

NOTES

THE CONSTITUTIONALITY OF THE GOOD FRIDAY HOLIDAY

JUSTIN BROOKMAN

Each year on a Friday in late March or early April—two days before Easter—Christians commemorate the crucifixion of their savior Jesus Christ. They call that day Good Friday. Many states have given Good Friday the status of a legal holiday, closing government offices and schools,¹ while countless localities observe the date in any number of ways, such as by shutting down various government services.² Recently, many of these provisions have been attacked as violating the Establishment Clause of the First Amendment: “Congress shall make no law respecting an establishment of religion.”³ This principle precludes government from favoring or endorsing a particular religious sect or religion in general.⁴ Critics argue that by giving legal recognition to a purely sectarian holiday such as Good Friday, the state or locality in effect “establishes” Christianity as the government’s religion.

The Supreme Court has never heard a Good Friday case, despite the mixed success of these claims in lower courts. The Ninth Circuit in *Cammack v. Waihee*⁵ found that a Hawaii statute declaring Good Friday to be a state holiday did not violate the Establishment Clause. In fact, the court intimated that by merely declaring a legal holiday, a state is unlikely ever to violate the First Amendment.⁶ In contrast, the

¹ See, e.g., Ind. Code Ann. § 1-1-9-1(a) (Michie 1996) (declaring Good Friday a legal holiday); Tenn. Code Ann. § 15-1-101 (1992) (closing all public offices on Good Friday).

² See, e.g., *Granzeier v. Middleton*, 955 F. Supp. 741, 743-44 (E.D. Ky. 1997) (describing city practice of closing courthouse on Good Friday).

³ U.S. Const. amend. I. While the Amendment speaks only in terms of prohibiting “Congress” from establishing religion, the Fourteenth Amendment has been construed to incorporate the Establishment Clause, thereby restraining states as well. See *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) (applying Establishment Clause standards in evaluating New Jersey statute).

⁴ See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (invalidating as unconstitutional tax exemption for publishers of all religious periodicals); see also *School Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (invalidating as unconstitutional statutes providing for reading of Bible passages and recitation of Lord’s Prayer in public schools).

⁵ 932 F.2d 765 (9th Cir. 1991).

⁶ See *id.* at 779-80.

Seventh Circuit in *Metzl v. Leininger*⁷ struck down Illinois's Good Friday law as impermissibly favoring Christian observers of the holiday.⁸ A handful of district and state courts have ruled on governmental recognition of Good Friday, with varying results.⁹

This Note explores the circumstances under which a Good Friday holiday could be constitutional. Part I provides a brief history of the Supreme Court cases dealing with holidays in general and introduces the constitutional issues that are implicated by the government's legal recognition of religious holidays. Part II explains the specific concerns that recognition of Good Friday raises and details the reasoning of the *Cammack* and *Metzl* courts. Part III analyzes recent Supreme Court pronouncements on the Establishment Clause and considers some of the arguments for and against the constitutionality of a Good Friday holiday. Part III.A. considers the issue of favoritism and asks whether a Good Friday holiday impermissibly discriminates in favor of Christians. It concludes that any benefit to Good Friday-observing Christians from state recognition of the holiday is minimal and therefore should not render the holiday unconstitutional. Part III.B. focuses on the issue of endorsement and questions whether the Good Friday holiday might violate the Establishment Clause because the holiday could reasonably be perceived as a government endorsement of Christianity. The Note concludes that no per se rule can be established on the constitutionality of Good Friday as a legal holiday, and that despite their seeming contradiction, both *Cammack* and *Metzl* were decided correctly on their facts.

⁷ 57 F.3d 618 (7th Cir. 1995).

⁸ See *id.* at 621.

⁹ Lower courts have addressed the constitutionality of state recognition of Good Friday in a number of contexts. Compare *Koenick v. Felton*, 973 F. Supp. 522 (D. Md. 1997) (upholding as constitutional state law providing for school holiday on Friday before and Monday after Easter Sunday), *Granzeier v. Middleton*, 955 F. Supp. 741 (E.D. Ky. 1997) (upholding as constitutional local practice of closing courthouse on Good Friday), *Franks v. City of Niles*, 29 Fair Empl. Prac. Cas. (BNA) 1114 (N.D. Ohio 1982) (upholding as constitutional local ordinance designating Good Friday and other holidays as paid holidays for city workers), *Americans United for Separation of Church & State v. County of Kent*, 293 N.W.2d 723 (Mich. Ct. App. 1980) (upholding as constitutional statute authorizing collective bargaining to determine state holiday which resulted in paid leave on Good Friday), and *California Sch. Employees Ass'n v. Sequoia Union High Sch. Dist.*, 136 Cal. Rptr. 594, 595 (Ct. App. 1977) (same), with *Mandel v. Hodges*, 127 Cal. Rptr. 244 (Ct. App. 1976) (invalidating state statute closing government offices on Good Friday afternoon), *Griswold Inn, Inc. v. Connecticut*, 441 A.2d 16 (Conn. 1981) (same), *Samuels v. Oberly*, No. 83M-JN-16, 1984 Del. Super. LEXIS 652, at *1 (Feb. 7, 1984) (invalidating state statute prohibiting sale of liquor on Good Friday), and *Freedom from Religion Found., Inc. v. Thompson*, 920 F. Supp. 969 (W.D. Wis. 1996) (invalidating state statute closing government offices and schools on Good Friday). Despite these apparently disparate results, this Note argues that these cases are all consistent with First Amendment principles. See *infra* notes 159-81 and accompanying text.

I
THE CONSTITUTIONALITY
OF GOVERNMENT-RECOGNIZED RELIGIOUS HOLIDAYS

The United States Supreme Court has never decided whether the Constitution prohibits states from making Good Friday a holiday.¹⁰ Indeed, it has never explicitly decided whether government recognition of any sectarian holiday could impermissibly favor or endorse religion.¹¹ However, the Court has considered a handful of cases in which the validity of religious holidays played a vital role. Though these cases were decided over a considerable span of time and under a number of different tests or interpretive frameworks,¹² they all seemed to turn on the question of whether the religious holiday had been sufficiently “desanctified” such that its status as a government-recognized holiday was not repugnant to the First Amendment. In each case, desanctification turned on the passage of time and acceptance by the public.

A. *The Sunday Blue Laws*

In 1961, the Court addressed the constitutionality of Sunday closing laws, or “Blue Laws,” in four sequential cases: *Gallagher v. Crown Kasher Super Market, Inc.*,¹³ *Braunfeld v. Brown*,¹⁴ *Two Guys from Harrison-Allentown, Inc. v. McGinley*,¹⁵ and the principal case, *McGowan v. Maryland*.¹⁶ In each of the four cases, local merchants sought injunctions against the enforcement of, or the overturning of convictions under, statutes that proscribed various business activities on Sunday.¹⁷ In each case, the result was the same: the Court re-

¹⁰ Cf. *Metz*, 57 F.3d at 622 (noting *Cammack* as only other case directly addressing whether Good Friday holiday violates Establishment Clause).

¹¹ But see *County of Allegheny v. ACLU*, 492 U.S. 573, 601 (1989) (stating that “[t]he government may acknowledge Christmas as a cultural phenomenon”); *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (implying constitutionality of Christmas, “long recognized as a National Holiday”).

¹² See *infra* notes 20-26, 31-35, 44-47 and accompanying text.

¹³ 366 U.S. 617 (1961).

¹⁴ 366 U.S. 599 (1961).

¹⁵ 366 U.S. 582 (1961).

¹⁶ 366 U.S. 420 (1961).

¹⁷ See *Gallagher*, 366 U.S. at 619-22; *Braunfeld*, 366 U.S. at 600-01; *McGinley*, 366 U.S. at 583-84; *McGowan*, 366 U.S. at 422. The parties bringing the action in the *Gallagher* case also included three Jewish customers of the co-plaintiff supermarket and an orthodox rabbi as a representative of rabbis who oversaw the inspection of kosher foods for compliance with Jewish dietary laws. See *Gallagher*, 366 U.S. at 618-19.

The cases dealt with different arguments for the invalidation of the Sunday closing laws. *McGowan* and *McGinley* addressed the issue of whether the state statute violated the Establishment Clause. In both cases, Free Exercise claims were dismissed because plaintiffs alleged only economic injury. See *McGowan*, 366 U.S. at 429-31; *McGinley*, 366

jected the various constitutional claims and upheld the laws.¹⁸ In *McGowan*, Chief Justice Warren wrote:

[W]e should make clear that this case deals only with the constitutionality of § 521 of the Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.¹⁹

Specifically, the Court inquired whether the Blue Laws were intended to favor Christians and to encourage Christian practice.²⁰ While the Court admitted that the challenged statutes each had a religious origin, it held that the modern purpose of the statutes was simply to "provide a uniform day of rest for all citizens."²¹ In each case the Court emphasized the established and traditional nature of the statute in question: in *Gallagher* the Court called the religious aspect of the statute "merely a relic;"²² in *McGinley* the Court noted that "[a]s early as 1848, the Pennsylvania Supreme Court vociferously disclaimed that the purpose of Sunday closing was religious;"²³ and in *McGowan* the Court made a similar argument about the Maryland Court of Appeals.²⁴ While in each of these cases the Court also noted ameliorative actions taken by the states to deemphasize the Christian

U.S. at 592. *Braunfeld* addressed the Free Exercise Claim of Orthodox Jewish retailers who, by combination of religious Sabbatarian law and Pennsylvania statutory law, were forced to keep their stores closed two days a week. See *Braunfeld*, 366 U.S. at 601-02. The *Gallagher* decision addressed both Establishment Clause and Free Exercise arguments against Massachusetts Blue Laws. See *Gallagher*, 366 U.S. at 618.

¹⁸ See *Gallagher*, 366 U.S. at 631; *Braunfeld*, 366 U.S. at 609; *McGinley*, 366 U.S. at 598; *McGowan*, 366 U.S. at 429-30, 452. While plaintiffs in three of the four cases also raised other claims for the invalidation of the Sunday closing laws, such as equal protection claims that certain merchandisers were allowed to sell on Sunday and certain ones were not, see *Gallagher*, 366 U.S. at 622-24; *McGinley*, 366 U.S. at 589-92; *McGowan*, 366 U.S. at 425-28, this Note is concerned only with attacks on the constitutionality of these laws based on their religious nature.

¹⁹ *McGowan*, 366 U.S. at 453.

²⁰ See *McGinley*, 366 U.S. at 592 (summarizing plaintiffs' argument that Establishment Clause violation stemmed from alleged illegitimate purpose behind Sunday closing laws—to close businesses and create tranquil atmosphere to increase church attendance).

²¹ *McGowan*, 366 U.S. at 445; see also *Gallagher*, 366 U.S. at 626-28; *McGinley*, 366 U.S. at 595-96. For an argument in favor of upholding under Establishment Clause review statutes that were religious in origin, but have since come to be seen as primarily secular, see Mark V. Tushnet, Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses, 27 Wm. & Mary L. Rev. 997 (1986); see also *infra* notes 155-68 and accompanying text.

²² *Gallagher*, 366 U.S. at 627.

²³ *McGinley*, 366 U.S. at 596. Presumably, the arguments advanced in this case would also apply to *Braunfeld*, where the same Pennsylvania statute was in question.

²⁴ See *McGowan*, 366 U.S. at 449.

nature of the holidays, the language of *McGowan* implied that the determinative factor was the gradual acceptance over time of Sunday as a day of rest: “[I]t is common knowledge that the first day of the week has come to have special significance as a rest day in this country.”²⁵ The Court suggested that was sufficient to justify the Blue Law and insulate it from Establishment Clause attack, despite criticism that Sunday closing laws still might have the effect of “establishing” religious belief.²⁶

B. *The Nativity Cases*

In 1984, the Court announced its decision in the case of *Lynch v. Donnelly*,²⁷ the first case since the Sunday closing cases to deal with state-supported recognition of a religious holiday.²⁸ It was also the first case to introduce the Establishment Clause test of endorsement as a separate inquiry from the traditional favoritism analysis.²⁹ At question in *Lynch* was whether Pawtucket, Rhode Island’s annual inclusion of a nativity scene (or crèche)³⁰ in a Christmas display surrounded by other more secular symbols of the holiday season ran afoul of the Establishment Clause.

²⁵ *Id.* at 451.

²⁶ See Robert A. Holland, Comment, A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty, 80 Calif. L. Rev. 1595, 1625 (1992) (“While the *McGowan* Court convincingly argued that there was a secular purpose for the Sunday closing laws, it failed to address the question of impermissible effect.”); cf. Michael C. Dorf, Incidental Burdens on Fundamental Rights, 109 Harv. L. Rev. 1175, 1217-18 (1996) (criticizing *Braunfeld* for not taking into account combination of legal and religious burdens as having effect of discrimination against free exercise by non-Christians); John Witte, Jr., The Essential Rights and Liberties of Religion in the American Constitutional Experiment, 71 Notre Dame L. Rev. 371, 415 n.227 (1996) (noting that *McGowan* Court rejected free exercise argument that Sunday closing laws have effect of burdening religion by forcing Jews to be closed for two days (Saturday for religious law and Sunday for statutory law), while Christians are only forced to close for one day (Sunday, for religious and statutory law)). But see *McGowan*, 366 U.S. at 449 (“[W]e accept the State Supreme Court’s determination that the statutes’ present purpose and effect is not to aid religion but to set aside a day of rest and recreation.” (emphasis added)).

²⁷ 465 U.S. 668 (1984).

²⁸ See *id.* at 670-71 (stating question in case as whether Christmas display as part of observance of holiday season violates Establishment Clause).

²⁹ See *id.* at 688 (O’Connor, J., concurring) (describing “government endorsement or disapproval of religion” as most invidious infringement of Establishment Clause); see also *infra* note 133 and accompanying text.

³⁰ A nativity scene is a religious Christmas display that depicts the story of the birth of Jesus. Jesus was born during his parents’ journey for the Roman census. When they reached Bethlehem there was no room in the inn, so Jesus was born in an adjoining stable. See generally 2 Luke 1-18. The nativity always includes Mary, Joseph, and the baby Jesus lying in a manger, and may also contain barn animals, shepherds, or the Three Wise Men.

While declaring that it would not restrict itself to any single test, the *Lynch* Court relied on the "*Lemon* test" in finding the Pawtucket display constitutional.³¹ Between the *McGowan* and *Lynch* decisions, the Court had adopted a formal structural framework for deciding the constitutionality of Establishment Clause challenges called the *Lemon* test. The test consists of three prongs: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"³² This test represented a more critical analysis than the one employed in the Blue Laws cases, which concentrated primarily on the purpose of the statutes.³³ Unfortunately, the Court's application of the *Lemon* test did not lead to the clear and cogent doctrine that courts and critics had hoped for;³⁴ increasingly, the Court was forced to engage in a difficult and ultimately impossible process of line drawing, often with "bewildering" and "scatter-pattern" results.³⁵

While the Court found that the crèche display easily passed the purpose³⁶ and entanglement³⁷ prongs of the *Lemon* test, it had a more difficult time deciding whether the primary effect of the crèche was secular.³⁸ Chief Justice Burger's majority opinion emphasized that "the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause,"³⁹ and that since the Court had previously

³¹ See *Lynch*, 465 U.S. at 679.

³² *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citations omitted) (quoting *Walz v. Tax Comm'n*, 387 U.S. 664, 674 (1970)).

³³ See *supra* Part I.A.

³⁴ See Calvin R. Massey, *Pure Symbols and the First Amendment*, 17 *Hastings Const. L.Q.* 369, 378 (1990) ("Modern establishment clause jurisprudence begins with *Lemon v. Kurtzman* and unravels shortly thereafter." (footnote omitted)).

³⁵ Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 *Notre Dame L. Rev.* 311, 316 (1986); see *id.* at 315-17 (arguing that Court's application of *Lemon* test has resulted in incoherent and garbled pronouncement of Establishment Clause doctrine). At times, the Court's intricate line drawing devolves from confusion into the area of incomprehensibility, especially in the area of student aid programs. Compare, e.g., *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (upholding state program authorizing loaning of state books to students in private religious schools), with *Meek v. Pittenger*, 421 U.S. 349 (1975) (striking down state program authorizing lending of instructional supplies, such as maps and tape recorders, to nonpublic schools).

³⁶ See *Lynch*, 465 U.S. at 680-81 (stating Court's practice of only invalidating legislation under purpose prong when no secular motivation whatsoever could be found and that celebration and depiction of origins of Christmas through crèche constitute secular purposes).

³⁷ See *id.* at 684 (agreeing with district court's finding of limited interaction between church and state authorities from yearly erection of crèche).

³⁸ See *id.* at 683 (finding that any effect of aid to religion was "indirect, remote, and incidental").

³⁹ *Id.* at 678.

held more direct aids to religion constitutional, it would be contradictory to invalidate the government display of the crèche.⁴⁰

The Court hardly paused to consider whether it might be unconstitutional for the state to make Christmas itself a legal holiday. Chief Justice Burger's opinion, while acknowledging that Christmas still involves a religious element,⁴¹ noted the longstanding recognition of Christmas as a federal holiday.⁴² He also cited the nation's religious traditions as support for exercising relaxed scrutiny in this case: "This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause."⁴³

In her concurrence in *Lynch*, Justice O'Connor proposed a more nuanced interpretation of the traditional *Lemon* formula:

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.⁴⁴

Under Justice O'Connor's formulation, the inquiry is turned from the question of whether a practice "favors" religion to whether government action sends a message (or intends to send a message) of approval or disapproval of a particular religion or religion in general.⁴⁵ This approach is now known as the "endorsement test," and

⁴⁰ See *id.* at 681-82 (stating that display of crèche did not constitute greater aid to religion than previously constitutional programs for various grants to religious institutions, Sunday closing laws, and practice of legislative prayers). This incremental approach by the majority in *Lynch* inspired a great deal of criticism. See, e.g., William Van Alstyne, Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on *Lynch v. Donnelly*, 1984 Duke L.J. 770, 783 (claiming that Court's fear of being confined by single test and Burger's incremental language in *Lynch* would result in "any-more-than" functional analysis). With the Court's equally confusing holding in *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding practice of legislative prayers before opening session of Congress), commentators feared a doctrinally bankrupt Establishment Clause jurisprudence leading to incremental encroachments on religious liberty. See Laurence H. Tribe, American Constitutional Law § 14-15, at 1292 (2d ed. 1988) (arguing that by use of selective and disanalogous precedents, future courts could use "any-more-than" approach to move Establishment Clause doctrine to embrace greater and greater aids to religion).

⁴¹ See *Lynch*, 465 U.S. at 675.

⁴² See *id.* at 676 ("[B]y Acts of Congress, it has long been the practice that federal employees are released from duties on [Thanksgiving and Christmas] . . .").

⁴³ *Id.* at 678.

⁴⁴ *Id.* at 690 (O'Connor, J., concurring).

⁴⁵ See *id.* at 688 (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."). For the argument that it is the message sent that one is an outsider that is the predominant constitutional harm, see *infra* note 137 and accompanying text. Justice O'Connor left the entanglement inquiry

though it was not accepted by a majority of the Court in *Lynch*, at least a majority of the Court has come to recognize its validity.⁴⁶

Despite her innovative analysis, Justice O'Connor reached the same conclusion as the majority in *Lynch*—that neither the purpose⁴⁷ nor the effect⁴⁸ of the Pawtucket display was to endorse Christianity. Her opinion argued that because perception is the key under endorsement analysis, a practice that has endured though the years and has become “traditional” is much less likely to evoke a thoughtful reaction or a belief that the practice constitutes an endorsement of religion. While Pawtucket’s decision to display a crèche in its Christmas display clearly has religious overtones, it is arguable that the display had become neutralized over time. The fact that the town erected a nativity scene every Christmas for forty years may well have lessened any endorsing message and institutionalized the crèche as a traditional decoration in the town.⁴⁹

Five years later, the Supreme Court revisited the issue of holiday displays in *County of Allegheny v. American Civil Liberties Union*.⁵⁰ In *Allegheny*, the Court voted 5-4 to strike down a somewhat more

untouched as a separate but equally important factor in Establishment Clause scrutiny. See *id.* at 687-88 (O'Connor, J., concurring).

⁴⁶ See *infra* note 133 and accompanying text.

⁴⁷ See *Lynch*, 465 U.S. at 691-92 (O'Connor, J., concurring):

The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.

Applying that formulation to this case, I would find that Pawtucket did not intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions. The evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.

Note that Justice O'Connor's inquiry under the purpose prong of *Lemon* does not simply require a secular purpose, but that the *overall* intended message was one of endorsement. But see *id.* at 681 (Burger, C.J., majority opinion) (asking only whether secular purpose for display of crèche existed); cf. *Bowen v. Kendrick*, 487 U.S. 589, 604 (1988) (accepting Congress's facial declaration of secular purpose for legislation, satisfying purpose prong of *Lemon* test).

⁴⁸ See *Lynch*, 465 U.S. at 691-94 (O'Connor, J., concurring). Justice O'Connor stated that the proper application of the effect prong was not whether a government practice aids, even as a primary effect, a particular religion (or religion in general), but “[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.” *Id.* at 692. Thus, Justice O'Connor found the Pawtucket crèche passed the effect test because the setting of it within a greater holiday display would be fairly understood simply as the celebration of a public holiday rather than a government endorsement of Christianity. See *id.*

⁴⁹ See *id.* at 671.

⁵⁰ 492 U.S. 573 (1989).

religious Christmas nativity display than the one in *Lynch*,⁵¹ but voted 6-3 to uphold the constitutionality of an eighteen-foot Chanukah menorah next to the town's Christmas tree.⁵² Justices Blackmun and O'Connor, the only two members of the Court to distinguish between the crèche and the menorah displays, agreed that Allegheny's Christmas display, unlike the one in *Lynch*, focused primarily on the crèche, and included few secular symbols (such as Santa Claus and snowmen) to detract from the crèche's religious message.⁵³ The combination of a menorah, a secular Christmas tree, and a message of goodwill, however, sufficiently mitigated the menorah's religious significance so that it would not reasonably be seen as endorsing Judaism (or religion in general).⁵⁴

One difference between the Court's decision in *Allegheny* and the one earlier in *Lynch* was that O'Connor's endorsement test was now adopted by a majority of the Court in analyzing the government's actions under the *Lemon* test.⁵⁵ More importantly, the more skeptical members of the Court endowed the endorsement test with some teeth: while O'Connor's formulation in *Lynch* seemed to be less stringent

⁵¹ See *id.* at 580-81. Instead of a nativity scene placed amongst a predominately secular set of holiday symbols, here the display consisted entirely of a crèche with an angel on top proclaiming "Gloria in Excelsis Deo!", surrounded by a wooden fence, Christmas poinsettias, and a pair of short Christmas trees. See *id.* at 580. Some commentators have criticized the Court's apparent requirement of nonreligious decorations to "desanctify" the religious aspects of a holiday display. See Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 127 (1992) (calling this requirement "the three plastic animals rule"). The Court also found the display's location, in the most beautiful and most public area of the country courthouse, symbolically important. See *Allegheny*, 492 U.S. at 599-600.

⁵² See *id.* at 620. The Justices split primarily into three voting blocks. See *id.* at 601, 620 (Blackmun, J., joined in part by O'Connor, J.) (holding that Christian display had effect of endorsing Christian message while Jewish menorah combined with Christmas tree and secular holiday message were unlikely to be perceived as endorsement or disapproval of religious choices); *id.* at 637 (Brennan, J., concurring in part and dissenting in part, joined by Marshall and Stevens, J.J.) (arguing that both crèche display and menorah/tree display signaled endorsement of Christianity and Judaism); *id.* at 655 (Kennedy, J., concurring, joined by Rehnquist, C.J., and White and Scalia, J.J.) (arguing that both displays were constitutionally permissible).

⁵³ See *id.* at 598-99 (Blackmun, J., joined in part by O'Connor, J.).

⁵⁴ See *id.* at 616; *id.* at 635-36 (O'Connor, J., concurring) (arguing that reasonable observer would see combined display as acknowledging cultural diversity rather than religious beliefs).

⁵⁵ See *id.* at 592 (explaining Establishment Clause jurisprudence as looking to whether challenged practice has purpose or effect of endorsing religion); *id.* at 624-25 (O'Connor, J., concurring) (recalling her concurrence from *Lynch* in favor of endorsement test); *id.* at 637 (Brennan, J., concurring in part, dissenting in part) (agreeing that crèche "signals an endorsement of the Christian faith in violation of the Establishment Clause" and that the menorah/tree display showed favoritism). But see *id.* at 669 (Kennedy, J., concurring) (criticizing endorsement test).

than the traditional *Lemon* test,⁵⁶ in *Allegheny* it began to be clear that the endorsement test required a much more heightened scrutiny that would invalidate not only actual purpose and effect, but also purposes and effects merely perceived as endorsement.⁵⁷ Three members of the Court went so far as to argue that simply because *any* reasonable observer could view the crèche, the menorah, or even the town Christmas tree as an endorsement of religion, the government recognition of the holiday violated the Establishment Clause.⁵⁸

It is important to recognize, though, that endorsement analysis has not supplanted, nor will it ever supplant, traditional favoritism analysis.⁵⁹ Courts will often have to consider the constitutionality of an aid to a religious group that, while not sending a message of endorsement, still favors one religious group over another. For example, the recent decision of *Board of Education v. Grumet*⁶⁰ did not implicate endorsement, as it only dealt with an accommodation for a small Satmar Hasidic sect in upstate New York.⁶¹ In striking down a special school district created for the sect, the Court did not rely not on endorsement analysis, since an endorsement claim would require arguing that the state was choosing Hasidism as the state's religion. That, however, would be very difficult to argue since the sect is such a small and often-ignored segment of New York's population. The Court instead decided that the accommodation violated the Establishment Clause's principle of neutrality by impermissibly favoring the Satmar sect.⁶² Even subtle aids to more mainstream religious groups might not necessarily send a message of endorsement but could still violate

⁵⁶ See *Lynch v. Donnelly*, 465 U.S. 668, 691-92 (1984) (O'Connor, J., concurring) (noting that primary effect of government action could be to advance or inhibit religion under the endorsement test so long as there was no perception of endorsement).

⁵⁷ See *Allegheny*, 492 U.S. at 642-43 (Brennan, J., concurring in part, dissenting in part) (arguing that because interpretation of Christmas tree's significance was debatable, and reasonable observer could consider it an endorsement, Court should find it to be unconstitutional establishment of religion); *id.* at 670 (Kennedy, J., concurring in part, dissenting in part) ("Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of [the endorsement] formula."). See generally Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266 (1987).

⁵⁸ See *Allegheny*, 492 U.S. at 640-43 (Brennan, J., concurring in part, dissenting in part).

⁵⁹ See *Everson v. Board of Educ.* 330 U.S. 1, 16 (1947) (stating that Establishment Clause may prohibit states from giving aid to religious groups).

⁶⁰ 512 U.S. 687, 696 (1994).

⁶¹ See *id.* at 690. "Endorsement" is mentioned only once in the opinion, in recounting the basis for decision in the New York Court of Appeals. See *id.* at 695 (quoting *Grumet v. Board of Educ.*, 618 N.E.2d 94, 100 (N.Y. 1993)).

⁶² See *Grumet*, 512 U.S. at 696; see also *infra* notes 110-12 and accompanying text (discussing *Grumet* and increasingly strict application of neutrality principles).

the First Amendment if it gave an unfair advantage to those sects. Thus, it is necessary to look at both favoritism and endorsement in adjudging Establishment Clause claims, including claims that governmental recognition of Good Friday violates the Constitution.

II

THE COURTS AND THE GOOD FRIDAY HOLIDAY

In Christian doctrine, Good Friday commemorates the day that Jesus died for humanity's sins.⁶³ Perhaps because crucifixion does not translate as easily into a day of celebration as birth (Christmas), or rebirth (Easter), Good Friday has remained an exclusively Christian holiday with no secular trappings.⁶⁴ Because of this, governmental recognition of Good Friday receives a greater level of judicial scrutiny than might recognition of a holiday which has both religious and secular aspects.⁶⁵ Since Good Friday has meaning only for Christians, government recognition of the holiday can be interpreted easily as exclusive and divisive in modern pluralistic society. Furthermore, in many areas where Good Friday is not observed enthusiastically by the populace, efficiency arguments for closing schools and offices on a day when few would otherwise stay away begin to lose force.⁶⁶ Note also that different types of governmental recognition have different practical effects on both the favoritism and the endorsement inquiries. Thus, courts have reached varying results on whether, for example,

⁶³ Christians began to observe a Good Friday holiday in the fourth century A.D., when religious leaders first led a procession to Gethsemane, the Sanctuary of the Cross, to commemorate Jesus's death. See Rowan Williams, *Resurrection: Interpreting the Easter Gospel* (1994). Christians always have commemorated Jesus's crucifixion on Friday, despite the fact that the Bible does not say on which day Jesus was crucified and in seeming contradiction to the traditional belief that Jesus arose from the dead on Sunday morning, see 20 John 1, three days after crucifixion, which would make Thursday the day of crucifixion. See Mark 9:31 (quoting Jesus as foretelling resurrection three days after death).

⁶⁴ But see *Cammack v. Waihee*, 932 F.2d 765, 778-79 (9th Cir. 1991) (stating that Good Friday had come to be traditional shopping and recreational day in Hawaii).

⁶⁵ See, e.g., *Florey v. Sioux Falls Sch. Dist.*, 464 F. Supp. 911, 915 (D.S.D. 1979) (stating that statute allowing only recognition of holidays with at least some secular meaning was saved from unconstitutionality by excluding holidays with only religious meaning, such as Good Friday), *aff'd*, 619 F.2d 1311 (8th Cir. 1980). While holidays such as Christmas, Thanksgiving, and Halloween all have a religious origin (celebrating the birth of Christ, giving thanks to God, acknowledging the resurrection of the dead on the eve of All Saints' Day), each also has a secular and cultural element in which non-Christians can, and do, participate (exchange of gifts, feasting, and trick-or-treating and costume parties).

⁶⁶ See *supra* note 25 and accompanying text (arguing that determinative factor in Blue Laws cases may have been common acceptance of Sunday as day of rest).

closing schools,⁶⁷ closing government offices,⁶⁸ closing liquor stores,⁶⁹ or closing the local courthouse⁷⁰ violates the Establishment Clause. Sometimes even the manner in which Good Friday has been assigned holiday status has determined its constitutionality.⁷¹ This section focuses primarily on the two leading Good Friday cases, *Cammack v. Waihee*⁷² and *Metzl v. Leininger*,⁷³ and explores how the circuits reached seemingly opposite results after evaluating similar holiday statutes.⁷⁴

A. *Cammack v. Waihee*

The question of whether the recognition of Good Friday as a state holiday violates the Establishment Clause reached a federal appellate court for the first time in *Cammack v. Waihee*.⁷⁵ The statute in question included “[t]he Friday preceding Easter Sunday, Good Friday” in a list of days to be “established as state holidays.”⁷⁶ Five Hawaii residents, including Neil Cammack, brought a suit challenging the

⁶⁷ See *Metzl v. Leininger*, 57 F.3d 618, 623 (7th Cir. 1995) (striking down Good Friday school holiday).

⁶⁸ Compare *Mandel v. Hodges*, 127 Cal. Rptr. 244, 254-56 (Ct. App. 1976) (striking down closing of government offices on Good Friday afternoon), with *Cammack*, 932 F.2d at 776 (upholding closing of government offices in Hawaii on Good Friday), and *Koenick v. Felton*, 973 F. Supp. 522, 528 (D. Md. 1997) (finding constitutional Maryland's closing of government-run public schools on Good Friday).

⁶⁹ See *Griswold Inn, Inc. v. State*, 441 A.2d 16, 19 (Conn. 1981) (striking down statute forbidding sale of liquor on Good Friday).

⁷⁰ See *Granzeier v. Middleton*, 955 F. Supp. 741, 748 (E.D. Ky. 1997) (upholding practice of closing selected government offices, including county courthouse, on Good Friday).

⁷¹ Compare *Mandel*, 127 Cal. Rptr. at 254-55 (invalidating statute providing for three hours off on Good Friday so that government workers could attend services), with *California Sch. Employees Ass'n v. Sequoia Union High Sch. Dist.*, 136 Cal. Rptr. 594, 595 (Ct. App. 1977) (distinguishing *Mandel* because number of state holidays was predetermined by statute and because bargaining between county and unions resulted in selection of Good Friday).

⁷² 932 F.2d 765 (9th Cir. 1991).

⁷³ 57 F.3d 618 (7th Cir. 1995).

⁷⁴ But see *infra* notes 167-68 and accompanying text (arguing that differences in public acceptance and government encouragement of Christian practice explained different results in *Cammack* and *Metzl*).

⁷⁵ 932 F.2d 765 (9th Cir. 1991).

⁷⁶ Haw. Rev. Stat. § 8-1 (1993). Governmental recognition of the holiday started in 1941, when Hawaii was a U.S. territory. See Act to Amend Section 21 of the Revised Laws of Hawaii 1935, Relating to Holidays, tit. 1, ch. 1, sec. 1, § 21, 1941 Haw. Sess. Laws 1 (codified as amended at Haw. Rev. Stat. § 8-1 (1993)). In 1959, Hawaii was granted statehood, and the Good Friday statute became state law. See Admissions Act, Pub. L. No. 86-3, § 15, 73 Stat. 4, 11 (1959) (admitting Hawaii into Union and establishing that territorial laws of Hawaii would remain in force as the laws of State of Hawaii).

specific provision establishing Good Friday as a holiday,⁷⁷ arguing that state recognition of the holiday violated the Establishment Clause.⁷⁸

Judge O'Scannlain, writing for a 2-1 majority, relied heavily on the Sunday closing laws cases in finding the Hawaii Good Friday statute constitutional.⁷⁹ Just as the earlier Supreme Court cases had found an acceptable purpose in a desire to provide a uniform day of rest, the *Cammack* court found that the primary motivating factor behind the Good Friday statute was not to favor or encourage Christian practice but to provide a uniform day of rest for all of Hawaii's citizens.⁸⁰ As there were no traditional secular holidays (e.g., Presidents' Day, Independence Day, etc.) in the spring, it was reasonable that the legislature would single out Good Friday as a good date in the spring to create a holiday.

While the court did note that such a designation seemed potentially favorable to Christians, it did not seem particularly troubled by this possibility:

It is of no constitutional moment that Hawaii selected a day of traditional Christian worship, rather than a neutral date, for its spring holiday once it identified the need. The Supreme Court has recently identified as an "unavoidable consequence of democratic government" the majority's political accommodation of its own religious practices and corresponding "relative disadvantage [to] those religious practices that are not widely engaged in." "The government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause."⁸¹

As with the Sunday closing laws, once the legislature decided that a uniform day of rest was best for the community, Sunday was an appropriate choice because so many already recognized it as a day of rest.⁸² Similarly, Good Friday, the court argued, was not just a per-

⁷⁷ The plaintiffs alleged standing based on the \$4.25 million in state and municipal revenues expended to pay for the holiday. See *Cammack*, 932 F.2d at 769-72.

⁷⁸ See *id.* at 767-68. The complaint also argued that the statute establishing Good Friday as a holiday violated the Hawaii state constitution, and that the city and state collective bargaining agreements providing for paid leave on Good Friday violated both constitutions. See *id.*

⁷⁹ See *id.* at 776-80 (making repeated references to *McGowan v. Maryland*, 366 U.S. 420 (1961)).

⁸⁰ See *id.* at 782.

⁸¹ *Id.* at 776 (alterations in original) (citations omitted) (quoting *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987)).

⁸² See *Cammack*, 932 F.2d at 778 ("It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord." (quoting *McGowan*, 366 U.S. at 452)).

missible choice but the most appropriate one, as many state employees take off Good Friday anyway to attend services.

Once it found that any favoritism to Christians was mitigated by its secular purpose, the court did point out a potential problem in that the holiday might send a message of disapproval to the state's non-Christian citizens.⁸³ However, even under the more stringent endorsement analysis, the court decided that the message was not strong enough to warrant a finding of unconstitutionality. First, Good Friday is just one holiday among many recognized by Hawaii, which, the court argued, diminished its "endorsing" effect.⁸⁴ When viewed comparatively to other constitutional accommodations of religion, the majority concluded that a Good Friday holiday looked relatively tame:

Hawaii's adoption of Good Friday as a legal holiday could be viewed as less "coercive" or "endorsing" of religion than the Sunday blue laws. Under Hawaii's scheme, recognition of the holiday is simply accomplished by closing the office doors; the freed employees may enjoy virtually any leisure activity imaginable. In contrast, the Sunday Closing Laws were originally designed to funnel people into Church. Thus, most leisure activities were restricted. . . . Such Court-approved strictures would seem to broadcast the government's endorsement of the religious purpose of the sabbath, as expressed in the Fourth Commandment, in a far more obvious manner than Hawaii's simple release of its workforce to do whatever tickles the fancy.⁸⁵

The court made special note of this, pointing out that the Good Friday holiday freed state employees for the entire day to enjoy any conceivable pastime, as opposed to a scheme which released employees for only a couple of hours (so they could attend church services).⁸⁶ Furthermore, the state did not encourage its citizens to attend services,⁸⁷ nor did it attempt to "celebrate" or "commemorate" the holiday in any way besides the closing of offices.⁸⁸

⁸³ See *supra* notes 44-47 and accompanying text (discussing Justice O'Connor's endorsement test).

⁸⁴ See *Cammack*, 932 F.2d at 779-80.

⁸⁵ *Id.* at 779 (citations omitted).

⁸⁶ But see *Mandel v. Hodges*, 127 Cal. Rptr. 244, 254 (Ct. App. 1976) (emphasizing short duration, designed specifically to allow church attendance, in finding limited Good Friday holiday unconstitutional).

⁸⁷ But see *id.* (emphasizing explicit encouragement to attend services in finding limited Good Friday holiday unconstitutional). However, the Court has suggested that nondenominational calls to prayer issued by the government are constitutional. See *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984) (noting traditional practice of Presidential proclamation of "National Days of Prayer").

⁸⁸ See *Cammack*, 932 F.2d at 780; see also *supra* Parts I.B.2-.3 (discussing holiday display cases).

In the past, the Supreme Court had presumed that it was constitutional for the government to recognize Christmas as a holiday;⁸⁹ thus, the *Cammack* court felt reluctant to overturn Good Friday as a holiday which they believed the average Hawaiian would not view as sending a greater message of endorsement than a Christmas holiday.⁹⁰ In fact, the Ninth Circuit implied that it would be reluctant to ever overturn a state holiday just because of its religious context: "Nothing in the [religious holiday] display cases . . . provides support to the notion that the mere calendar recognition of such a holiday would have the effect of endorsing the religion."⁹¹

B. Metzl v. Leininger

While *Cammack* argued that a reasonable person would perceive a Christmas holiday and a Good Friday holiday in a similar manner, the Seventh Circuit in *Metzl v. Leininger*⁹² made the argument that government recognition of Good Friday would be viewed as more problematic than state acknowledgment of Christmas. Instead of a generally applicable statewide holiday, *Metzl* dealt with the constitutionality of an Illinois school holiday.⁹³ Writing for a 2-1 majority, Judge Posner noted that whereas holidays like Christmas, Thanksgiving, and Easter have lost (at least to some extent) their religious connotations and taken on the trappings of secular holidays, "Good Friday . . . is not a secular holiday anywhere in the United States."⁹⁴

Because Good Friday is exclusively a Christian holiday (as opposed to Christmas, which is celebrated by many non-Christians), the natural effect of the law, the court argued, is to make Christian practice easier. While members of other religions have to take off time from school to attend religious services on their holy days, Christians do not have to take off from school on Good Friday if they want to attend church. Therefore, "[t]he state law closing all public schools on Good Friday makes the burden of religious observance lighter on

⁸⁹ See, e.g., *Lynch*, 465 U.S. at 710 (Brennan, J., dissenting) (commenting that recognition of Christmas as public holiday only accommodates calendar to behavior of citizens).

⁹⁰ See *Cammack*, 932 F.2d at 782.

⁹¹ *Id.* at 780.

⁹² 57 F.3d 618 (7th Cir. 1995).

⁹³ See 105 Ill. Comp. Stat. Ann. 5/24-2 (West 1989). The original statute passed in 1941 made Good Friday a holiday for all state workers, similar to the Hawaii statute in question in *Cammack*. See Act of July 17, 1941, § 1, 1941 Ill. Laws 1145. In 1989, the Illinois legislature amended the law so that it applied only to schools. See First 1990 Revisory Act, Pub. Act 86-1028, art. II, sec. 2-83, § 24-2, 1990 Ill. Laws 1, 553.

⁹⁴ *Metzl*, 57 F.3d at 620.

Christians than on the votaries of other religions.”⁹⁵ Judge Posner also pointed to a governmental proclamation sanctifying the Good Friday holiday for evidence that the statute tended to encourage Christian practice.⁹⁶

While it did strike down the Good Friday holiday in this instance, the court noted that it was not completely opposed to the practice of closing schools on wholly religious holidays: In fact, the court noted with approval the practice of school districts with large Jewish populations of closing on Jewish holidays.⁹⁷ Despite the apparent favoritism inherent in recognizing those types of school holidays, the *Metzl* court argued that such holidays serve a secular purpose in scheduling a holiday on a day that would otherwise have high absenteeism. If the state could prove a secular purpose for the Good Friday holiday, “non-Christians will understand that the law is intended not to accord special, favorable recognition to Christianity but merely to recognize reality.”⁹⁸

Judge Posner agreed with the *Cammack* court’s suggestion that potentially low school attendance on Good Friday would provide such a secular purpose.⁹⁹ However, because the district court had not heard any evidence on the matter, the circuit court decided that it could not find for the state that the law had a secular justification. The court did not presume, as the Ninth Circuit did, that school attendance would be low on the Christian holiday. As in *Cammack*, the *Metzl* court analogized the legislature’s choice of the Good Friday holiday to the legislature’s choice of Sunday as a day of rest.¹⁰⁰ Unlike in *Cammack*, the *Metzl* court decided that the choice of Sunday was a more obvious choice for a day of rest because of society’s practice than the choice of Good Friday as a holiday. Judge Posner felt that the Good Friday holiday required at least some evidence that it

⁹⁵ *Id.* at 621.

⁹⁶ See *id.* at 619 (noting proclamation “commend[ed] the sacred rites and ceremonies of the occasion” (alteration in original)).

⁹⁷ See *id.* at 623. The court also mentioned without apparent concern that various individual districts in the state had implemented policies to close on Good Friday after the district court had enjoined enforcement of the state holiday statute. See *id.*

⁹⁸ *Id.* at 621.

⁹⁹ Judge Posner explained that

[t]here is no purpose in keeping schools open when no one, or almost no one, is there. . . . If, therefore, not because of anything the state has done, but merely because of the preponderance of observant Christians throughout the state, very few students would show up at school on Good Friday, the state would be wasting its educational budget by keeping schools open on that day.

Id.; see also *supra* notes 80-82 and accompanying text.

¹⁰⁰ See *supra* note 85 and accompanying text.

was a logical secular choice for a holiday.¹⁰¹ While the case may have been decided on technical evidentiary grounds, the shift of the burden to the state to prove a secular justification for the law does show a higher level of scrutiny of government favoritism of religion than did the *Cammack* court.¹⁰²

In conclusion, the *Metzl* court emphasized that a Good Friday holiday has little actual effect on the religious beliefs and practices of the citizens of Illinois, Christian and non-Christian.¹⁰³ The harm, then, comes not from the actual effect on religious conscience (or even observance), but from the message of endorsement or disapproval that the recognition of a Good Friday holiday sends to the public. As Posner wrote, “[m]odern cases dealing with the establishment clause are largely about symbols, rather than about the practical reality of American religious practices.”¹⁰⁴

III

INTERPRETING GOOD FRIDAY HOLIDAYS IN A PLURALISTIC SOCIETY

Since its decision in *Allegheny*, the Supreme Court has not had occasion to consider the constitutionality, under the Religion Clauses, of any public holidays.¹⁰⁵ Nor did the Court grant certiorari in the Good Friday circuit cases.¹⁰⁶ However, though the Court has not addressed the issue of holidays in recent years, it has heard several freedom of religion cases.¹⁰⁷ Some argue that the Court has become more suspicious of government actions: While the 1980s Court may have

¹⁰¹ See *Metzl*, 57 F.3d at 623.

¹⁰² See *id.* at 622 (stating that placing governmental support behind a wholly Christian holiday justifies putting burden on state to show secular justification). But see *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring) (noting that statute can be held to have no secular purpose only when it is beyond argument that statute was designed to endorse religion).

¹⁰³ See *Metzl*, 57 F.3d at 623 (“We said earlier and repeat that we doubt that the challenged law has much actual effect on the religious beliefs or observances of the people of Illinois, and if this is right then neither will the invalidation of the law.”).

¹⁰⁴ *Id.* at 624.

¹⁰⁵ However, in *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), the Court did hear a case involving the constitutionality of public celebration of religious holidays.

¹⁰⁶ See *Cammack v. Waihee*, 505 U.S. 1219 (1992) (denying certiorari). As for *Metzl*, the time limit to appeal has since expired.

¹⁰⁷ See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (holding that religious groups must be granted equal access to student activities funds at public university); *Capital Square Review & Advisory Bd.*, 515 U.S. at 753 (holding that religious speakers must be granted equal access to public forum); *Board of Educ. v. Grumet*, 512 U.S. 687 (1994) (invalidating school district set up exclusively for sect of Hasidic Jews).

taken a more deferential attitude toward state legislation involving potential state endorsements of religion,¹⁰⁸ many commentators believe that recent Supreme Court opinions demonstrate a more committed enforcement of governmental neutrality in the context of religion.¹⁰⁹

This section looks at the elements of the Court's current Establishment Clause jurisprudence and applies it to a state's recognition of a holiday on Good Friday. Part III.A. looks at the traditional notion of favoritism and whether a Good Friday holiday impermissibly advantages Christians, especially Christians who observe Good Friday by attending church services. Part III.B. applies the idea of endorsement and asks whether a state's appearance of aligning itself with Christianity, regardless of whether Christians are actually aided or not, constitutes an establishment of religion and a violation of the First Amendment.

A. Favoritism

The most obvious attack on Good Friday as a state holiday is that government recognition explicitly favors Christianity over other religions or over no religion at all. The courts have always been especially suspicious of laws which treat members of different religious groups differently.¹¹⁰ For example, in *Board of Education v.*

¹⁰⁸ See Ira C. Lupu, *The Lingering Death of Separationism*, 62 *Geo. Wash. L. Rev.* 230, 237-58 (1993).

¹⁰⁹ See *infra* note 127 and accompanying text.

¹¹⁰ See Tribe, *supra* note 40, § 14-7, at 1188 (referring to "established principle that the Government must pursue a course of complete neutrality toward religion" (quoting *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985))). This principle does not just apply to laws which facially make a distinction between religions, but also to laws whose *effect* is to treat members of different religious groups differently. Thus, the Supreme Court has carved out a zone of *required accommodation*, where exceptions to otherwise valid and all-encompassing (and possibly facially neutral) statutes must be made so that members of some religious groups are not functionally discriminated against. For an example of this kind of accommodation, see *Sherbert v. Verner*, 374 U.S. 398 (1963) (mandating exception to Massachusetts unemployment benefits compensation scheme to allow collection of benefits by Seventh-Day Adventist who would not work on Saturdays because of dictates of her faith). Sometimes, a facially neutral statute is so infused with discriminatory effect and purpose that the entire statute must be invalidated. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533-34 (1993) (striking down city ordinance forbidding ritual sacrifice of animals for religious purposes, because no compelling state interest could be found for intentionally discriminatory law).

In recent years, however, the Court has reduced the scope of the doctrine of required accommodation. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court signaled its unwillingness continually to evaluate seemingly neutral laws for potentially uneven application in practice. The Court upheld a law forbidding the use of peyote, despite its traditional role in certain Native American religious ceremonies, stating "[w]e have never held that an individual's religious beliefs excuse him from compliance with an other-

Grumet,¹¹¹ Justice O'Connor wrote:

This emphasis on equal treatment is, I think, an eminently sound approach. In my view, the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits. As I have previously noted, "the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community."¹¹²

When this principle is applied to the case of the Good Friday holiday, does it appear that members of different religious groups are really being treated all that differently? In *Grumet*, the state of New York set up a separate school district for the sole benefit of a Hasidic sect. When the Good Friday holiday is recognized by the state, the principal benefit is a government holiday for all citizens, regardless of their faith.¹¹³ The Ninth Circuit in *Cammack* emphasized this fact, pointing out that the primary result of the holiday was to provide all government workers and families a day of rest, which could be spent on any number of leisure activities.¹¹⁴ The court took special notice of the fact that Hawaii's most ardent proponents of the Good Friday holiday were not the state's Christian churches but labor groups who desired another holiday for the state's workers.¹¹⁵ This point further suggests that government recognition of the holiday was not intended to favor the state's Christians but was meant to benefit all of its citizens.¹¹⁶

Thus, the discriminatory effect involved in government recognition of Good Friday is that the practice of the Christian religion is

wise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-79. While these cases were decided under the Free Exercise Clause, this principle of equality extends equally to Establishment Clause cases as well. See *Rosenberger*, 515 U.S. at 846-47 (stating that principle of equality is derived from Religious Clauses generally); *infra* text accompanying note 112.

¹¹¹ 512 U.S. 687 (1994).

¹¹² *Id.* at 715 (O'Connor, J., concurring) (quoting *Wallace*, 472 U.S. at 69 (O'Connor J., concurring)).

¹¹³ *Cf. McGowan v. Maryland*, 366 U.S. 420, 450 (1961) (noting that Sunday closing provides day of rest for all citizens, irrespective of religion).

¹¹⁴ See *Cammack v. Waihee*, 932 F.2d 765, 778 (9th Cir. 1991) (noting that Good Friday holiday in Hawaii had become opportunity for citizens to enjoy traditional leisure activities, such as "family outings," "trips to the country," and "shopping").

¹¹⁵ See *id.* at 776.

¹¹⁶ See *Metzl v. Leininger*, 57 F.3d 618, 623 (7th Cir. 1995) (noting that recognition of Good Friday holiday probably had little practical effect on individual religious choices); *cf. Cammack*, 932 F.2d at 777-80 (judging effect prong of *Lemon* test by considering endorsement as only sectarian effect of Good Friday holiday and not actual favoritism).

made slightly easier, as Christians have the holiday off to attend services.¹¹⁷ Judge O'Scannlain in *Cammack* did make the claim that churches in recent years had held services on Good Friday with increasing frequency, and as a result many businesses were allowing employees time off to attend.¹¹⁸ However, none of the opinions in any of the cases present any evidence on whether a Good Friday holiday does in fact promote Christianity—that is, whether many people actually take advantage of the holiday to attend services when given time off for Good Friday.¹¹⁹ Moreover, a high church attendance on Good Friday cuts both ways—while Christians are advantaged by not having to take off from work to attend services, high absenteeism provides the state with a “secular” justification for the holiday, even though that justification is a result of religious behavior.¹²⁰

Even if many Christians use the holiday to observe Good Friday, though, it is important to keep in mind that government employees already have the option of taking off time to attend religious services.¹²¹ Thus, the actual discriminatory effect of the holiday is to give Good Friday-observing Christians a few extra hours of leave time. This practice alone seems too insignificant a form of favoritism to raise constitutional objections. Furthermore, it seems safe to say that most non-observers of Good Friday would be willing to accept an extra paid holiday, even with this slight discriminatory effect.¹²²

Perhaps Christians might seem more favored if it could be shown that the Good Friday holiday was not an extra holiday but took the place of what instead would be an alternate day for a holiday. However, in the only two published cases that have considered a Good Friday holiday in the context of a predetermined number of overall

¹¹⁷ See *Metzl*, 57 F.3d at 621 (noting that state law closing public schools on Good Friday “makes the burden of religious observance lighter on Christians than on the votaries of other religions”); see also *supra* note 95 and accompanying text.

¹¹⁸ See *Cammack*, 932 F.2d at 775-76. But see *Metzl*, 57 F.3d at 621-22 (stating that Illinois’s revocation of Good Friday as government holiday stemmed from infrequency of Good Friday observation by Christians).

¹¹⁹ One piece of interesting anecdotal evidence is seen in Allentown, Pennsylvania, where the school system occasionally would cancel the Good Friday holiday to make up a “snow day.” See Dan Hartzell, *It Wasn’t a Good Friday to Have to Go to School; Students in Allentown, East Penn Are Not Thrilled with Snow Makeup Day*, *The Morning Call* (Allentown, Pa.), Apr. 6, 1996, at B1, available in LEXIS, News Library, Mrnc11 File (reporting that on two Good Fridays used for such purpose, absentee rate rose to 40% from usual 8%).

¹²⁰ See *Metzl*, 57 F.3d at 623 (making argument that closing schools on day when few students, or even fewer than usual, would attend might amount to neutral justification for Good Friday holiday).

¹²¹ See *id.* at 621.

¹²² See *Cammack*, 932 F.2d at 776 (noting support of religiously nonpartisan labor unions for Good Friday holiday).

holidays, both courts noted that this fact made the holiday *less* dangerous to First Amendment values, because no extra money was being allocated expressly by the legislature to make Good Friday a holiday.¹²³

The Seventh Circuit in *Metzl*, however, felt that the discriminatory effect of the holiday was enough to raise a presumption of invalidity,¹²⁴ and in the past the Supreme Court has found a number of relatively minimal aids to religious groups to violate the Establishment Clause.¹²⁵ Some commentators argue for a more rigid application of the principles of equality and neutrality, requiring that legislation have no unequal effect, or at least as little as possible;¹²⁶ many feel that this is a direction in which the Supreme Court is currently heading.¹²⁷ For example in *Board of Education v. Grumet*,¹²⁸ while the Court technically decided the case as a violation of the Reli-

¹²³ See *California Sch. Employees Ass'n v. Sequoia Union High Sch. Dist.*, 136 Cal. Rptr. 594, 595 (Ct. App. 1977) (holding designation of Good Friday as holiday for state employees constitutional where it arose out of labor negotiations and where "discretionary authority in requesting said days rested primarily with a nongovernmental agency"); *Americans United for Separation of Church & State v. County of Kent*, 293 N.W.2d 723, 726 (Mich. Ct. App. 1980) (finding collective bargaining agreement making Good Friday half-holiday for county employees constitutional, because if Good Friday had not been selected as half-holiday, another half-holiday would have been chosen in its stead; thus, there was no increase in cost to taxpayers or decrease in the number of hours the county facilities would be open for business). The courts traditionally have been more suspicious when states expressly allocate money for a scheme that arguably furthers or endorses religion. See *Everson v. Board of Educ.*, 330 U.S. 1, 14 (1947) (noting that state courts that considered constitutionality of state aid to church schools had "remained faithful" to protecting religious freedom and separating religions and governments); Jesse H. Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses* 16-19 (1995) (arguing that government actions violate Religion Clauses when they discriminate against "voluntary religious choice" or direct money to support religious belief or enterprise).

¹²⁴ See *Metzl*, 57 F.3d at 621 (stating that First Amendment does not permit state "to make it easier for adherents of one faith to practice their religion than for adherents of another faith to practice *their* religion" absent secular justification for difference in treatment).

¹²⁵ See, e.g., *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973) (invalidating statute providing for payment to nonpublic schools for administration of state-required tests). Note, however, that the Court has construed the Establishment Clause more strictly in education cases as children are thought to require greater protection for their still-developing religious beliefs and because schools are intrinsically coercive. See *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (noting "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools"). Unfortunately, the Court's holdings in this area have been particularly confusing and contradictory.

¹²⁶ See generally Lupu, *supra* note 108.

¹²⁷ See, e.g., Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 *Notre Dame L. Rev.* 581, 591 (1995) (noting "a trend, in which the Court is now mid-stream, of replacing an older regime focused on *separationism* with a new regime based on *equality*"); John H. Garvey, *All Things Being*

gious Test Clause,¹²⁹ the case was rooted doctrinally in the principle of equality: “The general principle that civil power must be exercised in a manner neutral to religion . . . is well grounded in our case law, as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges.”¹³⁰

How much advantage to one religious group should a jurist allow before finding a violation of the Establishment Clause? The Good Friday holiday does not seem a particularly strong case for finding an Establishment Clause violation based on the principle of favoritism. It is difficult to argue that the principle of equality should “protect” non-Christians from a Good Friday holiday; as noted earlier, it seems counterintuitive that a non-observer of Good Friday would want to forsake a holiday simply because Christian observers in effect get an extra few hours leave time.¹³¹ However, the idea of protecting non-Christians does not include simply the minority schoolchildren or workers who get Good Friday off—it also includes the entire minority population who notices that Good Friday is singled out for special treatment. Therefore, it is appropriate to evaluate the impact of a Good Friday holiday in terms of endorsement, even where favoritism is not necessarily implicated.

B. Endorsement

Though endorsement analysis usually has been relied on only in concurring and dissenting opinions,¹³² eight members of the Court recently appeared to agree that the endorsement test is appropriate at least when “government action [is] alleged to *discriminate in favor of*

Equal . . . , 96 B.Y.U. L. Rev. 587, 596 (1996) (commenting that “there is a discernible trend in aid cases away from *Lemon* and toward a rule of neutrality”).

¹²⁸ 512 U.S. 687 (1994).

¹²⁹ See *id.* at 702 (claiming that New York’s scheme for delegating school district responsibility to group of Hasidic Jews constituted religious test for holding political power). The Religious Test Clause was included in the body of the Constitution to proscribe ruling groups from instituting an oath or test requirement to public office to keep rival religious factions out of power, a practice common in the history of England. The clause provides that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” U.S. Const. art. VI, cl. 3; see also *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 126-27 (1982) (invalidating statute, which allowed local churches to prevent issuance of liquor licenses for neighborhood bars, on similar grounds).

¹³⁰ *Grumet*, 512 U.S. at 704.

¹³¹ See *supra* note 95 and accompanying text.

¹³² See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846-49 (1995) (O’Connor, J., concurring) (arguing for application of endorsement test); *County of Allegheny v. ACLU*, 492 U.S. 573, 642-43 (1989) (Brennan, J., concurring in part, dissenting in part) (arguing that because Christmas tree could be reasonably construed as endorsement of Christianity, its display violated Establishment Clause).

private religious expression or activity,"¹³³ exactly the case presented by the Good Friday holiday. Endorsement analysis looks beyond the facially discriminatory effect of a law and considers the effect of the message sent by the law (or, perhaps more importantly, the message perceived to be sent).¹³⁴ Instead of focusing on measurable discriminatory effect, endorsement analysis pays special attention to the equally important symbolic harms and perceived rejection that government involvement in the religious sphere can produce.¹³⁵ As the *Metzl* court noted, modern Establishment Clause cases very rarely come down to actual discriminatory effect, but instead focus on the symbolic harms of government action.¹³⁶

The endorsement test asks the question whether a reasonable observer would view a government action as an endorsement or disapproval of religion, or of a particular religion. Considerable debate has developed over the question of how a "reasonable observer" should be defined. Many have argued that the test of a statute's constitutionality under this standard should be judged from the perspective of the person whose religious choices are perceived to be disapproved. As argued in the religious display context:

In determining whether litigants who seek establishment clause protection have been harmed by government's display of religious symbols, the Court must decide whether there has been a religious endorsement not from the viewpoint of the majority, or of a hypothetical reasonable man, but rather from the viewpoint of those who reasonably claim to have been harmed.¹³⁷

Others have argued that the primary harm from a government endorsement of religion is not the violation of individual non-adherents' rights, but the division of society into religion-based factions that threaten the political unity of the nation.¹³⁸ Under that reading of the endorsement test, the harm should be measured from a more objective standpoint.

¹³³ *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995) (Scalia, J., joined by Kennedy and Thomas, JJ., and Rehnquist, C.J.); see also *id.* at 772 (O'Connor, J., concurring, joined by Souter and Breyer, JJ.) (stating that endorsement test is proper frame of inquiry); *id.* at 799 (Stevens, J., dissenting) (noting that when government action could be reasonably seen as endorsement, action should be found unconstitutional).

¹³⁴ See *supra* notes 56-57 and accompanying text.

¹³⁵ See *infra* notes 137-38 and accompanying text.

¹³⁶ See *Metzl v. Leininger*, 57 F.3d 618, 624 (7th Cir. 1995).

¹³⁷ Norman Dorsen & Charles Sims, David B. Baum Memorial Lecture: The Nativity Scene Case: An Error of Judgment, 1985 U. Ill. L. Rev. 837, 861; see also Tribe, *supra* note 40, § 14-15, at 1293 (arguing that Court should adopt perspective of nonadherent in judging endorsement claims).

¹³⁸ See Christopher L. Eisgruber, Political Unity and the Powers of Government, 41 UCLA L. Rev. 1297, 1305 (1994).

The latter approach appears to have been adopted by the majority of justices who apply the endorsement test. Thus, in her concurrence in *Capital Square Review and Advisory Board v. Pinette*,¹³⁹ Justice O'Connor rejected the notion that endorsement should be judged by the perceptions of actual individual observers, or even by a reasonable non-adherent. Instead, she argued that judges should adjudicate the issue from the perspective of a hypothetical reasonable and objective viewer, who is presumed to possess a certain amount of information about the history and the context of the government's action.¹⁴⁰

Would a reasonable objective observer perceive a state's Good Friday holiday as an endorsement of Christianity? To answer this question it might be helpful to look at whether a Christmas holiday could be perceived as an endorsement of religion. While courts over the years generally have presumed without discussion that a state holiday on Christmas does not constitute a violation of the Establishment Clause,¹⁴¹ what is it about Christmas that would make a reasonable observer necessarily decide that the holiday would not be an endorsement of Christianity? First, a defender of a state practice recognizing the Christmas holiday could argue that very few Americans would work, attend school, or desire non-essential government services on Christmas, making it wasteful to keep government offices and schools open. A reasonable observer aware of this situation would be unlikely to see the holiday as endorsing Christianity, but instead would recognize it as a reasonable and cost-effective accommodation of Christian practice.

Second, it could be argued that Christmas has become secularized, such that adherents of other religions also celebrate Christmas. Besides the traditional sectarian recognition of Christmas as the day Jesus Christ was born, Christians and non-Christians alike exchange presents, decorate trees, and visit with family and friends on the holiday. If a government holiday was seen as celebrating these secular aspects, a Christmas holiday would not send a message endorsing Christianity, or religion in general. Thus, as Blackmun's opinion for the Court in *Allegheny* noted, "[t]he government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment

¹³⁹ 515 U.S. 753 (1995).

¹⁴⁰ See id. at 779-80 (O'Connor, J., concurring, joined by Souter and Breyer, JJ.). But see id. at 799-80 (Stevens, J., dissenting) (arguing that endorsement or disapproval should be judged from perspective of nonadherent).

¹⁴¹ See supra notes 42-43 and accompanying text.

it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus."¹⁴²

Finally, regardless of whether a holiday is celebrated by non-Christians, it could be argued that the significance of recognizing the religious holiday has been lost over time, such that state recognition would not be perceived as an endorsement of Christianity *today*. Thus, one might argue that if a Christmas holiday has not been completely secularized, its message of religious endorsement might have faded over the ages. What might have been a message of endorsement from a time-forgotten legislature might not be seen as an endorsement by modern eyes.¹⁴³

To validate the idea that a once-illegitimate message of endorsement may have faded over time, the courts recognize an area of "ceremonial deism," where an objective reasonable observer, familiar with the history of this country, would find that despite their facial endorsement of religion, the message has been lost over time as the government practice has lost its religious significance.¹⁴⁴ Instead, these practices are interpreted more as remnants of a more religious era than as current endorsements of religious doctrine.

For example, under this principle, courts have uniformly rejected challenges to the national motto "In God We Trust" imprinted on coins.¹⁴⁵ In *Gaylor v. United States*,¹⁴⁶ the Tenth Circuit declared that

¹⁴² County of Allegheny v. ACLU, 492 U.S. 573, 601 (1989).

¹⁴³ In *Zorach v. Clauson*, 343 U.S. 306 (1952), Justice Douglas wrote for the Court that United States history was replete with official and legitimate acknowledgments of religion. See *id.* at 312-13. However, at first blush, many of the examples he gives, such as prayers read before legislative sessions and the invocations of "God" before argument at the Supreme Court, could be reasonably perceived by the most objective observer as an endorsement of Christianity. Part of the reason that Justice Douglas saw such a rich tradition of official "acknowledgments" might be because the Supreme Court had never even intimated that a government act could be struck down as violating the Establishment Clause until five years earlier. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947). As recently as *Lynch*, however, the Court continued to maintain that government practices, such as celebrating holidays on traditional Christian holidays, including the language "One nation under God" in the Pledge of Allegiance, and providing Senate and House Chaplains, had not lost any of their religious significance and were simply accommodations of "the religious nature of our people." See *Lynch v. Donnelly*, 465 U.S. 668, 674-78 (1984) (quoting *Zorach*, 343 U.S. at 314).

¹⁴⁴ See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2087-91 (1996) (arguing that seemingly harmless instances of "ceremonial deism," such as Pledge of Allegiance, religious symbols in government seals, and Good Friday holiday, should be unconstitutional because of potential threat they represent to religious liberty).

¹⁴⁵ See *Gaylor v. United States*, 74 F.3d 214, 216 (10th Cir.) (holding that "In God We Trust" appearing on United States currency does not violate the Establishment Clause), cert. denied, 116 S. Ct. 1830 (1996); *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970) (finding motto "In God We Trust" lacking theological impact); *O'Hair v. Blumenthal*, 462 F. Supp. 19, 20 (W.D. Tex. 1978) (finding imprinting of motto "In God We

despite the obvious implication of the government's recognizing one true God, a reasonable observer, "deemed aware of the history and context of the community and forum in which the [message] appears," would find that today the motto is perceived as a traditional expression of patriotism, and not as an endorsement of monotheism.¹⁴⁷ Under this analysis, even if no secular purpose or subsequent secularization of the Good Friday holiday could be found, how should the Good Friday statutes in *Cammack* and *Metzl* be perceived?

In judging whether a Good Friday holiday conveys a message endorsing Christianity, a court should ask three questions. First, a court should ask whether the holiday is justified by secular concerns. If sufficient secular justification cannot be found, the court next should determine whether Good Friday has become secularized so that it could not be reasonably seen as endorsement. If it has not become so secularized, the court should then ask whether recognition of the holiday has ceased to send a message of endorsement because of the passage of time. Both the Hawaii and Illinois statutes were passed in 1941,¹⁴⁸ six years before the Supreme Court's decision in *Everson v. Board of Education*.¹⁴⁹ If a reasonable observer would not be convinced that absenteeism provides an explanation for the legislature's choice of Good Friday as a state holiday, is it possible that any message of religious endorsement that the holiday once conveyed has now disappeared?

Under the first prong, both the *Cammack* and *Metzl* courts agree that potentially high absenteeism would provide a secular justification for the Good Friday holiday,¹⁵⁰ even though they disagree over who should bear the burden of proof. However, it is highly unlikely that a court would find that absenteeism on Good Friday would be as great as on Christmas. As a result, a reasonable observer still might believe that accommodation of Christian practice might not fully explain a legislature's choice of a holiday on Good Friday, and that the choice conveys an implicit message endorsing Christian religious beliefs.

Trust" constitutional), aff'd sub nom. *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979) (per curiam). "In God We Trust" was accepted as the national motto in 1864 and has been on U.S. minted coins ever since. See Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 Iowa L. Rev. 35, 51 (1993).

¹⁴⁶ 74 F.3d 214 (10th Cir.), cert. denied, 116 S. Ct. 1830 (1996).

¹⁴⁷ *Id.* at 217 (quoting *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring)).

¹⁴⁸ See supra notes 76 & 93 and accompanying text.

¹⁴⁹ 330 U.S. 1 (1947) (declaring for first time that Establishment Clause may invalidate statute or practices that impermissibly aid religious practice).

¹⁵⁰ See supra notes 80-82, 98-99 and accompanying text.

If it appears from the facts of the case that the enactment was based primarily on secular motivations—such as a desire to close government offices and schools on a day when many workers and children would not attend anyway—then a reasonable observer would probably not say that the holiday sends a message of endorsement. The question then arises how much secular justification must be shown, and who has the burden of proving the legislature's purposes.¹⁵¹ In the past, the courts have been reluctant to “psychoanalyze” legislatures to determine whether their intentions were correct;¹⁵² on the other hand, some level of scrutiny is required to determine if a reasonable person would believe that a state was aligning itself with Christianity. Because of the deference the courts usually have shown legislatures in this regard, it seems that the government should not have an affirmative duty to make legislative findings or be forced to bear the burden of proof on a challenge in court against the statute's constitutionality. However, courts should not simply defer to any proffered secular purpose. Instead, courts should not look primarily at the subjective intent of state legislatures and city councils but should consider objectively whether secular justification for the holiday exists.

If a court finds that no secular justification suffices, then it must consider whether Good Friday has become secularized. Under this factor, a Good Friday holiday might seem to fail an Establishment Clause attack; as Judge Posner in *Metzl* noted in comparing the Good Friday holiday to Christmas, “Good Friday . . . is not a secular holiday anywhere in the United States.”¹⁵³ In the past, at least one court has found this factor dispositive, declaring a per se rule that a state cannot observe any holiday of purely religious significance.¹⁵⁴

However, some courts have argued that Good Friday has, in fact, become secularized over the years. The *Cammack* court especially makes a great deal out of this stating that:

¹⁵¹ Compare *Cammack v. Waihee*, 932 F.2d 765, 775-76 (9th Cir. 1991) (accepting government's claim that spring holiday was desirable and Good Friday was best day because it was traditional day of rest for many already), with *Metzl v. Leininger*, 57 F.3d 618, 623 (7th Cir. 1995) (holding that government has burden to show that Good Friday holiday is necessary to prevent wasteful spending).

¹⁵² See *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring) (urging that plausible legislative purpose should be sufficient to satisfy *Lemon's* requirement of secular purpose); see also *Bowen v. Kendrick*, 487 U.S. 589, 602-03 (1988) (holding that statute would violate *Lemon's* purpose prong only if it could be said that “it [was] motivated wholly by an impermissible purpose”).

¹⁵³ *Metzl*, 57 F.3d at 620.

¹⁵⁴ See *Florey v. Sioux Falls Sch. Dist.*, 464 F. Supp. 911, 915 (D.S.D. 1979) (noting Good Friday, Ash Wednesday, and Pentecost as examples of purely sectarian holidays).

The record evidence on the impact of the Good Friday holiday in Hawaii suggests nothing inconsistent with the observations made in *McGowan* [that the traditional celebrations of Sunday were primarily family outings and trips to the country]. For example, the Good Friday holiday has become a popular shopping day in Hawaii and businesses have benefited from the three-day weekend created as a result of the holiday. Similarly, citizens are better able to enjoy the many recreational opportunities available in Hawaii. Such evidence indicates that Hawaii's Good Friday holiday, *at least at this late date*, fifty years after enactment, cannot be regarded as an endorsement of religion any more than Sunday Closing Laws may.¹⁵⁵

While the enactment in *Metzl* occurred in the same year, Judge Posner notes that a message of religious endorsement continued to linger over time, at least in part because of the explicit proclamation that went along with the law declaring its religious purpose¹⁵⁶—no comparable statement of purpose is found in the Hawaii law.

Perhaps Judge O'Scannlain's argument that Good Friday has been "secularized" over time might be better understood as an argument that the Good Friday statute's endorsing value has been lost over time. If the court finds no secular justification for selecting Good Friday as a holiday, and that Good Friday has not taken on the trappings of a secular holiday, it must inquire whether the holiday continues to send a message endorsing Christianity, or whether the holiday has been traditionally accepted by the citizens to the extent that it is no longer reasonably perceived as an endorsement of Christianity. The argument that a Good Friday holiday has lost its endorsing quality appears less strong than in the context of Sunday Closing Laws¹⁵⁷ and the national motto on coins,¹⁵⁸ which are encountered by the people of a state much more regularly, and thus are less likely to be noticed and more likely to be ingrained into everyday experience. There is no clear time limit when the endorsing effect of a Good Friday statute would "wear off;" however, the more evident it is that a legislature was motivated by secular reasons for the choice of a Good Friday holiday, the less time it should take for a reasonable observer to conclude that the holiday does not carry a message of endorsement.

Two recent district court cases illustrate why this approach is sensible. In *Granzeier v. Middleton*,¹⁵⁹ a court upheld a city practice of closing its courthouse and library on Good Friday. The court found

¹⁵⁵ *Cammack*, 932 F.2d at 778-79 (emphasis added) (citations omitted).

¹⁵⁶ See *supra* text accompanying note 96.

¹⁵⁷ See *supra* text accompanying note 25.

¹⁵⁸ See *supra* notes 145-47 and accompanying text.

¹⁵⁹ 955 F. Supp. 741 (E.D. Ky. 1997).

that given the facts of the case, no reasonable objective observer would perceive the practice as an endorsement of Christianity. First, the court emphasized that many local businesses and schools were closed on Good Friday—for many schools, the holiday marked the beginning of Spring vacation.¹⁶⁰ Also, the city took special care not to appear to be encouraging Christian practice: “Although the closing is to be observed on Good Friday, . . . there is no evidence that the court and office closings are otherwise related to the Christian holiday. No employees are encouraged to attend church or other religious services. No emphasis is placed on the religious aspects of Good Friday.”¹⁶¹ Furthermore, when a patron objected to a depiction of a cross on a “Closed for Good Friday” sign in the library window a year earlier, the city immediately removed it.¹⁶² Thus, it appears that the city was simply accommodating the religious practice of the predominantly Christian town, and not endorsing Christianity. Also, the court noted, if somewhat vaguely, that the city had closed the courthouse and library on the holiday for “many years.”¹⁶³ Combined with the obvious efforts of the town to remove any perception of endorsement from the closings, it seems that this case was rightly decided, in that a reasonable observer of this situation would not perceive the closing as the city’s endorsing Christianity.

Compare that case with *Freedom from Religion Foundation, Inc. v. Thompson*.¹⁶⁴ Although this case involved a 1945 Wisconsin statute declaring Good Friday a holiday, the statute in issue still carried a message of endorsement because the legislative history and the language of the statute itself “unequivocally demonstrate[d] religious endorsement.”¹⁶⁵ Instead of the self-consciously neutral policy in *Granzeier*, this court was faced with a statute which “on its face command[ed] that Good Friday be uniformly observed for the purpose of worship.”¹⁶⁶ So, although time can often cleanse a statute of its message-conveying qualities, here the purpose and wording of the statute were so geared toward a policy of encouraging Christian practice that even fifty years later, a reasonable observer would see the statute as aligning the state on the side of Christians. On this principle, the statutes in *Cammack* and *Metzl* can be fairly reconciled—

¹⁶⁰ See *id.* at 747.

¹⁶¹ *Id.* at 744.

¹⁶² See *id.* at 743, 748.

¹⁶³ *Id.* at 747.

¹⁶⁴ 920 F. Supp. 969 (W.D. Wis. 1996) (holding that Wisconsin statute declaring that 11:00 a.m. to 3:00 p.m. on Good Friday “shall be uniformly observed for the purpose of worship” violated Establishment Clause).

¹⁶⁵ *Id.* at 974.

¹⁶⁶ *Id.* at 973.

though both were enacted in 1941, the passage of fifty years was sufficient to rid the Hawaii statute of its initial endorsing quality (if any) because Good Friday was simply enshrined as a holiday along with twelve other holidays and because Good Friday had been accepted by society as a traditional shopping and leisure day.¹⁶⁷ On the other hand, the Illinois statute was issued along with the governor's proclamation that Good Friday "is a day charged with special meaning to multitudes throughout the Christian world,"¹⁶⁸ a message not easily diluted, and still reasonably perceived today as an endorsement of Christianity.

The few other Good Friday cases are also consistent with these principles. In *Mandel v. Hodges*,¹⁶⁹ the Good Friday holiday, like those at issue in *Metzl* and *Thompson*, was accompanied by a explicit proclamation encouraging citizens to use the time off to go to Good Friday services.¹⁷⁰ Thus, the California Court of Appeals was correct in invalidating the statute as discriminating against non-Christians. On the other hand, the statutes upheld by *Koenick v. Felton*¹⁷¹ and *Franks v. City of Niles*¹⁷² were accompanied by no such proclamation and the holidays were passed simultaneously along with numerous other holidays.¹⁷³ The Maryland law especially seems unlikely to send a message of endorsement, as the Monday after Easter is also made a holiday,¹⁷⁴ which suggests that Easter vacations are being accommodated. Recognition of the vacation is justified by the efficiency theory and acknowledgment that Easter has a secular element.¹⁷⁵

¹⁶⁷ See *supra* text accompanying note 155.

¹⁶⁸ *Metzl v. Leininger*, 57 F.3d 618, 619 (7th Cir. 1995). Judge Posner further contrasts the Hawaii statute by arguing semi-facetiously that the Good Friday holiday in Hawaii had acquired a secular element altogether lacking in Illinois's recognition of the holiday. See *id.* at 622-23.

¹⁶⁹ 127 Cal. Rptr. 244 (Ct. App. 1976).

¹⁷⁰ See *id.* at 254.

¹⁷¹ 973 F. Supp. 522 (D. Md. 1997) (upholding Md. Code Ann., Educ. § 7-103(c) (1997), which designates Friday before Easter through Monday after Easter as school holiday).

¹⁷² 29 Fair Empl. Prac. Cas. (BNA) 1114 (N.D. Ohio 1982) (holding that Niles, Ohio Ordinance No. 38-74 (Apr. 24, 1974), which designates Good Friday as paid nonwork day for city employees, was enacted "in the interest of the public health, welfare and safety" and, containing no reference to religious observance, reflected secular purpose).

¹⁷³ See *id.* at 1114-16.

¹⁷⁴ See Md. Code Ann., Educ. § 7-103(c) (1997); see also *Koenick*, 973 F. Supp. at 526 (arguing that inclusion of Monday after Easter, which "holds no religious significance," demonstrates secular purpose of making Friday before Easter a holiday).

¹⁷⁵ See, e.g., *Metzl v. Leininger*, 57 F.3d 618, 620-21 (7th Cir. 1995) (contrasting Good Friday with Easter as holidays with and without secular elements). In *Franks*, no extra holiday was created and the Good Friday holiday was adopted only eight years before the case came to court. See *Franks*, 29 Fair Empl. Prac. Cas. (BNA) at 1114. Thus, arguably, state recognition of the holiday violated the Establishment Clause because the relatively

In *Americans United for Separation of Church and State v. Kent County*¹⁷⁶ and *California School Employees Ass'n v. Sequoia Union High School District*,¹⁷⁷ the number of holidays was set by statute and by collective bargaining between counties and labor unions¹⁷⁸ simply allocated the holiday to Good Friday. Thus, no extra time was taken off to explicitly recognize Good Friday as a holiday, which would send a potentially stronger message of endorsement. Both courts also noted that there was nothing in either the agreements or the statutes encouraging workers to attend Good Friday services, and that the real purpose and effect of the statute was to lengthen the Easter holiday weekend.¹⁷⁹

Two cases that invalidated statutes giving state recognition to Good Friday holidays, *Griswold Inn, Inc. v. Connecticut*¹⁸⁰ and *Samuels v. Oberly*,¹⁸¹ struck down prohibitions against the sale of alcohol on Good Friday, which makes constitutional sense. In both cases, no secular purpose whatsoever can be found in the original law—no uniform day of rest is created as only a small number of employees are given time off by the statute, and the only purpose for closing down liquor stores on Good Friday would be to sanctify the holiday. In cases such as these, the passage of time does little to remove the endorsing effect of the clearly sectarian statute. This might also help explain the Court's jurisprudence on other questions involving government action and conveyed religious endorsement. Critics have had difficulty reconciling the relatively similar holiday display cases of *Lynch* and *Allegheny*.¹⁸² While there were some differences between the Christmas displays in both those cases, many believed that these minor nuances were insufficient to necessitate opposite results. However, little mention is made of the fact that in *Allegheny*, the inclusion of the crèche in the Christmas display was of recent origin.¹⁸³ In *Lynch*, the Court mentioned that "[t]he crèche . . . ha[d]

short passage of time had not cleansed the holiday of its potentially discriminatory message.

¹⁷⁶ 293 N.W.2d 723 (Mich. Ct. App. 1980).

¹⁷⁷ 136 Cal. Rptr. 594 (Ct. App. 1977).

¹⁷⁸ See *Kent*, 293 N.W.2d at 726; *Sequoia Union*, 136 Cal. Rptr. at 594-95.

¹⁷⁹ See *Kent*, 293 N.W.2d at 725-26; *Sequoia Union*, 136 Cal. Rptr. at 595-96.

¹⁸⁰ 441 A.2d 16 (Conn. 1981) (holding that prohibition against sale of alcohol on Good Friday lacked clear secular purpose, had as its primary effect the advancement of religion, and required excessive entanglement of government with religion).

¹⁸¹ No. 83M-JN-16, 1984 Del Super. LEXIS 652 (Feb. 7, 1984) (finding no secular purpose in prohibition of alcohol sales on Good Friday).

¹⁸² See *supra* note 51.

¹⁸³ See *County of Allegheny v. ACLU*, 492 U.S. 573, 579 (1989) (noting that crèche had been included only since 1981, five years before suit was brought).

been included in the display for 40 or more years.”¹⁸⁴ Understood this way, the invalidation of the Christmas display in *Allegheny* could have been directed primarily at stopping a relatively new practice that could more reasonably be interpreted as a government endorsement of religion. The fact that it was a new inclusion, different from the traditional and accepted display, thus could have had a greater effect on the sensibilities of the viewers.

CONCLUSION

In 1892, the Supreme Court recognized “this is a Christian nation.”¹⁸⁵ Even after the Supreme Court’s landmark Establishment Clause decision in *Everson v. Board of Education*¹⁸⁶ five years later, the Supreme Court still maintained that “[w]e are a religious people whose institutions presuppose a Supreme Being.”¹⁸⁷ Though the modern day Court is more solicitous of the concerns of non-Christians, many of our traditions still reflect the same assumptions made by those earlier Courts. For example, many of this nation’s statutes and ordinances closing schools and government offices on Good Friday may have been motivated by concerns that today would render the practice unconstitutional. In fact, if a state Good Friday holiday were passed today, it is unlikely that it would pass constitutional muster without a strong showing of a secular purpose, such as traditionally high absenteeism on that date. However, as a practice has become accepted, or even ignored, over the years, it becomes less clear that the holiday stood for the idea that government was siding with Christians and against non-Christians in society. It is not the job of the courts to go back through history and eradicate every governmental reference to God or invalidate every practice that could be conceivably interpreted as endorsing religion. However, to the extent that a governmental practice, no matter how long-standing, reasonably creates the impression that government is choosing sides among religious groups, the courts have a duty to strike down that practice as violating the Establishment Clause and the principle against government endorsement of religion.

¹⁸⁴ *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

¹⁸⁵ *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (construing statute prohibiting assistance of migration into United States as inapplicable to case of church contracting with minister to move from England and enter service as rector and pastor).

¹⁸⁶ 330 U.S. 1 (1947) (holding that state reimbursement of parochial students’ transportation expenses did not violate Establishment Clause).

¹⁸⁷ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (upholding city program permitting public school students to leave school grounds to attend religious instruction or devotion).