain a wall separating church and state is entirely cognizable as a doctrine which recognizes that it is not the role of the state to advance religious beliefs or institutions. Such a concern does not require a similar wall to be constructed within the value structure of each legislator. The attempt to build this latter wall ends in the absurd consequence that legislators are somehow expected to ignore that which they deem to be of paramount importance whenever they enter the political arena.

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209. This note has not attempted to answer this question. *See* note 3 *supra* and accompanying text.