IN DEFENSE OF THE SECULAR PURPOSE STATUS QUO

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The secular purpose rule, one prong of the Supreme Court's interpretation of the Establishment Clause of the First Amendment, requires that government action be justified by a primary, genuine secular purpose. Government actions supported only by religious beliefs, therefore, are unconstitutional. A debate about the morality of the secular purpose rule has emerged, with the main arguments tending to view religious beliefs as either permissible or impermissible. This Note argues that rather than decide purely for or against the secular purpose rule, courts should maintain the current status quo, which is underenforcement of the rule.

To justify this approach to resolving the secular purpose debate, this Note analyzes common arguments made for and against the rule, and distills each argument to its core animating political value. The arguments against the secular purpose rule are motivated by the value of political access, while arguments for the secular purpose rule are motivated by the value of political legitimacy. Underenforcement creates equilibrium between these political values.

Some may worry that underenforcement will change the underlying meaning of the secular purpose rule. But a constitutional requirement can retain its full meaning and be legally binding even if underenforced. Another possible objection is that underenforcement would be tantamount to nonenforcement. To respond to that objection, this Note attempts to canalize underenforcement by marking out situations in which the secular purpose rule should be fully enforced. When, for example, underenforcement would allow discrimination against vulnerable groups, the secular purpose rule should be enforced.

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INTRODUCTION

RESTAURANTS in Utah have a unique feature. From the main dining area, a patron can see the bar and bartender, but cannot see any alcohol. This quirk comes from a Utah law that requires restaurants to

keep alcohol out of the view of restaurant patrons.[1] Restaurants around the state have cordoned off the areas in which they store and mix drinks with a seven-foot-tall opaque barrier, which Utahns call the Zion Curtain.[2]

The Zion Curtain has touched a sensitive nerve in Utah because of its relationship to long-held cultural conflicts. The Church of Jesus Christ of Latter-day Saints ("LDS"), which has its headquarters in Salt Lake City and a strong membership base in the state,[3] requires its members to follow a set of dietary guidelines known as the Word of Wisdom, which categorically prohibits consumption of alcohol.[4] Opponents of the Zion Curtain are outraged by the law because they see it as only enacted to enforce the religious beliefs of the state's Mormon majority.[5]

At the core of the conflict surrounding the Zion Curtain is the question of whether religious beliefs can or should be a proper justification for political decisions. This question implicates the Establishment Clause of the First Amendment.[6] The U.S. Supreme Court has interpreted the Establishment Clause to require that, among other things, government action must be justified with reference to a secular purpose.[7]

[1] Utah Code Ann. § 32B-6-205(12) (LexisNexis 2015); id. § 32B-6-305(12).

[2] Dennis Romboy, Senate Panel Moves to Study Alcohol Barrier in Utah Restaurants, Deseret News (Feb. 16, 2016, 11:50 AM), http://www.deseretnews.com/article/865647804/Senate-panel-moves-to-study-alcohol-barrier-in-Utah-restaurants.html [https://perma.cc/6JSL-2YET].

[3] See Matt Canham, Mormon Populace Picks up the Pace in Utah, Salt Lake Trib. (Dec. 31, 2014, 4:47 PM), http://www.sltrib.com/news/1842825-155/mormon-populace-picks-up-the-pace [https://perma.cc/J2PJ-U3H9] ("Utah overall saw its share of Mormon adherents tick upward for the fourth straight year, reaching 62.64 percent.").

[4] The Doctrine and Covenants of the Church of Jesus Christ of Latter-day Saints § 89:1–21 (2013); The Lord Has Given Us a Law of Health, Liahona (Feb. 2012), https://www.lds.org/liahona/2012/02/the-lord-has-given-us-a-law-of-health [https://perma.cc/W43P-W3FJ].

[5] Ben Winslow, Winery Protests Liquor Laws by Putting 'Utah Doing as Bishop Commands' on Zion Curtain, FOX 13 (June 6, 2016, 5:07 PM), http://fox13now.com/2016/06/06/winery-protests-liquor-laws-by-putting-utah-doing-as-bishop-commands-on-zion-curtain/ [https://perma.cc/3GSW-MDKD]. Indeed, one Utah winery protested the required barrier by printing on it "brought to you by your Utah Legislature" and, in a play on the acronym for the Utah Department of Alcoholic Beverage Control, "Utah Doing As Bishop Commands." Id (internal quotation marks omitted).

[6] See U.S. Const. amend I ("Congress shall make no law respecting an establishment of religion . . . ."). Although the Zion Curtain implicates a state statute, the Establishment Clause of the First Amendment was incorporated against the states in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

[7] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). *Lemon* itself gives three requirements for a law to be constitutional under the Establishment Clause: The government action "must have a secular purpose," "its principal or primary effect must be one that neither advances

Although the test devised in *Lemon v. Kurtzman*,[8] including the secular purpose rule, has been criticized heavily on legal and moral grounds,[9] the Court has repeatedly reaffirmed its reliance on the rule.[10] The Court, however, only rarely enforces the secular purpose rule; it only does so when the law in question is openly religious on its face.[11]

The arguments in the debate about the morality of the secular purpose rule tend to be binary: Some consider a law that is justified primarily on religious grounds to be morally objectionable because it violates the principles embodied in the Establishment Clause,[12] while others consider

nor inhibits religion," and it "must not foster 'an excessive government entanglement with religion.'" Id. (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). Whether the *Lemon* test is the exclusive test for the Establishment Clause, whether it is the best test for the Establishment Clause, and whether it is constitutional are all questions outside the scope of this project. The focus of this Note is on interpreting the secular purpose rule, which is one facet of the *Lemon* test.

[8] 403 U.S. 602 (1971).

[9] See, e.g., Steven G. Gey, Religious Coercion and the Establishment Clause, 1994 U. Ill. L. Rev. 463, 467–68 (calling the *Lemon* test "a constitutional Rorschach test, reflecting the often contradictory constitutional views of different observers"); Michael Stokes Paulsen, *Lemon* is Dead, 43 Case W. Res. L. Rev. 795, 800–04 (1993) ("For many years, *Lemon* had been the subject of sharp criticism from legal commentators and even sharper criticism from members of the Court. The criticism was well deserved." (footnote omitted)).

[10] See McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 859–60 (2005); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000); Edwards v. Aguillard, 482 U.S. 578, 585 (1987); Wallace v. Jaffree, 472 U.S. 38, 55–56 (1985); Stone v. Graham, 449 U.S. 39, 40–41 (1980) (per curiam); see also Epperson v. Arkansas, 393 U.S. 97, 106–07 (1968) (invalidating a state law for want of a secular purpose before the announcement of the *Lemon* test).

[11] Richard C. Schragger, The Relative Irrelevance of the Establishment Clause, 89 Tex. L. Rev. 583, 593–94 (2011).

[12] See Robert Audi, Religious Commitment and Secular Reason 32–33, 86–87 (2000); Gey, supra note 9, at 528; Andrew Koppelman, Secular Purpose, 88 Va. L. Rev. 87, 108–12 (2002); Arnold H. Loewy, Morals Legislation and the Establishment Clause, 55 Ala. L. Rev. 159, 161–62 (2003); Michael J. Perry, Religion in Politics, 29 U.C. Davis L. Rev. 729, 737, 755–56 (1996); Schragger, supra note 11, at 589–90 (defending the notion that laws justified by reference to religion alone are "axiomatic" violations of the disestablishment norm); Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. Chi. L. Rev. 195, 197–98 (1992); cf. John Rawls, Political Liberalism 217 (1993) [hereinafter Rawls, Political Liberalism] ("[O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."); John Rawls, The Idea of Public Reason Revisited, 64 U. Chi. L. Rev. 765, 782, 795 (1997) [hereinafter Rawls, Public Reason Revisited] ("While no one is expected to put his or her religious or nonreligious doctrine in danger, we must each give up forever the hope of changing the constitution so as to establish our religion's hegemony, or of qualifying our obligations so as to ensure its influence and success. To retain such hopes and aims would be inconsistent with the idea of equal basic liberties for all free and equal citizens.").

religion to be a morally acceptable basis for political decision making.[13] This Note argues that courts should not definitively side with either arguments opposing or supporting the secular purpose rule, but should instead take a middle approach: The secular purpose rule should remain legally binding, but it should be underenforced. It is not unreasonable to think that the judiciary would adopt this approach since it is already the status quo.[14]

This Note focuses mainly on the morality, as opposed to the constitutionality, of the secular purpose rule, although it engages with the constitutionality of the rule when necessary.[15] The underenforcement scheme proposed herein would allow government actors to act both morally and within the confines of the Constitution. To show that underenforcement is a tenable and desirable approach to resolving the secular purpose debate, the first Part of this Note will describe common arguments made in support of and against the secular purpose rule, and distill the political value that motivates each one. Ultimately, the debate boils down to a tension between two competing fundamental values. The arguments made against the rule are motivated by the political value of access. They are concerned that the secular purpose rule excludes citizens from full participation in the political process. Motivating the arguments made in favor of the rule is the political value of legitimacy. They are concerned that laws passed on purely religious grounds will not be morally binding on all citizens. Underenforcement is an appealing solution because it strikes an equilibrium between the competing values of access and legitimacy.

This Note will also respond to criticisms of secular purpose underenforcement. One concern is that underenforcement would sharply limit the extent to which the secular purpose rule is binding law. But underenforcement need not alter the legal status of the secular purpose rule. It

[13] See Christopher J. Eberle, Religious Conviction in Liberal Politics 10 (2002); Kent Greenawalt, Religious Convictions and Political Choice 12 (1988); Michael J. Perry, Love and Power: The Role of Religion and Morality in American Politics 142–43 (1991); Michael W. McConnell, Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation, 1999 Utah L. Rev. 639, 642–43; Paulsen, supra note 9, at 803–04; Michael J. Perry, Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause, 42 Wm. & Mary L. Rev. 663, 670–71 (2001) [hereinafter Perry, Political Reliance].

[14] See Schragger, supra note 11, at 593–94.

[15] Since the secular purpose rule is a part of the Supreme Court's interpretation of the First Amendment, many of the moral arguments presented in this Note will necessarily be informed by the Constitution.

can leave the Supreme Court's interpretation of the Establishment Clause intact in its full depth and breadth. A second concern is that underenforcement would be tantamount to nonenforcement in practice. In response to that concern, this Note will attempt to canalize the underenforcement of the secular purpose rule, thereby drawing a line between circumstances in which the rule should and should not be fully enforced. A handful of additional objections that can be dealt with more briefly will be addressed in Subsection II.C.4.

Much has been written about the secular purpose rule, leaving it difficult to make a unique contribution to the literature. This Note, however, departs from the existing literature in important ways. First, it seeks to reach a compromise in the secular purpose debate, based on a distinction between the enforcement and the legality of constitutional laws. Most arguments in this debate view religious laws as either permissible or impermissible; although some scholars do seek compromise, accepting certain religious justifications for laws in certain circumstances, they do not advocate for using underenforcement of the secular purpose rule to reconcile the fundamentally binary nature of their arguments.[16] This Note suggests this approach as a novel middle ground between the extremes of permitting or forbidding religious laws.

Second, this Note supports the argument that underenforcement is a feasible way to resolve the secular purpose debate by using a unique analytical move. It distills common arguments made on both sides of the debate down to the political values motivating those arguments and then uses those values as a litmus test to assess the prudence of underenforcement. This analytical move is not present in disestablishment literature.

Third, this Note offers an in-depth examination of the interrelationship between underenforcement and the Establishment Clause and departs from the limited literature on the topic. The landmark piece describing this relationship is an article by Professor Richard Schragger.[17] This Note, however, diverges from Professor Schragger's work in a number of significant ways. Professor Schragger gives a broad account of the underenforcement of the Establishment Clause in general,[18] whereas this Note presents a more focused analysis of the secular pur-

[16] See supra notes 12–13 and accompanying text.
[17] See Schragger, supra note 11, at 583, 587–88.
[18] Id.

pose rule, which is only one facet of the Supreme Court's Establishment Clause jurisprudence. Furthermore, Professor Schragger's argument is descriptive: It identifies the trend in modern jurisprudence to underenforce the Establishment Clause.[19] Conversely, the argument of this Note is normative, contending that underenforcement is a workable and even desirable way to resolve the secular purpose debate. Finally, Professor Schragger's article does not attempt to provide a framework to say when underenforcement is appropriate or inappropriate.[20] This Note provides such a framework.

I. THE SECULAR PURPOSE DEBATE AND COMPETING POLITICAL VALUES

The First Amendment requires that "Congress shall make no law respecting an establishment of religion."[21] To enforce the Establishment Clause, the Supreme Court articulated, in the case of *Lemon v. Kurtzman*, three separate requirements for legislation: First, a law "must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion"; and third, "it must not foster 'an excessive government entanglement with religion.'"[22] The question of whether laws can be justified by religious beliefs is answered by the first prong: the secular purpose rule.

Some argue that the rule should have limited application and only be read to prohibit laws that coerce individuals into participating in religious worship.[23] Similarly, some argue that only laws that are motivated solely by religion violate the rule.[24] But the language of the Supreme Court's most recent articulation of the secular purpose rule suggests that the rule is quite robust. In *McCreary County v. ACLU of Kentucky*, the Court noted that a reading of the rule "as if the purpose enquiry were so naive that any transparent claim to secularity would satisfy it" lacked both precedent and reasoning to support it.[25] Furthermore, the opinion described the secular purpose standard as the following: "[A]lthough a

[19] Id. at 585.
[20] Id.
[21] U.S. Const. amend I.
[22] 403 U.S. 602, 612–13 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
[23] See Paulsen, supra note 9, at 797, 802–03.
[24] See Thomas C. Berg, "Secular Purpose," Accommodations, and Why Religion Is Special (Enough), 80 U. Chi. L. Rev. Dialogue 24, 32–33 (2013).
[25] 545 U.S. 844, 863–64 (2005).

legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."[26] Thus, the secular purpose rule imposes the stringent requirement that all state action be motivated by a nonreligious purpose that is both its primary and actual justification.

As described above, wide-ranging arguments have been made for and against the secular purpose rule. The purpose of this Note, however, is to present a unique middle-ground resolution to these moral arguments. To do so, this Part first frames the arguments made in the debate as essentially a conflict between two competing political values: access and legitimacy. It then presents the main argument of this Note: that underenforcing the secular purpose rule would serve as a tenable compromise between these values.

The "framing" and resolution of the debate in this Part proceeds as follows. Section A will analyze prominent moral arguments made against the secular purpose rule. These arguments focus on political access. They worry that barring religious beliefs as a basis for laws keeps religious people from full participation in the political process. Section B will explore moral arguments for the secular purpose rule. These arguments worry about the legitimacy of law. Their concern is that laws must be justified by public reason to have any moral force, so laws justified by religion alone lack moral force. Section C will present the main point of this Note, arguing that underenforcement is a defensible and practical way to strike a balance between these competing values and to resolve the secular purpose debate.

A. Political Access as the Value Motivating Arguments Against the Secular Purpose Rule

There are a number of prominent moral arguments made against the secular purpose rule. This Section demonstrates that each has, at its core,

[26] Id. at 864. This standard is supported by precedent. See Edwards v. Aguillard, 482 U.S. 578, 586–87, 593 (1987) (finding that a requirement that creationism be taught alongside evolution was meant to promote religious doctrine, not to advance academic freedom); Wallace v. Jaffree, 472 U.S. 38, 56, 59–60 (1985) (holding that adding the phrase "or voluntary prayer" to a statute providing for "a silent minute of meditation" in a classroom was motivated by the sole purpose of promoting prayer); Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam) (finding the required posting of the Ten Commandments in school rooms to be clearly religious); Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 223–24 (1963) (deciding that required daily Bible reading and recitation of the Lord's Prayer at the start of the school day were meant to promote religion, not just moral values).

a concern that the rule excludes religious persons from full participation in the political process.[27] These arguments illustrate the so-called "participation principle": "[C]itizens are obligated to obey the law only if they have a full opportunity to participate in the process of making it."[28] Otherwise, "they will have no moral reason to abide by the outcomes of that process."[29]

1. The Problem of Introspection

One argument against the secular purpose rule is that religious persons are unjustly burdened by the rule because it requires them to make an impossible internal assessment that others do not have to make.[30] When, for example, a religious person wants to support a political action that aligns with her religious beliefs, she must answer a difficult counterfactual question: Would I still support this decision based on my moral beliefs, if not for my religious beliefs?[31] But "[e]ven if [the religious believer] tries, it will be hard for him to assess the reasoned arguments detached from what he thinks is correct on religious grounds."[32] For many religious adherents, "[i]t is not possible to think productively about issues of right and wrong, justice and injustice, without thinking of God's will."[33] Further complicating the issue is the reality that some people will hold a certain belief for religious reasons, while others will hold that same belief for nonreligious reasons.[34] Thus, complying with the rule

[27] The term "religious persons" in this Note refers to those who would rely on religious beliefs to support government action, including lawmakers and citizens.

[28] Micah Schwartzman, What If Religion Is Not Special?, 79 U. Chi. L. Rev. 1351, 1368 (2012).

[29] Id.

[30] See Berg, supra note 24, at 31.

[31] See Eberle, supra note 13, at 72–73; Berg, supra note 24, at 31. Professor Christopher Eberle phrases this inquiry as follows: "[W]ould that citizen continue to regard moral claim C (on the basis of which he supports a proposed law) as sufficient reason for that law if he didn't believe that theistic claim T constitutes adequate reason for C?" Eberle, supra note 13, at 73.

[32] Greenawalt, supra note 13, at 152.

[33] McConnell, supra note 13, at 655; see also Douglas Laycock, The Benefits of the Establishment Clause, 42 DePaul L. Rev. 373, 381 (1992) ("Questions of morality, of right conduct, of proper treatment of our fellow humans, are questions to which both church and state have historically spoken. They are questions within the jurisdiction of both.").

[34] See Perry, Political Reliance, supra note 13, at 672. Given any moral belief upon which a person may base a political decision, "it is the case that although for many persons the belief is religiously grounded (grounded on a religious premise or premises), for many others

places a difficult burden on religious persons; and asking a judge to discern the difference between a lawmaker's religious and secular moral reasoning, and to do so after the fact, is entirely impracticable.

Utah's Zion Curtain provides an apt illustration of the introspection argument. Consider two Utah legislators, both of whom support the Zion Curtain. One legislator is Mormon, and the other is not. To comply with the secular purpose rule, the Mormon legislator would have to discern whether his support for the Zion Curtain comes from his religious convictions or from his secular beliefs. The non-Mormon legislator need not conduct this difficult inquiry before supporting the Zion Curtain. The Mormon legislator therefore must clear an extra hurdle before participating in the political process. His access has been curtailed.

The introspection argument against the secular purpose rule is primarily concerned that requiring religious persons to engage in such thorough self-reflective parsing of religious from secular moral beliefs is a barrier to full participation in the political process. Indeed, it is a barrier that nonreligious citizens do not have to face, so such a barrier impedes access to the political process solely for religious persons. The secular purpose rule, according to this argument, thus excludes a particular group from active engagement in politics, which is antithetical to a pluralistic democratic system. In sum, the introspection argument is fundamentally concerned with preserving political access for religious persons.

2. Inability to Promote Self-Interest

A second argument raised against the secular purpose rule is that a religious person's inability to support political decisions for religious reasons leaves her unable to act in her own best interest. Religious commitments are "comprehensive in nature," encompassing education, birth, death, weekly meetings, "personal counseling," "moral guidance," and time devoted to service, among other things.[35] People define themselves by their religious commitments in a way that makes "[a]lmost any other individual decision pale[] in comparison to the serious commitment to religious faith."[36] Professors Christopher Eisgruber and Lawrence Sager

the belief is not religiously grounded but, instead, is grounded wholly on secular (nonreligious) premises." Id.

[35] Berg, supra note 24, at 37.

[36] Id. (quoting Alan E. Brownstein, The Right Not to Be John Garvey, 83 Cornell L. Rev. 767, 807 (1998) (reviewing John H. Garvey, What Are Freedoms For? (1996))).

describe religion as "an expansive web of belief and conduct" to demonstrate the extent to which a person's religion touches many different aspects of her life.[37] The interconnectedness of this comprehensive web means that "frustration of one aspect" of a person's religious convictions has far-reaching effects on other seemingly unrelated parts of the believer's life.[38]

To bar a believer from basing political decisions on her religious belief, according to this argument, has a negative impact on many parts of her interconnected web of belief. But, in at least some circumstances, a religious person should be able to make political decisions based on her religious belief to avoid this holistic negative effect. The political decision in question may be directly relevant to only one small aspect of the person's web of belief, but it is in her best interest to protect that web from far-reaching damage.[39] Since many religious beliefs can only be defended on religious grounds, barring such religious grounds from public discourse keeps religious citizens and lawmakers from advocating for their own best interests.

Consider again the Zion Curtain. If a Mormon legislator is barred by the secular purpose rule from supporting the Zion Curtain, the impact on his life reaches beyond his mere inability to legislate according to his religious beliefs. The legislator believes it is wrong to drink alcohol, which would lead him to be concerned about his children drinking alcohol and about their exposure to alcohol at a young age. It would be in his self-interest to vote in favor of a measure that would limit his children's exposure to alcohol, such as by keeping it out of sight in restaurants. Being unable to advocate in favor of a religious belief (that it is sinful to drink alcohol) thus quickly leads to an inability to work in his self-interest on a secular issue (parenting).

The concern about a religious person's inability to act in his own best interest is also motivated by political access. This argument recognizes that religion permeates the lives of religious persons, including the secular parts. A consequence of the broad reach of religion is that seemingly minimal impacts on a religious belief system can have far-reaching effects. A religious person can only act to prevent such effects by advocat-

[37] Christopher L. Eisgruber & Lawrence G. Sager, Religious Freedom and the Constitution 61, 125–26 (2007).

[38] Berg, supra note 24, at 37; see also Eisgruber & Sager, supra note 37, at 125–26 (describing the way religion links seemingly disparate aspects of a person's life).

[39] See Berg, supra note 24, at 37.

ing for laws that align with their religious beliefs. This argument is an access argument because if religious persons are barred from considering religion in political decision making, they cannot act in their best interest and seek the laws that, because of their beliefs, would affect all aspects of their lives.

3. The Integrity Objection

Another argument against the secular purpose rule is that it disables a religious person from acting with integrity. Integrity, for the purposes of this argument, is a term of art meaning that a person acts in accordance with "her character, projects, plans and beliefs."[40] The integrity objection stems from a concern that all persons have a right and duty to live their life with "fidelity to those projects and principles that are constitutive of one's core identity."[41] Religious persons, by being unable to use their religious beliefs in the political process, experience a "splitting" of their identity, meaning that they must "corner-off the social space in which [they] can act in accord with their own judgments."[42] Essentially, this means that religious persons must act differently in the political sphere than they do elsewhere. Those making this argument assert that a person should not have to cordon off her religious beliefs in the political context, and thus not act with integrity, in exchange for full participation in the political process.[43]

The integrity objection is bolstered by arguments about the positive social benefits that accrue when citizens and legislators act with integrity.[44] When citizens act in accordance with their core moral beliefs, it can lead to important social progress.[45] One prominent example of such a group is the black churches that were a driving force behind the civil rights movement.[46] The 1964 Civil Rights Act was "fueled by a religious protest movement organized in African American churches" whose

[40] Kevin Vallier, Liberalism, Religion and Integrity, 90 Australasian J. Phil. 149, 155 (2012) (summarizing the philosophical idea of "integrity" as outlined by Bernard Williams).

[41] Id. (quoting Cheshire Calhoun, Standing for Something, 92 J. Phil. 235, 235 (1995) (internal quotation marks omitted)).

[42] Id. at 157.

[43] See id.

[44] See id. at 158 (quoting Paul J. Weithman, Religion and the Obligations of Citizenship 22 (2002)).

[45] Id. at 159–60.

[46] Berg, supra note 24, at 30. Note that the abolitionist, temperance, and civil rights movements were all advanced by organized religious protest movements. Id.

members and clergy "made thousands of phone calls to legislators and held daily protests and worship services near the Capitol."[47] In that setting, religious beliefs were able to "generate the urgency and tenacity necessary to overcome entrenched opposition."[48] By acting with integrity in the political sphere, citizens can generate meaningful social good, even when their political actions are based on religious belief. Accordingly, requiring that political action have a primary secular justification may have deleterious effects on the political participation of cultural groups that develop their civic morals through religious organizations, thereby depriving society of tangible social and political benefits.

The integrity argument is motivated by political access in at least two respects. First, the argument is fundamentally a concern that the secular purpose rule creates an undue burden on religious persons. Disallowing political reliance on religious beliefs prevents religious persons from acting with integrity in the political process because they may not be able to act in accordance with their deeply held beliefs. Second, the argument cautions society about the detrimental impact of hampering the political access of subsections of society that have learned their civic values from religious organizations. Citizens making religious arguments in favor of socially beneficial legislation have often provided the necessary energy to effectuate important changes, and barring such arguments could prevent future social progress.[49]

4. Discrimination Against Religious Beliefs

Another argument leveled against the secular purpose rule is that singling out religion for exclusion from the political process is the result of discrimination. The argument relies on the premise that religious commitments are not descriptively unique from other moral commitments.[50] Religious beliefs, according to the proponents of this argument, are "not different in any relevant sense from beliefs about morality, aesthetics, or other controversial domains of value."[51] Regardless of what principle is

[47] Id.
[48] Id.
[49] Id.
[50] See Schwartzman, supra note 28, at 1363–64. Some opponents of the secular purpose rule believe that "the secular purpose doctrine rests on a dubious epistemological view that distinguishes between secular moral views and religious beliefs on the grounds that the former are publicly justifiable in a way that the latter are not." Id.
[51] Id. at 1364.

used to determine which values can or cannot be used in public discourse, "it will fail to select uniquely for religious beliefs."[52] Any candidate will either "sweep in secular moral values" or "not exclude many religious beliefs."[53] Therefore, religious convictions should not suffer any special disability in serving as the basis for state action, when other indistinguishable beliefs are allowed as a basis for such action.

Returning to the Zion Curtain example, suppose two legislators support the law. One does so based on his religious belief that alcohol consumption is sinful. The other supports it based on her secular moral belief that alcohol consumption is morally reprehensible. This argument posits that these religious and secular moral rationales are epistemologically indistinguishable and should be treated the same.[54] But the secular purpose rule prevents the religious legislator from supporting the Zion Curtain while allowing the other to freely do so despite having a similar, albeit nonreligious, moral justification. Because there is no principled distinction between these justifications, the secular purpose rule discriminates against the religious legislator.

The discrimination argument is also motivated by concerns about political access. If it is true that the secular purpose rule permits moral beliefs as the justification for state action generally, then selecting indistinctive religious beliefs as inappropriate for lawmaking while considering other moral beliefs to be appropriate is a form of discrimination. Such discriminatory distinctions unjustifiably hamper political access of a section of the citizenry. This argument is therefore motivated, at least in part, by the concern that religious persons are kept from full political participation because of arbitrary line drawing.

B. Legitimacy as the Political Value Motivating Arguments for the Secular Purpose Rule

There are also several prominent arguments in favor of the secular purpose rule. This Section seeks to show that at the core of each of these arguments is a concern about the legitimacy of law.

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[52] Id.

[53] Id.; see also Larry Alexander, Liberalism, Religion, and the Unity of Epistemology, 30 San Diego L. Rev. 763, 764–70 (1993) (arguing that "liberals" who wish to "insulat[e]" public policy from religion have not offered a logically sufficient justification for their view and that religious perspectives must necessarily be included in public policy debates).

[54] Schwartzman, supra note 28, at 1363–64.

Legitimacy, in this context, has a technical definition. As Professor John Rawls explains:

> [O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principal of legitimacy.[55]

Thus, only laws justified by principles that are generally accepted among all citizens satisfy the principle of legitimacy.[56] Conversely, laws justified by principles that lack general acceptance lack legitimacy.

Proponents of the secular purpose rule rely on this concept of legal legitimacy.[57] Each of the following arguments is based on a worry that political action based on religious belief is not legitimate since, in a religiously diverse society, not all citizens can "reasonably be expected to endorse" any particular theology.[58] Law based on religion will therefore not have the moral force necessary to obligate all citizens to obey the law.

1. Religious Justifications Are Incomprehensible to Nonbelievers

One prominent argument made in support of the secular purpose rule is a relatively straightforward application of the concern about legitimacy in the political process. This argument posits that laws based on religious beliefs lack "public reason," and hence are illegitimate, because religious beliefs are incomprehensible to nonbelievers.[59] Public reasons

[55] Rawls, Political Liberalism, supra note 12, at 217.

[56] Id. It is important to keep in mind that even if a law is not morally binding, it can still be legally binding.

[57] See, e.g., Schwartzman, supra note 28, at 1368–69.

[58] See, e.g., Rawls, Political Liberalism, supra note 12, at 217. Note that religious beliefs in a religiously homogenous society can be the basis of legitimate law. This is because all citizens in that society could reasonably be expected to endorse those beliefs. But in a society that lacks general consensus on religious beliefs, no such endorsement can be reasonably expected.

[59] Schwartzman, supra note 28, at 1364, 1368. Professor Micah Schwartzman describes the idea that laws only have moral force when supported by public reason with reference to the idea that all citizens must be able to contribute meaningfully to political discourse:

> Briefly stated, the argument for this premise is that if religious convictions dominate political discussion about whether to adopt a law, nonbelievers cannot take part meaningfully in that discussion. Because they do not share a belief in the normative authority of religious convictions, which by definition appeal to a transcendent source,

are reasons that the general public agrees are valid.[60] They are "reasons whose force [as reasons, even if not their power to determine the resolution of an issue] would be acknowledged by any competent and level-headed observer."[61]

When a political decision is couched in terms of public reason, all citizens can discuss fundamental issues within a framework of values that others can "reasonably be expected to endorse" and be prepared to defend in good faith.[62] Public reason is marked by the principle of "reciprocity," which means that a citizen proposing certain arguments "must also think it at least reasonable for others to accept them, as free and equal citizens."[63] Others call this feature of public reason "shareability," meaning that public reasons "are reasons that all citizens acknowledge as having normative force."[64] Examples of public reasons include "accepted general beliefs," "reasoning found in common sense," and scientific methods and conclusions "when these are not controversial."[65]

Without a secular purpose rule, political decisions could be justified by religious reasons. Religious beliefs are not public reason because nonbelievers cannot be expected to endorse the given reasons or participate meaningfully in public discourse couched in religious beliefs. Since religious beliefs lack public reason, a law resulting from such beliefs is not legitimate.[66] The lack of shareability or reciprocity of religious be-

> nonbelievers will be excluded from the deliberative process. Moreover, given the participation principle, it follows that they will have no moral reason to abide by the outcomes of that process.

Id. at 1368 (footnote omitted).

[60] See Rawls, Political Liberalism, supra note 12, at 213–14; Rawls, Public Reason Revisited, supra note 12, at 770. Rawls sets out three requirements for a reason to be public: first, "as the reason of citizens as such, it is the reason of the public"; second, "its subject is the good of the public and matters of fundamental justice"; and third, "its nature and content is public, being given by the ideals and principles expressed by society's conception of political justice, and conducted open to view on that basis." Rawls, Political Liberalism, supra note 12, at 213–14.

[61] Richard H. Fallon, Jr., Of Speakable Ethics and Constitutional Law: A Review Essay, 56 U. Chi. L. Rev. 1523, 1546 (1989) (reviewing Michael J. Perry, Morality, Politics, and Law: A Bicentennial Essay (1988)) (alteration in original) (quoting Greenawalt, supra note 13, at 57); id. at 1549 & n.80.

[62] Rawls, Political Liberalism, supra note 12, at 217–18.

[63] Rawls, Public Reason Revisited, supra note 12, at 770.

[64] Vallier, supra note 40, at 152.

[65] See Rawls, Political Liberalism, supra note 12, at 224.

[66] See Schwartzman, supra note 28, at 1368–69.

liefs between believers and nonbelievers hence robs laws based on such beliefs of their moral force.

Consider a non-Mormon restaurant owner subject to Utah's Zion Curtain law. If the Zion Curtain truly was passed for religious reasons, then it was not justified by public reason, and the law is not legitimate. The religious beliefs that led to the law lack reciprocity. The restaurant owner could not be reasonably expected to endorse or comprehend the LDS prohibition of alcohol, nor participate meaningfully in a discussion based on that belief. The restaurant owner's legal duty to put up the barrier remains, but she has no moral duty to comply.

This argument is fundamentally motivated by concerns about the legitimacy of law. Religion is not public reason because nonbelievers cannot be reasonably expected to endorse, comprehend, or participate meaningfully in public discussion based on those beliefs. Any decision based on religious beliefs lacks public reason and cannot be considered legitimate. Supporters of the secular purpose rule thus argue that requiring a genuine and primary secular purpose remedies this problem by ensuring that no political decision can be made without reference to public reason.[67] All those affected by the decision would be able to comprehend the reasoning behind it and therefore would have a moral duty to comply. In sum, the secular purpose rule, according to this argument, protects against religiously based illegitimate lawmaking.

2. Avoiding Government Declarations of Religious Truth

Another argument made in support of the secular purpose rule is that the rule prevents the government from declaring religious truth.[68] It asserts that the rule is necessary in order for the axiom that "[g]overnment . . . must be neutral in matters of religious theory, doctrine, and practice" to have any substantive meaning.[69] This argument is characterized well by Professor Kent Greenawalt, who connects the quasi-truism that a liberal democracy cannot declare religious truth with the need for a secular purpose rule:

> A liberal society . . . has no business dictating matters of religious belief and worship to its citizens. . . . One needs only a modest extension

[67] Schwartzman, supra note 28, at 1368–69.

[68] Koppelman, supra note 12, at 110–12.

[69] Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968); Koppelman, supra note 12, at 110–12.

> of these uncontroversial principles to conclude that a liberal society should not rely on religious grounds to prohibit activities that either cause no secular harm or do not cause enough secular harm to warrant their prohibition.[70]

Thus, the government should not dictate religious truth in a liberal society, and the secular purpose rule gives this tenet legal effect.[71]

The Zion Curtain, according to this argument, creates a risk that the government is declaring religious truth. Assume that allowing restaurant patrons to see alcohol causes little or no secular harm. The only reason to enact the Zion Curtain would then be a religious belief that alcohol should be tucked out of view. Legislative action based on that belief declares religious truth by implying that the state has adopted and correctly interpreted LDS doctrine on alcohol and, therefore, has legally elevated this doctrine above other beliefs regarding alcohol.

Concerns about legitimacy motivate this argument as well. Any declaration of religious truth by the government would lack legitimacy because it would not be based on beliefs or principles common to all citizens.[72] The secular purpose rule prevents illegitimate government action

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[70] Greenawalt, supra note 13, at 90–91.

[71] Professor Andrew Koppelman offers compelling justifications for the argument that government should not declare religious truth:

> Three reasons are typically given for disestablishment of religion; all of them support the restriction on government speech [in declaring religious truth]. One reason is civil peace: In a pluralistic society, we cannot possibly agree on which religious propositions the state should endorse. The argument for government agnosticism is that, unlike government endorsement of any particular religious proposition, it is not in principle impossible for everyone to agree to it.
>
> A second reason for disestablishment is futility: Religion is not helped and may even be harmed by government support. Professor John Garvey notes that this principle has roots in the theological idea that "God's revelation is progressive," so that free inquiry will bring us closer to God. The futility argument can also take the form of a sociological claim that state sponsorship tends to diminish respect for religion, or a skeptical claim that the state does not know enough to justify preferring any particular religious view.
>
> Finally, there is an argument based on respect for individual conscience. This argument states that the individual's search for religious truth is hindered by state interference.

Koppelman, supra note 12, at 110 (footnotes omitted) (quoting John H. Garvey, An Anti-Liberal Argument for Religious Freedom, 7 J. Contemp. Legal Issues 275, 285 (1996)).

[72] See Rawls, Political Liberalism, supra note 12, at 217–18 (explaining that laws are legitimate only when supported by principles upon "which all citizens may reasonably be expected to endorse"). A declaration of religious truth would be necessarily supported primarily by religious beliefs, since the content of the declaration is itself a religious belief. As such,

that declares religious truth by requiring that government action be based on such common principles. Therefore, because proponents of this argument are concerned with preventing illegitimate government declarations of religious truth and ensuring that laws are based on common principles, they are fundamentally concerned with preserving the legitimacy of law.

3. Preservation of Independent Constitutional Rights

A third argument in favor of the secular purpose rule is that the rule is necessary for independent constitutional limits on government action to have any substance. According to this argument, religious justifications can be found for nearly any conceivable state action, so removing the secular purpose rule would "devastate many constitutional protections that have nothing to do with religion."[73]

Consider, for example, the protections afforded by the Fourteenth Amendment. Discriminatory governmental action that is suspect under the Fourteenth Amendment is often supported by religious arguments.[74] Religion has been used to support, for example, race discrimination, sex discrimination, and anti-gay discrimination.[75] Without the secular purpose requirement, "the state could invoke divine will as a compelling justification for any discrimination that it chose to practice."[76] The secular purpose rule prevents such an exercise by removing the state's ability to defer to divine will. Thus, according to proponents of this argument, the secular purpose rule preserves independent rights guaranteed by the Constitution.

Legitimacy is also the driving force behind this argument. Without a secular purpose rule, the government could perform actions not backed by public reason in ways that violate many constitutional rights. This argument therefore expands the breadth of concern about illegitimate lawmaking. The secular purpose rule prevents illegitimate action that

it cannot be supported by a principle which all citizens can be expected to endorse and, consequently, cannot be legitimate.

[73] Koppelman, supra note 12, at 88.

[74] Id. at 93.

[75] Id. at 160–61 (citing Forrest G. Wood, The Arrogance of Faith: Christianity and Race in America from the Colonial Era to the Twentieth Century (1990); After Patriarchy: Feminist Transformations of the World Religions (Paula M. Cooey et al. eds., 1991); Homosexuality and World Religions (Arlene Swidler ed., 1993)).

[76] Id. at 93–94.

would undercut constitutional guarantees by forcing religious persons to justify their political decisions with public reason. This argument is motivated by legitimacy in that it posits that the secular purpose rule prevents such illegitimate attempts to circumvent constitutional protections.

C. Underenforcement as a Tenable Solution to the Secular Purpose Debate

As the previous Sections indicate, the debate over the morality of the secular purpose rule boils down to a conflict between the value of access and the value of legitimacy. Arguments in favor of the secular purpose rule worry about legitimacy, while arguments against the secular purpose rule worry about access. But the challenges posed by the debate are not insurmountable. It can, and may already have been, resolved in a way that maintains equilibrium between political access and legitimacy: underenforcement of the secular purpose requirement. This approach would allow all persons involved—lawmakers, citizens, and judges, both religious and nonreligious—to conduct their political decision making morally and within the confines established by the Constitution.

The underenforcement scheme would ensure that religious persons would be morally required, and lawmakers would be constitutionally required, to support only laws backed by public reason. Thus, the scheme would promote legitimacy of law. But when courts must decide the constitutionality of a law that lacks a secular purpose, they would elect not to overturn such laws. Thus, the scheme would also promote political access. The political values motivating both the proponents and opponents of the secular purpose rule would coexist in a state of pragmatic equilibrium. This approach is morally defensible because it would not violate either of the values important to both sides of the debate, while operating within the requirements of the Establishment Clause.

This Section will elaborate on the argument that underenforcement is a constitutionally permissible and morally desirable way to resolve the secular purpose debate by maintaining equilibrium between the political values motivating the debate. The first Subsection will give a detailed explanation of how underenforcement of the secular purpose rule creates equilibrium between the competing political values animating the debate. The second Subsection will show that underenforcement has been reached organically by courts in a manner that resolves the secular purpose debate.

1. Underenforcement as Equilibrium Between Competing Political Values

As described above, underenforcement balances the competing values at issue in the secular purpose debate. This balancing, in practice, would proceed as follows. The secular purpose rule is a consistently affirmed piece of the Supreme Court's interpretation of the Establishment Clause.[77] Legislators, the President, judges, and other governmental actors are obligated by oath to act in accordance with the Constitution.[78] Therefore, the existence and judicial reaffirmation of the secular purpose rule broadcasts to those actors that they may only make decisions that are supported by a primary, genuine secular purpose.

However, should a law be passed that arguably violates the secular purpose rule and gets challenged in court, the court should usually decline to invalidate the law based on the secular purpose rule.[79] This move preserves political access. A refusal to overturn the law prevents the religious persons who supported such a law from being relegated to second-class status; it sends the message to religious persons that their voice in the political process will be heard in the same way that persons acting on other deeply held convictions will be heard. Religious persons' political access is thus not definitively circumscribed.

Clayton ex rel Clayton v. Place[80] provides an excellent illustration of underenforcement of the secular purpose rule balancing political values. The case involved Purdy, Missouri's long-standing prohibition of dances on school grounds.[81] Local congregations believed that dancing was sin-

[77] See *McCreary Cty.*, 545 U.S. at 859–60; Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000); Edwards v. Aguillard, 482 U.S. 578, 585 (1987); Wallace v. Jaffree, 472 U.S. 38, 55–56 (1985); Stone v. Graham, 449 U.S. 39, 40–41 (1980) (per curiam); see also Epperson v. Arkansas, 393 U.S. 97, 106–07 (1968) (invalidating a state law for want of a secular purpose before the announcement of the *Lemon* test).

[78] U.S. Const. art. VI, cl. 3. ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."); see also Curtis A. Bradley & Trevor W. Morrison, Essay, Presidential Power, Historical Practice, and Legal Constraint, 113 Colum. L. Rev. 1097, 1109–11 (2013) (explaining that courts use tools like the political question doctrine, standing, and ripeness to avoid decisions on the constitutionality of the President's actions).

[79] One circumstance under which courts should enforce the secular purpose rule is discussed in Section II.B, infra.

[80] 884 F.2d 376 (8th Cir. 1989).

[81] Id. at 377–78. According to the case, "Rule 502.29 of the Purdy R-2 School District provide[d] in part: 'School dances are not authorized[,] and school premises shall not be used for purposes of conducting a dance.'" Id. (second alteration in original).

ful and strongly supported the dancing ban in schools.[82] A group of high school students argued that the ban violated the Establishment Clause because it was justified only by religious beliefs.[83]

The U.S. Court of Appeals for the Eighth Circuit declined to overturn the ban.[84] Although the court cited the secular purpose rule, it dodged rigorous application of the rule by reasoning that "[t]he mere fact a governmental body takes action that coincides with the principles or desires of a particular religious group, however, does not transform the action into an impermissible establishment of religion."[85] The court held that mere alignment of religious belief and law does not mean that the law violates the Establishment Clause.[86]

By ruling as it did, the Eighth Circuit balanced political access and legitimacy in a way that preserved both values. When the court cited the secular purpose rule, it affirmed the rule's validity as the current interpretation of the Establishment Clause. It sent a message to governmental actors that they have a constitutional duty to only support actions backed by public reason. While the decision may not have immediately cured the dancing ban's lack of legitimacy, reiterating the rule promoted legitimacy in perpetuity. Legislators considering the dancing ban in the future would be under a constitutional duty to either justify the dancing ban with public reason or repeal it if it truly lacked a secular purpose.

Meanwhile, the Eighth Circuit helped preserve the political access of a large cross section of Purdy society. A decision to invalidate the dancing ban for lack of a secular purpose would create a high risk of alienation by broadcasting a message to religious citizens that they could not participate in the political process to the same extent as others with deeply held secular beliefs. Essentially, invalidating the dancing ban could give life to the idea, whether fallacious or not, that those who believe dancing is sinful and has no place in school are second-class citizens. It could send the message that their voice is less efficacious or important than the voices of other citizens who act in accordance with their deeply held secular beliefs. Underenforcement thus helped to avoid both

[82] Id. at 378. The local First Assembly of God congregation, for example, required from those who wanted to join "a separation from worldliness, including dancing." Clayton ex rel Clayton v. Place, 690 F. Supp. 850, 856 (W.D. Mo. 1988), rev'd 884 F.2d 376 (8th Cir. 1989).

[83] *Clayton*, 884 F.2d at 377.

[84] Id. at 381.

[85] Id. at 379–80.

[86] Id. at 380.

this problem and the problems posed by a potential loss of legitimacy due to a lack of secular purpose.

2. Underenforcement as the Disestablishment Status Quo

Not only is underenforcement a tenable way to resolve the moral debate over the secular purpose rule by preserving equilibrium between political values, it is also a strategy that courts have reached organically. Perhaps, like a standard macroeconomic model, political market forces have driven the competing values of access and legitimacy to a stable state of equilibrium.

The underenforcement of the Establishment Clause was first observed by Professor Schragger. He argues that the Supreme Court elects not to invalidate many laws that actually violate the Establishment Clause.[87] As he describes, in only five cases has the Supreme Court invalidated laws that violate the secular purpose rule: Two were school-prayer cases,[88] two were public posting of the Ten Commandments cases,[89] and one was a teaching creationism in schools case.[90]

The Court's enforcement practices suggest that it applies a coercion-type rule, under which the Court will only strike down laws that involve "patently religious activities" such as "prayer or specific religion-based doctrines."[91] Indeed, "[t]he Court has never struck down a substantive law that did not involve a specific religious practice or expression of religious dogma" under the secular purpose rule.[92] This is underenforcement because the robust language used by the Court does not comport with its practice; the Court's language purportedly requires laws to have

[87] Schragger, supra note 11, at 585, 593–94.

[88] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308–09, 317 (2000); Wallace v. Jaffree, 472 U.S. 38, 59–61 (1985).

[89] *McCreary Cty.*, 545 U.S. at 870–72, 881; Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam).

[90] Edwards v. Aguillard, 482 U.S. 578, 586–90, 593 (1987); Schragger, supra note 11, at 594; see also Epperson v. Arkansas, 393 U.S. 97, 106–07 (1968) (overturning a creationism law because it was justified by religious reasons, but predating the *Lemon* test).

[91] Schragger, supra note 11, at 594.

[92] Id.

a genuine primary secular purpose.[93] As a matter of practice, however, the Court does not strike down these laws.[94]

II. OBJECTIONS TO UNDERENFORCEMENT

Although underenforcement strikes a desirable balance between the competing political values at play in the secular purpose debate, some may object to its feasibility. This Part will address a few of these potential objections. First is the possibility that the disparity between the Court's language and its enforcement is not underenforcement; rather, one could argue, its enforcement practices define the contours of the rule. In response, this Note will argue that, as a jurisprudential matter, limited enforcement need not limit the extent to which the rule is legally binding.

Second is the concern that what this Note calls underenforcement in theory would turn into nonenforcement in practice. If that were the case, the secular purpose rule would have no substance. To respond to this concern, this Note will propose a way to canalize the underenforcement of the secular purpose rule and mark out some situations in which the secular purpose rule should be fully enforced. Finally, it will address a collection of more minor objections to secular purpose rule underenforcement.

A. Underenforcement of Constitutional Norms

One potential criticism of this Note's proposed approach is that a decision not to enforce the secular purpose rule limits the legally binding

[93] See *McCreary Cty.*, 545 U.S. at 863–64 (cautioning against interpreting the secular purpose rule "as if the purpose enquiry were so naive that any transparent claim to secularity would satisfy it" because "although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective").

[94] See, e.g., Van Orden v. Perry, 545 U.S. 677, 682–83, 691–92 (2005) (holding that a display of the Ten Commandments at the Texas State Capitol did not violate the secular purpose rule); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 329–30, 335–36 (1987) (holding that applying Section 702 of the Civil Rights Act, which grants an exemption from Title VII's ban on discrimination to religious organizations, to the "secular nonprofit activities" of such organizations does not violate the secular purpose rule); Lynch v. Donnelly, 465 U.S. 668, 681 (1984) (holding that a city-sponsored crèche display did not violate the secular purpose rule); see also Salazar v. Buono, 559 U.S. 700, 708–09 (2010) (noting the reluctance of the district and appellate courts to consider whether a cross placed on federal land had a secular purpose).

effect of the rule. Essentially, the argument goes, if courts do not enforce the secular purpose rule to its full potential, the lack of enforcement is not underenforcement. Rather, the enforcement merely defines the metes and bounds of the rule.

Limitations on the scope of enforcement of a constitutional doctrine, however, do not necessarily abrogate the legal force of that doctrine. Professor Greenawalt suggested as much when he said that "[t]he Constitution may actually prohibit certain actions that courts will not declare to be unconstitutional."[95] Under these conditions, Professor Greenawalt would say that political action based on improper religious motives violates the "spirit of the Establishment Clause," even if the violation is not enforced.[96]

This Section first provides a framework for evaluating the effect that underenforcement has on a constitutional principle. It then applies that framework to the secular purpose rule, arguing that despite underenforcement, the secular purpose rule remains legally binding to its full extent.

1. Institutional and Analytical Underenforcement Compared

To address the question of whether the scope of enforcement defines the meaning of the secular purpose rule, this Note adopts the framework proposed by Professor Sager. He argues against the "[m]odern convention" of treating "the legal scope of a constitutional norm as inevitably coterminous with the scope of its federal judicial enforcement."[97] Rather, he posits that constitutional norms can be "valid to their conceptual limits" regardless of the extent to which they are enforced.[98] "Federal judicial doctrine" marks boundaries for federal enforcement but not the length and breadth of the underlying constitutional norm.[99] The underenforced constitutional norm still grants the same "legal powers or legal obligations of government officials which are subtended in the unen-

[95] Greenawalt, supra note 13, at 8.

[96] See 2 Kent Greenawalt, Religion and the Constitution: Establishment and Fairness 498 (2008).

[97] Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1213 (1978).

[98] Id.

[99] Id.

forced margins" of those norms.[100] The threat of enforcement, in his view, is thus not necessary for a law to be valid.[101]

Professor Sager argues that there are two categories of reasons that a constitutional rule would be enforced at less than its full potential reach.[102] The first category is "institutional."[103] Reasons to limit enforcement that are "based upon questions of propriety or capacity" are institutional.[104] The second category is "analytical."[105] Reasons "based upon an understanding of the [underlying constitutional] concept itself" fall into this category.[106] Under Professor Sager's underenforcement framework, when enforcement is abrogated for institutional reasons, such as the inability or impropriety of the court deciding a certain issue, the underlying meaning remains intact and legally binding to its full extent.[107] This is true underenforcement; the constitutional rule remains legally binding to its full extent, but the rule is not enforced to its full extent. But when enforcement is truncated for analytical reasons, such as a decision by the court that the constitutional provision at issue actually means something different than was previously understood, the underlying meaning of the doctrine changes.[108] In this instance the law changes, so limited enforcement defines the contours of the law.

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[100] Id. at 1221.

[101] Cf. id. at 1221 n.27 ("Professor H.L.A. Hart recognizes only two conditions as essential to the existence of a legal system, neither of them necessarily involving the availability of enforcement. First, rules of behavior valid under the system's own criteria 'must be generally obeyed.' Second, those rules specifying the criteria of validity and the system's 'rules of change and adjudication' should be 'accepted as common public standards of official behavior by its officials.'" (quoting H.L.A. Hart, The Concept of Law 113 (1961)).

[102] Id. at 1217–18.

[103] Id.

[104] Id.

[105] Id.

[106] Id.

[107] Id. at 1217–21.

[108] Id. at 1217–18, 21. *Korematsu v. United States*, 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting), gives an excellent illustration of the dangers of analytical underenforcement. The majority opinion held that national security is a sufficiently important interest to satisfy strict scrutiny triggered by racial classifications, lending constitutional legitimacy to the military's systematic detention of Japanese citizens during World War II. Id. at 216, 223–24 (majority opinion). In his dissent, Justice Jackson expressed concerns about using analytical reasons to underenforce the Due Process Clause of the Fourteenth Amendment. He cautioned against rationalizing the military's racially discriminatory program, because "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution . . . the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens." Id. at 246 (Jackson, J., dissenting). According to the dissent, the majority's analytical approach actually changed the underlying

Professor Sager illustrates his thesis with the Equal Protection Clause of the Fourteenth Amendment.[109] He begins by defining the underlying meaning of the clause: "A state may treat persons differently only when it is fair to do so."[110] He then notes that under the Supreme Court's enforcement framework, including rational basis review and strict scrutiny, "only a small part of the universe of plausible claims of unequal and unjust treatment by government is seriously considered by the federal courts."[111] Questions that elicit the highly deferential rational basis review, such as claims that a taxation scheme is arbitrary or unfair, will be only nominally scrutinized, and often dismissed out of hand.[112]

The truncated enforcement framework for dealing with taxation schemes under the Equal Protection Clause is "institutional," since the main reasons given for rational basis review are the "[im]propriety of . . . judges[] displacing the judgments of elected . . . officials" and the incompetence of courts to fashion alternative workable schemes.[113] Despite the limited scope of enforcement, the operative conception of the Equal Protection Clause remains intact: "A state [should] treat persons differently only when it is fair to do so."[114] Thus, even though taxation schemes are rarely invalidated under the Court's current construct for enforcing the Equal Protection Clause, legislators are still obligated by the Constitution to fashion taxation schemes that only treat people differently when it is fair to do so.

A second illustrative example comes from the law governing the Internet, where underenforcement is common.[115] When, for example, massive numbers of illegal downloads of copyrighted material occur without investigation, arrests, or prosecution, the police have underenforced the

constitutional norm, meaning that the military could then make similar race-based decisions in the future and escape judicial scrutiny. Id. at 245 ("But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.").

[109] Sager, supra note 97, at 1215.

[110] Id.

[111] Id. at 1215–16.

[112] Id. at 1215–17.

[113] Id. at 1216–18.

[114] Id. at 1215.

[115] Alexandra Natapoff, Article Underenforcement, 75 Fordham L. Rev. 1715, 1741 (2006) ("[C]yberspace is the single largest location of violations of intellectual property precepts of any place in human history." (quoting Lawrence Lessig, The Death of Cyberspace, 57 Wash. &. Lee L. Rev. 337, 343 (2000)) (internal quotation marks omitted)).

law.[116] These crimes go unpunished not because those responsible for its enforcement read the law to mean that the illegal downloads are not a crime, but because of limited resources, value judgments about the costs and benefits of enforcement, and the inherently open technical structure of the internet.[117] Even though the police have not enforced copyright law to its full extent, the reasons given are institutional rather than analytical, so the scope and magnitude of the law does not change.

2. Institutional Justifications for Establishment Clause Underenforcement

Courts that underenforce the Establishment Clause generally do so based on some combination of three particular reasons.[118] This Subsection argues that each of the reasons is institutional rather than analytical.[119] Since the reasons are institutional, the current underenforcement of the Establishment Clause in general and the secular purpose rule in particular does not alter the extent to which the Establishment Clause and secular purpose rule are legally binding.[120] Thus, this Note's recommended application of the secular purpose rule does not define the meaning of the rule, just its proper level of enforcement.

The first reason often given for underenforcement is political pragmatism.[121] A court "may be concerned about its inability to enforce its judgments in the civic arena" and may hesitate to fully enforce its disestablishment doctrine because it is "politically powerless to do so."[122] Justice Scalia voiced this concern in *McCreary County v. ACLU of Kentucky*, arguing that if the Court fully enforced the disestablishment norm, it would lose "the willingness of the people to accept its interpretation of the Constitution as definitive."[123] The judiciary may fear that it lacks the institutional capacity to enforce the Establishment Clause to its full

[116] See id.

[117] See id. at 1741–42 ("On this view, underenforcement is not merely a paucity of police on the streets or FBI agents trolling the Internet. Rather, underenforcement is a combination of public value judgments, resource allocations, structural choices about how public spaces function, and, most importantly, the power of residents of those spaces to make their demands heard.").

[118] Schragger, supra note 11, at 615.

[119] See Sager, supra note 97, at 1217–18.

[120] Id.

[121] Schragger, supra note 11, at 617.

[122] Id.

[123] 545 U.S. 844, 892–93 (2005) (Scalia, J., dissenting); Schragger, supra note 11, at 617.

breadth and depth, so it chooses to underenforce. The political pragmatism concern is institutional, as opposed to analytical, because it focuses on the capabilities of the court, not on an interpretation of the Constitution.[124]

The second reason is a concern about judicial competence.[125] The judiciary's lack of competence to deal with disestablishment questions can be divided into two distinct components: "First, as with many cases in which legislative motive is at stake, courts find it difficult to determine what motivates particular legislators."[126] This is a "generic concern" about institutional competence relevant to many areas of constitutional law.[127] "Second, and more specific to the Establishment Clause, courts cannot wholly exclude religious rationales as an appropriate basis for lawmaking."[128] Throughout history, religion and religious beliefs have been thought to underpin the rule of law because "[f]or some, belief in God . . . is a prerequisite for law."[129] The Court, however, is not yet ready to reject that branch of legal philosophy. Instead, the Court "nod[s] to th[e] cultural reality" that American legal codes "tend to be justified with reference to some religious tradition" and "recogni[zes] that the Court is not capable of resolving a difficult philosophical question about legal foundations."[130] In sum, the judiciary fears that it is incompetent to decide such sensitive questions and must therefore leave such issues to other institutions. This concern is institutional because its focus is on judicial capabilities, not an interpretation of relevant law.[131]

The third reason that the Court may underenforce is deference to the democratic process.[132] In order for a democracy to function, it may be necessary that "the Court not close off any justification for political decision making, including the justification that particular laws are required by God."[133] By fully enforcing the secular purpose rule, on this rationale, the Court could chill the democratic process.[134] As such, courts

[124] Sager, supra note 97, at 1217–18.
[125] Schragger, supra note 11, at 615.
[126] Id. at 620.
[127] Id.
[128] Id. at 620–21.
[129] Id. at 623.
[130] Id. at 624.
[131] Sager, supra note 97, at 1217–18.
[132] Schragger, supra note 11, at 625.
[133] Id.
[134] Id.

may decide that the political process should be left to other institutions, such as political branches of government, and not be inhibited by courts.[135] This reason is also institutional, since it focuses on the proper role of the courts rather than the proper interpretation of the Constitution.[136]

Because the underenforcement of the secular purpose rule has been justified by institutional rather than analytical reasons, it retains its legal force.[137] The full doctrine of the Establishment Clause, including the secular purpose rule, remains binding. This supports the argument that underenforcement is a tenable way to resolve the secular purpose debate because underenforcement will not limit the scope of protections offered by the Establishment Clause. Thus, underenforcement does not define the meaning of the secular purpose rule; it merely sets the level of enforcement.

B. Canalizing Secular Purpose Underenforcement

A second possible objection to underenforcement is that in practice, underenforcement is tantamount to nonenforcement. This objection correctly recognizes that underenforcement is not appropriate in every situation and that there must be instances in which the rule should be fully enforced. The Supreme Court has acknowledged as much by invalidating laws that coerce citizens into participating in overtly religious practices, such as praying or teaching creationism in schools.[138] This Section, therefore, responds to and recognizes the merit of this objection by presenting an additional instance in which the secular purpose rule should be enforced: when underenforcement would lead to discrimination against vulnerable groups.

1. Discriminatory Underenforcement

In many situations, underenforcement can have positive social effects. For example, "[w]hen law enforcement recedes to leave room for individual autonomy, creativity, or the expression of democratic challenges to authority, it can be an important ingredient in maintaining freedom of the public sphere. . . . [U]nderenforcement may delineate the proper bal-

[135] See id.
[136] Sager, supra note 97, at 1217–18.
[137] See supra Subsection II.A.1.
[138] See supra notes 87–90 and accompanying text.

ance between state coercive authority and individual freedom."[139] The underenforcement of some crimes, for example, including online copyright violations, "civil disobedience," "personal drug use," and "[sodomy] prior to *Lawrence v. Texas*" can generate net positive social benefits.[140] Although criminal behavior goes unpunished in these circumstances, fundamental political values benefit. But in other situations, underenforcement can have negative consequences.[141] The arbitrary enforcement discretion granted by systematic underenforcement often leads to disproportionate and detrimental effects on socially disenfranchised victim groups.[142] In these instances, "underenforcement is often linked with official discrimination, increased violence, legal failure, and the undemocratic treatment of the poor."[143] When underenforcement leads to discrimination, it is improper and the underlying legal norm should be enforced to its full extent. Accordingly, the underenforcement of the secular purpose rule should be limited to situations in which such underenforcement will not lead to discrimination against suspect classes.[144]

2. Discriminatory Underenforcement Illustrated

By way of illustration, this Subsection will analyze *Romer v. Evans*, in which the Supreme Court invalidated a Colorado constitutional amendment ("Amendment 2") prohibiting laws against discrimination based on sexual orientation.[145] In 1992, the citizens of Colorado enacted a constitutional amendment to prevent localities from passing laws barring discrimination based on sexual orientation.[146] *Romer*, the Supreme

[139] Natapoff, supra note 115, at 1740.
[140] Id. at 1740–44.
[141] Id. at 1729–30.
[142] Id. at 1717, 1729–30.
[143] Id. at 1717.
[144] I use the term "suspect class" to denote politically vulnerable groups, as described in *United States v. Carolene Products* footnote 4: that is, "discrete and insular minorities." See 304 U.S. 144, 153 n.4 (1938). "Suspect class," as used here, includes LGBTQ individuals, since they are a traditionally "politically powerless minority group." Courtney A. Powers, Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny, 17 Duke J. Gender L. & Pol'y 385, 386, 388–89 (2010).
[145] 517 U.S. 620, 623–24 (1996).
[146] Id. The following is the text of Colorado's Amendment 2:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agen-

Court decision that invalidated this law, is now a hallmark of modern Fourteenth Amendment jurisprudence.[147] The Court's opinion in *Romer* did not cite the Establishment Clause,[148] but commentators have noted that there were significant religious undertones in the case.[149]

Some contend that Colorado's Amendment 2 was passed to codify religious aversion to homosexuality and lacked a genuine primary secular purpose.[150] The proponents of Amendment 2 maintained that it had a rational basis grounded in secular reason; namely, that it was designed to protect citizens' freedom of association, especially that of "landlords or employers who have personal or religious objections to homosexuality."[151] This purported rationale was thin at best. The Court recognized as much when it said:

> We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake . . . .[152]

> cies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. at 624 (quoting Colo. Const. art. II, § 30b).

[147] Id. at 623–24.

[148] Koppelman, supra note 12, at 161 ("The recent case of *Romer v. Evans* did not rely on the secular purpose prong of *Lemon* or even mention the Establishment Clause, but it is nevertheless highly pertinent [to the author's discussion of the secular purpose requirement]." (footnote omitted)).

[149] Daniel A. Crane, Faith, Reason, and Bare Animosity, 21 Campbell L. Rev. 125, 145–46 (1999) ("[T]he citizens of Colorado clothed their support (and opposition) to Amendment 2 in the lofty language of morality, political theory, and economics. And, above all, they clothed their arguments in the language of religion. . . . Justice Kennedy must have been aware of the religious subtext of the controversy over Amendment 2.").

[150] See Marc L. Rubinstein, Note, Gay Rights and Religion: A Doctrinal Approach to the Argument that Anti-Gay-Rights Initiatives Violate the Establishment Clause, 46 Hastings L.J. 1585, 1589–91, 1606–10 (1995).

[151] *Romer*, 517 U.S. at 635.

[152] Id.

Had the litigation been couched in disestablishment terms, it could be said that Colorado's purported secular purpose was "a sham" and therefore violated the secular purpose rule.[153]

If the secular purpose argument had been made, the Court should have applied the secular purpose rule to its full extent rather than underenforcing it. Amendment 2 strongly disadvantaged the LGBTQ community. The Supreme Court accused the amendment of imposing "a broad and undifferentiated disability on a single named group" and noted that such broad discrimination "seems inexplicable by anything but animus toward the class it affects."[154] In the face of such egregious discrimination, underenforcement is therefore inappropriate, even if the underenforcement status quo is desirable in other contexts.

C. Additional Objections

The final Section addresses a handful of additional objections to the underenforcement scheme proposed in this Note. This Section addresses concerns that underenforcement would render the secular purpose rule useless because it would overlap entirely with the Equal Protection Clause, that it would allow for discrimination against nonsuspect classes, that the First Amendment itself preempts balancing political values under the Establishment Clause, and that underenforcement would undercut judicial legitimacy. None of these objections is fatal to the proposed underenforcement of the secular purpose rule.

1. Secular Purpose Underenforcement as Coterminous with Equal Protection

The first objection to underenforcement of the secular purpose rule raises a concern about the proposed limit to underenforcement when discrimination is present. This objection asserts that underenforcement would render the secular purpose rule impotent because it would be entirely preempted by the Equal Protection Clause. The Equal Protection Clause already protects suspect classes from discrimination.[155] The secu-

[153] *McCreary Cty.*, 545 U.S. at 864. For further discussion of sham secular purposes and anti-gay legislation, see Sherryl E. Michaelson, Note, Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis, 59 N.Y.U. L. Rev. 301, 388–97 (1984) (arguing that laws against gay marriage violate the Establishment Clause because the secular reasons given for such laws are pretextual).

[154] *Romer*, 517 U.S. at 632.

[155] See U.S. Const. amend XIV.

lar purpose rule would, therefore, always go underenforced, because any government action against which the rule should be enforced would be addressed by the Equal Protection Clause.

The problem with this objection is that it assumes perfect overlap between the Equal Protection Clause and the discrimination limitation on underenforcement. But the reach of the Equal Protection Clause is more limited than the reach of the secular purpose rule. *Washington v. Davis* interpreted the Equal Protection Clause such that only laws that have a discriminatory effect *and* a discriminatory intent are invalid.[156] But the secular purpose rule discrimination limitation would require courts to invalidate laws that lack a secular purpose whenever they have a discriminatory effect on a suspect class; a showing of discriminatory intent would not be necessary. By not requiring discriminatory intent, this limitation is far broader than the protection given by the Equal Protection Clause.

Furthermore, the secular purpose rule would be effective beyond the Equal Protection Clause because the Supreme Court has already delineated other situations in which the rule should apply. When a law coerces citizens into religious practice, the Court enforces the secular purpose rule against that law.[157] Thus, even if the secular purpose rule is underenforced, it has effect beyond what is covered by the Equal Protection Clause. It will be enforced when the law in question has a discriminatory effect but no apparent discriminatory intent, and it will also be enforced in cases analogous to those in which the Supreme Court has already enforced the secular purpose rule.

2. Discrimination Against Nonsuspect Classes

Another potential objection to underenforcement is that it allows for laws passed in violation of the secular purpose rule to discriminate against nonsuspect classes. Only suspect classes would be protected under the scheme proposed in this Note. It thus leaves citizens outside of protected classes exposed to government action founded on religious morality.

Nonsuspect classes receive less protection in court than suspect classes because of their ability to protect their own interests in the political arena. Footnote 4 of the Court's opinion in *United States v. Carolene*

[156] 426 U.S. 229, 238–40 (1976).
[157] See supra notes 87–90 and accompanying text.

Products indicates that suspect classes include "discrete and insular minorities" for whom there is a tendency "to curtail the operation of those political processes ordinarily to be relied upon."[158] Thus, suspect classes are, by definition, those that cannot protect their interests politically. In contrast, nonsuspect classes *can* protect their interests politically. Nonsuspect groups do not need protection by the courts in the same way that suspect classes do because of their ability to advocate for themselves.

To illustrate the argument that nonsuspect classes do not need the same protection as suspect classes, return to Utah's Zion Curtain. The classes of people disadvantaged by the law could include restaurant owners and alcohol drinkers in the state. These groups presumably do not face the same obstacles to ordinary political processes that groups like racial minorities do. Even if alcohol drinkers were a small minority in the state, there is no indication that they have faced systematic historic exclusion from the political process that would have a lingering impact on their ability to advocate for favorable legislation. Those disadvantaged by the Zion Curtain can therefore challenge the law in the legislature, even if a court challenge would fall flat.

This is not to say, however, that secular purpose underenforcement leaves nonsuspect classes to fend for themselves entirely. It provides some judicial protection to all groups, though perhaps to a lesser degree than that afforded to suspect classes. The secular purpose rule is binding law. Underenforcing courts still state the law, broadcasting it to all. This message encourages lawmakers to act only on secular justifications, which provides at least some protection from religiously based government action to nonsuspect groups.

3. Constitutional Preemption of Balancing Political Values

Another potential objection to the underenforcement scheme is that an attempt to balance access and legitimacy is inappropriate because the Constitution has already conducted that balancing in favor of legitimacy by prohibiting religious lawmaking. This argument objects to the very root of the project undertaken in this Note. Essentially, it asserts that the Establishment Clause and the secular purpose rule simply prohibit religious lawmaking, so any balancing between access and legitimacy violates the Establishment Clause.

[158] 304 U.S. 144, 153 n.4 (1938).

One problem with this objection is that the text of the Establishment Clause itself does not unambiguously prohibit religious lawmaking.[159] It is flexible. The Supreme Court has acknowledged that the clause is "at best opaque."[160] It must be read to prevent Congress from implementing or taking steps toward implementing a state religion, but the text itself does not clearly require any more than that.[161] Moreover, the secular purpose component of the rule only requires that government action be justified with reference to a primary, genuine secular purpose.[162] The Establishment Clause hence leaves room for religious beliefs to be a secondary purpose behind government action.[163] Accordingly, it is incorrect to argue that the Establishment Clause categorically prohibits religion in lawmaking and has therefore already decided that legitimacy should be definitively privileged over access. Rather, since some religious lawmaking is allowed, there is room to attempt to find balance between access and legitimacy.

The real problem with this objection, however, is that it misunderstands the distinction between the substance and the enforcement of the secular purpose rule. Even if the Establishment Clause definitively prohibited religious lawmaking, it would be necessary to determine the extent to which it should be enforced. It is therefore appropriate to balance access and legitimacy through underenforcement, regardless of the exact contours of the secular purpose rule.

4. Underenforcement Undercuts Judicial Legitimacy

One final potential objection to the secular purpose status quo is that the attempt to balance access and legitimacy by underenforcing the rule actually undercuts the value of legitimacy. The concern here is that because underenforcement requires the judiciary to say one thing and do another, courts that underenforce will be viewed as illegitimate.

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[159] See U.S. Const. amend I ("Congress shall make no law respecting an establishment of religion . . . .").

[160] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[161] Id.

[162] *McCreary Cty.*, 545 U.S. at 864.

[163] See, e.g., Van Orden v. Perry, 545 U.S. 677, 691–92 (2005) (holding that a Ten Commandments monument at the Texas state capitol did not violate the Establishment Clause, because despite its religious nature, its presence is justified by the nature of the monument and history of the state).

This objection misunderstands the meaning of legitimacy as discussed in this Note. Legitimacy, as used in the Rawlsian sense, means that government action is based on public reason.[164] Under this framework, laws based on religion are illegitimate because they are not based on reasons the public can agree upon.[165] Underenforcement, however, does not undercut legitimacy in this sense unless the decision to underenforce lacks public reason. And a decision to underenforce in order to preserve the political access of a group of people is a decision based on public reason.

This objection may be additionally concerned with the public's perception of the judiciary, rather than legitimacy in the Rawlsian sense; it may be more concerned with public relations than with public reason. While it is possible that the public could be perturbed by a court reiterating the secular purpose rule but failing to apply it to an apparently religious law, it is important to note that underenforcement is already the status quo, and not a new proposal.[166] Furthermore, underenforcement is already common in certain areas of the law.[167] As such, it is unlikely that adherence to secular purpose underenforcement would contribute in any significant way to the public perceptions of the illegitmacy of the judiciary.

CONCLUSION

The secular purpose status quo is a tenable solution to the conflict of political values in the debate over the morality of the secular purpose rule. Underenforcement of the secular purpose rule preserves the political values that animate the secular purpose debate, namely political access and the legitimacy of law. By keeping the rule on the books, the Supreme Court puts its imprimatur on the value of public reason in American political discourse and creates a duty for other constitutional actors to base their actions on public reason, thereby promoting the legitimacy of law. But by underenforcing the rule, religious citizens and

[164] Rawls Political Liberalism, supra note 12, at 217.

[165] Id.; Rawls, Public Reason Revisited, supra note 12, at 770.

[166] See Schragger, supra note 11, at 593–94; see also Clayton ex rel Clayton v. Place, 884 F.2d 376, 379–81 (8th Cir. 1989) (upholding a school dance ban argued to be religious and holding that "[t]he mere fact a governmental body takes action that coincides with the principles or desires of a particular religious group . . . does not transform the action into an impermissible establishment of religion").

[167] See Natapoff, supra note 115, at 1740–44.

lawmakers have the same political access as nonreligious citizens and lawmakers. Moreover, underenforcement leaves the legal force of the Establishment Clause intact because it flows from institutional rather than analytical concerns; so under Professor Sager's framework, the Establishment Clause remains binding to its full depth and breadth.

Underenforcement is not a novel phenomenon in the American legal system. But when underenforcement occurs hand-in-hand with discrimination, it can be detrimental to well-ordered society. Harmful underenforcement has some notable hallmarks, including "official discrimination, increased violence, legal failure, and the undemocratic treatment of the poor."[168] If underenforcement leads to a failure to protect vulnerable groups, then it is an untenable mechanism for distribution of the "social good of lawfulness."[169] Therefore, the secular purpose rule should not be underenforced where it would discriminate against vulnerable groups.

The current state of underenforcement is a justifiable, and even desirable, solution to the secular purpose debate, and it should be maintained. The secular purpose rule has thus far not been overruled, but neither has it been used to invalidate laws like Utah's Zion Curtain. The Zion Curtain's supporters may want an official declaration by the courts that it is permissible to enact laws based on religious morality, and its detractors may want courts to overturn such laws as excessively religious. But the status quo is a defensible way to resolve this and all manifestations of the secular purpose debate because it carefully balances the political values underlying it.

[168] Id. at 1717.
[169] Id.