Cornell Law Review

Volume 72
Issue 5 *July 1987*

Article 2

Establishment Clause in the Supreme Court Rethinking the Court's Approach

Gary J. Simson

THE ESTABLISHMENT CLAUSE IN THE SUPREME COURT: RETHINKING THE COURT'S APPROACH

Gary J. Simson †

Writing for the Supreme Court in 1971 in *Lemon v. Kurtzman*,[1] Chief Justice Burger acknowledged that, in deciding what is permitted and what is forbidden by the first amendment's prohibition on laws "respecting an establishment of religion,"[2] the Court could "only dimly perceive the lines of demarcation."[3] According to the Chief Justice, in interpreting the "at best opaque" language of this clause, the Court was obliged to "draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' "[4] In a passage that the Court and other courts would quote repeatedly in later establishment clause decisions, he then went on to explain:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. 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

---

† Professor of Law, Cornell Law School. B.A. 1971, J.D. 1974, Yale University. I am grateful to various colleagues and students at Cornell and Berkeley for discussions of the establishment clause that helped shape the ideas expressed in this Article. I especially thank Jesse Choper for his comments on an earlier draft of the Article and Rosalind Simson for her suggestions throughout the writing of the Article.

1 403 U.S. 602 (1971).

2 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion. . . ."). The due process clause of the fourteenth amendment has been interpreted as making this prohibition applicable to the states. Everson v. Board of Educ., 330 U.S. 1, 8 (1947).

3 403 U.S. at 612.

4 *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)). The Court's principal discussions of the historical background of the clause appear in Everson v. Board of Educ., 330 U.S. 1, 8-13 (1947), and Engel v. Vitale, 370 U.S. 421, 425-36 (1962). In both instances, Justice Black wrote the opinion of the Court. For a sense of the range of views among scholars as to the implications of history for interpreting the clause, see R. CORD, SEPARATION OF CHURCH AND STATE (1982); M. HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965); P. KAUPER, RELIGION AND THE CONSTITUTION (1964); L. PFEFFER, CHURCH, STATE AND FREEDOM (rev. ed. 1967).

entanglement with religion."[5]

By the mid-1980's, with Chief Justice Burger spearheading the attack, this three-part test appeared headed for obsolescence.[6] In 1983 the Court in *Marsh v. Chambers*[7] rejected an establishment clause challenge without applying the *Lemon* test. *Marsh* involved a challenge to a state legislature's practice of opening its sessions with a prayer by a state-paid chaplain. Writing for a 6-3 majority, the Chief Justice ignored both the *Lemon* test and Justice Brennan's attempt in dissent to show that the practice was utterly irreconcilable with the test. Instead, he sustained the practice based on the "unique history"[8] of legislative prayer in the United States—in particular, the widespread existence of the practice since colonial times, and the authorization by the Congress that proposed the first amendment of the appointment of paid chaplains to open its sessions with prayer.[9]

As Justice Brennan suggested in dissent,[10] the Court's opinion in *Marsh* can be understood as simply creating a limited exception based on history to the application of the *Lemon* test. The Court's opinion the following year in *Lynch v. Donnelly*,[11] however, is much less susceptible to a narrow reading as far as its implications for the *Lemon* test. It seems to take the Court to the brink of repudiating the test.

Lynch presented the question of whether the establishment clause prevented a city from including a nativity scene in its annual Christmas display. By a 5-4 margin the Court found no establishment clause bar, and Chief Justice Burger again wrote for the majority. The Chief Justice did not on this occasion ignore the *Lemon* test. He applied it, however, in no more than form alone. According to the Chief Justice, the city's inclusion of the crèche in its Christmas display was supported by two "legitimate secular purposes"—"to celebrate the Holiday and to depict the origins of that Holiday."[12] In addition, its primary effect plainly was not to advance religion

---

5 403 U.S. at 612-13 (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

6 For commentary calling for abandonment of the test, see Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817 (1984); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978); Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847 (1984).

7 463 U.S. 783 (1983). *Marsh* is also discussed *infra* at text accompanying notes 99-100.

8 463 U.S. at 791.

9 *Id.* at 786-91.

10 *Id.* at 795-96 (Brennan, J., dissenting).

11 465 U.S. 668 (1984).

12 *Id.* at 681.

because "whatever benefit to one faith or religion or to all religions [exists here] is indirect, remote, and incidental."[13] For present purposes, I leave to the dissenting opinions in *Lynch* the task of demonstrating for anyone who needs convincing the superficiality of this application of the *Lemon* test.[14] I call attention, however, to a passage toward the close of the majority opinion in which the Court all but announced that it was guided not by the *Lemon* test but by a materially less restrictive approach:

> We are unable to perceive the Archbishop of Canterbury, the Bishop of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed.[15]

In light of *Marsh*, *Lynch*, and other indications[16] that a majority of the Justices no longer viewed the *Lemon* test as the proper measure of establishment clause violations, the establishment clause decisions of the Court's 1984-85 Term must be seen as representing somewhat of a shift in direction. The *Lemon* test emerged from these decisions not only intact in form but to some extent revitalized in substance. Invoking the test, the Court invalidated a state moment-of-silence law,[17] three publicly-financed programs offering remedial or enrichment classes to parochial school children in

---

13 *Id.* at 683.

14 *See id.* at 694-726 (Brennan, J., dissenting); *id.* at 726-27 (Blackmun, J., dissenting); *see also* Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U.L. REV. 1, 12-14 (1984); Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770.

15 465 U.S. at 686.

16 *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983) (5-4 decision upholding tax deduction for tuition and other expenses of parochial school education). *Mueller* is discussed *infra* at text accompanying notes 90-91.

17 Wallace v. Jaffree, 472 U.S. 38 (1985). Although the Court in *Jaffree* invalidated the Alabama moment-of-silence law under review, the decision did not cast doubt on the validity of moment-of-silence laws generally. Indeed, quite the contrary. Most obviously, the majority rested its invalidation of the Alabama statute entirely on the statute's specific history—one revealing, in the majority's view, that "the statute had *no* secular purpose." *Id.* at 56 (emphasis in original). In addition, the majority appeared to suggest in dictum that some moment-of-silence laws could withstand constitutional scrutiny. *See id.* at 59 ("The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday."). Furthermore, two members of the six-member majority were unequivocal in separate concurrences as to the validity of some moment-of-silence laws, and the three dissenters seemed prepared to approve virtually any moment-of-silence law. For the view that, in light of "the circumstances in which [current moment-of-silence] statutes were passed and the setting of the public school classroom in which they take effect," these statutes "may violate all three prongs of the [*Lemon*] test," see Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 HARV. L. REV. 1874 (1983).

parochial school classrooms,[18] and a state law barring employers from requiring employees to work on their Sabbath.[19]

In this Article I suggest that this reprieve for the *Lemon* test was appropriate only if the test's requirements are substantially revised. I propose various revisions that I believe are essential in terms of two principal considerations: protection against the "three main evils"[20] recognized by the Court as central to a proper interpretation of the clause; and the need for a test that invites objective and consistent application. In my view, these two considerations are not only of independent importance but also intimately related, because failure to minimize the extent to which judges are left to intuition in applying the test is apt to undermine the protective functions of the clause. Very simply, the promotion of religion is something that most people—judges included—have difficulty seeing as bad. Not only are most people taught by their parents and others to regard religion itself as a good, but many if not most are also taught to regard in similar fashion the spreading of one's religion to nonbelievers.[21]

I emphasize at the outset that my proposals are not intended to yield a test that, fairly applied, reconciles the results in all or almost all of the Court's establishment clause cases. Whether more attention to consistency in results with the decided cases would be appropriate is a matter about which reasonable persons may differ. I invite the reader to consider, however, whether the results in these cases are such that no coherent approach could hope to reconcile them to a very high degree.[22]

I
THE SECULAR PURPOSE REQUIREMENT

A. The Requisite Showing

The first prong of the *Lemon* test sets forth as a necessary condition for constitutionality that the law under review have a "secular

---

18 Aguilar v. Felton, 473 U.S. 402 (1985); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985).

19 Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985). The Court's one establishment clause decision of the 1985-86 Term, Witters v. Washington Dep't of Services for the Blind, 106 S. Ct. 748 (1986), *see infra* text accompanying notes 108-09, cast no doubt on the Court's current commitment to the *Lemon* test. The Justices were unanimous in recognizing that the *Lemon* test applied and that it required rejection of the respondent's establishment clause challenge.

20 Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

21 For insight into the attitudes toward religion of the individual Justices of the past fifty years, see Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83.

22 For suggestions to this effect, see Johnson, *supra* note 6; Kurland, *supra* note 6; Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463 (1981).

legislative purpose."[23] The Court has made clear that this requirement focuses on the actual purpose or purposes that motivated adoption of the law. Although the Court has varied somewhat in its statements elaborating on this requirement,[24] it seems clear that, unless a law is proven to be predicated entirely or almost entirely on nonsecular purposes, this requirement is met.

This requirement is defensible to the extent that it recognizes that a law adopted for reasons incompatible with the establishment clause should be struck down even though the law would be unassailable if adopted for valid reasons. As several commentators have argned convincingly at length,[25] the various provisions of the Constitution are most reasonably interpreted to afford protection against laws predicated on purposes implicitly prohibited by those provisions. Although a number of objections have been raised to invalidating laws for illicit motivation,[26] they have been shown to be ultimately unpersuasive.[27]

The first prong's secular purpose requirement is not defensible, however, to the extent that it limits the protection afforded by the establishment clause against illicitly motivated laws to laws predicated entirely or almost entirely on nonsecular purposes. This limitation is inconsistent with the basic rationale for invalidating illicitly motivated laws—a rationale described by Professor Brest as follows:

> 1. Governments are constitutionally prohibited from pursuing certain objectives—for example, the disadvantaging of a racial group, the suppression of a religion, or the deterring of interstate migration.
>
> 2. The fact that a decisionmaker gives weight to an illicit objective may determine the outcome of the decision. The decisionmaking process consists of weighing the foreseeable and desirable

---

23 403 U.S. at 612.

24 *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (a law must have "a clearly secular purpose"); Lynch v. Donnelly, 465 U.S. 668, 680 (1984) ("The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations."); Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam) (the "pre-eminent purpose" of a law must not be "plainly religious in nature").

25 *See, e.g.*, Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

26 *See* Brest, *supra* note 25, at 119 (identifying four objections: "the difficulty of ascertaining motivation," "the futility of invalidating an otherwise permissible law," "the disutility of invalidating what may otherwise be a perfectly good law," and "the general impropriety of the inquiry").

27 *See id.* at 119-30; Ely, *supra* note 25, at 1212-23.

consequences of the proposed decision against its foreseeable costs. Considerations of distributive fairness play an important role. To the extent that the decisionmaker is illicitly motivated, he treats as a desirable consequence one to which the lawfully motivated decisionmaker would be indifferent or which he would view as undesirable.

3. Assuming that a person has no legitimate complaint against a particular decision merely because it affects him adversely, he does have a legitimate complaint if it would not have been adopted but for the decisionmaker's consideration of illicit objectives. If in fact the rule adopted is useful and fair, the adversely affected party might have no legitimate grievance, whatever considerations went into its adoption. In our governmental system, however, only the political decisionmaker—and not the judiciary—has general authority to assess the utility and fairness of a decision. And, since the decisionmaker has (by hypothesis) assigned an incorrect value to a relevant factor, the party has been deprived of his only opportunity for a full, proper assessment.[28]

In keeping with the above rationale, the Court should revise the first prong of the *Lemon* test to require the invalidation of any law that would not have been adopted if a nonsecular purpose had not been considered.[29] The fact that such a purpose may not have been the exclusive or even the primary one motivating adoption should be seen as beside the point. In suggesting this revision of the first prong, I note that I am hardly alone in accepting both the accuracy

---

28 Brest, *supra* note 25, at 116-17.

29 Under this formulation, proof of a nonsecular purpose does not necessarily require invalidation of the law: The law satisfies the first prong if its adoption did not depend upon consideration of the impermissible purpose. Proof of a nonsecular purpose should be treated, however, as a basis for shifting to the state the burden of showing that adoption was not dependent on such a purpose. *See* Brest, *supra* note 25, at 117-18:

> If the decisionmaker gave weight to an illicit objective, the court should presume that his consideration of the objective determined the outcome of the decision and should invalidate the decision in the absence of clear proof to the contrary. Evidence sufficient to establish that the decisionmaker gave any weight to an illicit objective will also often establish that the decision would not have been made but for the pursuit of that objective. A complainant may, however, prove clearly and convincingly that the decisionmaker gave weight to an illicit objective and yet fail to establish with equal certainty that this affected the outcome of the decision. It is conceivable—though seldom likely—that the same decision would have been made even in the absence of illicit motivation. In this case, proof that the decisionmaker took account of an illicit objective rebuts whatever presumption of regularity otherwise attaches. For this reason, and because of the constitutional interests at stake, the court should place on the decisionmaker a heavy burden of proving that his illicit objective was not determinative of the outcome.

To similar effect, see Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

of Professor Brest's rendition of the rationale for invalidating impermissibly motivated laws and the implications of this rationale for laws only partly based on impermissible motives. In particular, several years after handing down *Lemon*, the Court in an equal protection context cited the discussion by Professor Brest quoted above as support for holding that a law should be struck down if the decision to adopt it depended on a racially discriminatory purpose, regardless of whether such purpose was exclusive, primary, or subordinate.[30]

B. Nature of the Prohibited Purposes

Under the first prong of the *Lemon* test as set forth by the Court or as revised in accordance with the above discussion, the question arises as to what constitutes a nonsecular purpose. The Court generally has been content to define these purposes broadly as ones to aid or inhibit religion.[31] In its 1985 decision invalidating a state moment-of-silence law for failure to pass the first prong of the *Lemon* test, however, a majority of the Court subscribed to the narrower definition of such purposes as ones to endorse or disapprove of religion.[32]

Neither of these definitions of "nonsecular" is adequately tailored to the function that the term is intended to serve: identifying those purposes that the establishment clause prohibits the government from seeking to effectuate. If, as the Court has maintained, the establishment clause was adopted to afford protection against "sponsorship, financial support, and active involvement of the sovereign in religious activity,"[33] it should be interpreted as barring the government from having as its purpose the realization of any of these evils. Rather than define nonsecular purposes as ones to aid or inhibit religion or ones to endorse or disapprove of religion, the Court therefore should define them as ones to sponsor religion, support religion with public funds, or involve the state actively in religious activity.[34]

---

30 *Arlington Heights*, 429 U.S. at 265-66 & n.12.

31 *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 613 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 672-73 (1970); Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

32 Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

33 Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970), *quoted in Lemon*, 403 U.S. at 612.

34 As Dean Choper has observed, the Court "has never seriously discussed" the meaning of the term "religion" in the first amendment. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 579. For discussion of the Court's few modest attempts at defining the term, see *id.* at 587-91. Although difficult questions of the meaning of "religion" may arise in establishment clause cases, they arise far more frequently in free exercise clause cases, and it is beyond the scope of this Article to address this definitional problem. For a sampling of the wide range of scholarly resolutions of

If the Court adopts this proposed definition, it also should elaborate upon it in two respects. First, the Court should make explicit that the prohibition on purposes to sponsor religion, like the existing "endorse or disapprove" definition, extends to both endorsement and disapproval. Although endorsing religion is synonymous with sponsoring it, disapproving of religion is not. From a functional perspective, however, it makes little sense to differentiate between endorsement and disapproval in delineating the purposes prohibited by the clause. Governmental endorsement of religion is an evil because it sends a message to nonadherents that they should revise their beliefs or practices and that, if they do not, they are not full-fledged members of the political community.[35] Governmental disapproval of religion is objectionable for the same reason. In addition, consideration of the ultimate evil of an established religion suggests similar treatment of governmental endorsement and disapproval. Although the religious establishments that existed historically may seem most memorable for their messages of governmental approval of religion, they also included more than their share of messages of governmental disapproval.[36]

---

the problem, including suggestions that "religion," which appears only once in the first amendment ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."), be defined differently for the establishment and free exercise clauses, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6 (1978); Choper, *supra*; Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984); Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

35 *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); Engel v. Vitale, 370 U.S. 421, 431 (1962).

36 It may be objected that this interpretation of the establishment clause fails to take proper account of the presence of its companion provision, the free exercise clause. According to one commentator, "there is a clear definitional distinction between the two clauses. Government support for religion is an element of every establishment claim, just as a burden or restriction on religion is an element of every free exercise claim." Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1384 (1981). Under this view, state disapproval of religion is a free exercise rather than an establishment clause concern because it is a question of inhibition. Neither the language nor history of the clauses, however, offers persuasive evidence that the framers intended all questions of inhibition to be tested by the free exercise clause alone. Indeed, any such view of the framers' intent is difficult to reconcile with the general understanding, *see, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 48-55 (1985); Abington School Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring); *id.* at 227 (Douglas, J., concurring); P. KAUPER, *supra* note 4, at 77; Merel, *supra* note 34, at 809-12; Moore, *The Supreme Court and the Relationship Between the "Establishment" and "Free Exercise" Clauses*, 42 TEX. L. REV. 142, 196-98 (1963), that the two clauses are bonded by a core concern with protecting from governmental inhibition people's freedom to decide for themselves matters of religion. To be sure, the paradigmatic establishment clause problem is one that focuses on direct governmental support of religion and involves indirect inhibition of nonadherents' religious autonomy. My contention here, however, is simply that the clause is properly understood also to address some problems that do not fit this mold. *See id.* at 150-51.

Second, the Court should clarify the implications of the proposed definition for various religion-related purposes. Most obviously, it should be made clear that, despite its nonsecular component, a purpose to comply with the mandate of the free exercise clause[37] is not nonsecular within the meaning of the first prong.[38] The Court has not treated such purposes as prohibited,[39] and the proposed definition does not require otherwise. As the Court regularly has assumed,[40] the establishment and free exercise clauses are most sensibly interpreted as coexisting with one another: One clause does not require what the other clause forbids.[41] Under this view of the relationship between the two clauses—a view virtually compelled by their juxtaposition and common roots[42]—a purpose of complying with the free exercise clause cannot reasonably be found to be incompatible with the establishment clause. Instead, it stands apart from the types of purposes prohibited by the establishment clause as a distinct variety of purpose permissible under the clause.

Assume, for example, that in response to the Court's free exercise clause ruling in *Wisconsin v. Yoder*,[43] a state exempts Amish children who complete eighth grade from the state's requirement that all children attend school until the age of sixteen. The state has a ready answer to charges that its purpose is the impermissible one of

---

37 "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I. For general discussion of the clause, see Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development* (pt. 1), 80 HARV. L. REV. 1381 (1967); Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

38 In keeping with this suggestion, I also make the modest recommendation that purposes prohibited or permitted by the establishment clause be characterized simply as "prohibited" or "permissible" purposes rather than as "nonsecular" or "secular" ones. The exercise of deciding which religion-related purposes are "secular" within the meaning of the clause is needlessly confusing and invites misapplication.

39 *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 719-20 (1981); Wisconsin v. Yoder, 406 U.S. 205, 234 n.22 (1972); Sherbert v. Verner, 374 U.S. 398, 409 (1963).

40 *See supra* note 39.

41 This is not to deny that there are occasions on which the demands of the two clauses are in *apparent* conflict. Indeed, there are, and commentators have taken an array of views as to how the clauses should be interpreted to resolve any such tensions that may arise. *See, e.g.*, P. KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT (1962); L. TRIBE, *supra* note 34, §§ 14-2 to -4; Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Galanter, *Religious Freedom in the United States: A Turning Point?*, 1966 WIS. L. REV. 217; Moore, *supra* note 36; Schwartz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692 (1968). This debate, however, is not over what to do when one clause requires what the other clause forbids. Rather, it is over how to interpret the two clauses so as to render their demands compatible. The absence of *actual* conflict is assumed.

42 *See* Everson v. Board of Educ., 330 U.S. 1, 40 (1947) (Rutledge, J., dissenting); P. KURLAND, *supra* note 41, at 16-18; Moore, *supra* note 36, at 194.

43 406 U.S. 205 (1972).

sponsoring religion. It can defend the exemption in terms of a purpose of complying with the mandate of the free exercise clause.[44] Similarly, if a state in response to *Sherbert v. Verner*[45] awards unemployment compensation benefits to a person unavailable for work for religious reasons, it can easily avoid a charge that its purpose is the prohibited one of using state funds to support religion. It can rely upon a purpose of satisfying the demands of the free exercise clause.

More problematic in terms of consistency with the establishment clause are purposes to protect people's freedom to engage in religious practices where such protection is not required by the free exercise clause. Consider, for example, a law barring private employers from requiring any employee to work on his or her Sabbath.[46] The state cannot claim that its purpose is simply to comply with the free exercise clause because the clause is not a constraint on nongovernmental employers. Assume, however, that the state claims that its purpose is to protect employees' freedom to observe their religion's Sabbath. On its own terms, this purpose is a purpose of singling out for special treatment one religious practice from among the many that employers may try to pressure employees not to observe. As such, this purpose inevitably entails a message to employees and others that Sabbath observation is a religious practice more worthy of respect than others, which is the essence of sponsorship.

Assume instead that the state attempts to defend the law by asserting the broader purpose of protecting employees' freedom to engage in religious practices that they feel compelled to observe. Again, I suggest that the purpose is one forbidden by the prohibition on purposes to sponsor religion. It singles out for favored treatment religiously motivated actions from among those that employees may feel compelled to take and that employers may pressure them not to take. It implicitly states that religious motivations count for more than nonreligious ones and that religion is preferable to nonreligion.

The above analysis does not imply that the state may not go beyond the demands of the free exercise clause in protecting people's freedom to engage in religious practices. It does imply, how-

---

44 If a state purports to be acting in accordance with the mandate of the free exercise clause but the implications of the clause for the particular issue have not been settled, a court must decide these implications before addressing the question of the permissibility of the purpose under the establishment clause.

45 374 U.S. 398 (1963).

46 In Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), the Court invalidated a Connecticut law of this sort under the primary effect prong of the *Lemon* test. It did not address the validity of the law under the first prong of the test.

ever, that the state cannot act in this way without violating the proposed first prong unless it can explain its actions in terms of a purpose that does not implicitly express a preference for religion generally, for a particular religion, or for a particular religious belief or practice. Moreover, this analysis also has important implications for the legitimacy of such actions under the second prong insofar as that prong is properly revised to require scrutiny of the relationship between means and end—a possibility that I explore below.[47]

II
IMPERMISSIBLE EFFECTS

A. The Range of Effects Adverse to the Clause

Under the second prong of the *Lemon* test, a law fails to survive establishment clause review unless its "principal or primary effect . . . neither advances nor inhibits religion."[48] An initial difficulty with this formulation that the Court has not remedied by interpretation in the years since *Lemon* is its broad reference to advancements and inhibitions of religion. In keeping with the reasons that prompted adoption of the clause, effects adverse to the clause should not be identified by reference to any general notions of what constitutes an advancement or inhibition of religion. Rather, they should be identified in terms of the "three main evils" that the clause was designed to prevent. The Court therefore should expressly limit the scope of the second prong to effects of sponsoring religion, supporting religion with public funds, or involving the state actively in religious activity.

To help ensure consistent and objective decisionmaking and the degree of protection against the "three main evils" that the clause was intended to afford, I also suggest that the Court announce criteria along the following lines for deciding the existence of any of these effects adverse to the clause. First, a law has an effect of sponsoring religion if it either: communicates to nonadherents of religion a preference on the part of the state that they adhere to some religion; communicates to nonadherents of a particular religion, religious belief, or religious practice a preference on the part of the state that they adhere to such religion, religious belief, or religious practice; or communicates to adherents of a particular religion, religious belief, or religious practice a preference on the part of the state that they abandon such religion, religious belief, or religious practice. Second, a law has an effect of supporting religion with public funds if it authorizes an expenditure of public funds that

---

47 *See infra* Part II-B.

48 Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

benefits the operations of a religious institution or that increases the likelihood that an individual will exercise freedom of choice in favor of a religious alternative. Third, a law has an effect of involving the state actively in religious activity if it interferes with the authority of a religious group or organization to decide a matter of religious doctrine.

The first of the above criteria focuses on the reasonable perception of persons who would feel pressured and alienated by the allegedly sponsored message. In doing so, it builds on the assumption that the framers' objection to laws sponsoring religion was aimed at the pressure to conform and the sense of second-class citizenship generated by such laws.[49] If people are to be protected from these harms, the existence of sponsorship must be measured by the reasonable perception of the persons who would experience them. To determine the existence of sponsorship based on the reasonable perception of "an objective observer"[50]—someone apt to be less sensitive to it—would insulate from constitutional scrutiny at least some laws inflicting harms of the sort that the framers wished to prevent.[51]

The second criterion recognizes two types of effects as effects of supporting religion with public funds: an effect of benefiting religious institutions, and an effect of encouraging individuals to pursue a religious course of action. In doing so, it implements the assumption that the framers' objection to laws supporting religion with public funds was based on a principle that it is wrong to exact contributions from one person to support another's religion.[52] Both of the effects recognized by this criterion are offensive in terms of this principle.

The third criterion focuses on one type of state involvement in religious activity—state involvement that to some extent displaces the authority of a religious group or organization to decide which doctrines it holds true. This criterion does not assume that this type

---

49 *See supra* note 35.

50 *See* Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) (maintaining that reference should be made to the perception of "an objective observer, acquainted with the text, legislative history, and implementation" of the law under review).

51 With regard to the difficulties of an approach not focusing on the perception of persons who would experience the harms, recall the Court's logic in Plessy v. Ferguson, 163 U.S. 537 (1896), in denying the relevance of black persons' perception of separate but equal railroad accommodations:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Id. at 551.

52 *See* Everson v. Board of Educ., 330 U.S. 1, 8-16 (1947), and sources cited therein.

of state involvement was the only type to which the framers objected. Rather, it assumes that it was the only type to which they objected other than involvement that sponsors religion or that supports religion with public funds—forms of involvement already taken into account by the first two criteria. The history that provides the backdrop for the adoption of the establishment clause includes extreme examples of involvement of the sort identified by this criterion. Perhaps the most notable is the British government's introduction of the Book of Common Prayer, which described in detail for use in the established Church of England the proper form and content of religious ceremonies.[53] Governmental action today, however, rarely implicates this criterion. Basically, the criterion comes into play as a constraint on the manner in which courts may resolve internal church disputes brought before them: To the extent that the resolution of such disputes depends upon a matter of religious doctrine, this criterion casts doubt on the validity of any attempt by the judiciary to inject its own notions of proper doctrine.[54] Because of this limited significance to modern establishment clause problems, this criterion is discussed only briefly in the pages that follow.

B. The Primary Effect Distinction

In providing that laws may be invalidated for effects adverse to the clause, the Court in *Lemon* was careful to indicate that courts should not strike down every law having such an effect. It limited invalidation for adverse effects to laws having such an effect as their "principal" or "primary" one.

Not long after handing down *Lemon,* the Court in *Committee for Public Education v. Nyquist*[55] significantly elaborated upon this primary effect distinction. First, the Court made clear that its use of "primary" should not be taken literally. It denied that the distinction required courts to ascertain whether a particular effect adverse to the clause actually is a law's primary one. Writing for the majority in *Nyquist,* Justice Powell maintained:

> We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legit-

---

53 The Acts of Parliament approving the Book at its inception were 2 & 3 Edw. 6, ch. 1 (1548), and 3 & 4 Edw. 6, ch. 10 (1549). The subsequent history of the Book—a turbulent history that included various revisions, demises, and revivals—is described briefly in Engel v. Vitale, 370 U.S. 421, 425-27 (1962), and at length in L. PULLAN, THE HISTORY OF THE BOOK OF COMMON PRAYER (1900).

54 *See generally* Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes,* 69 CALIF. L. REV. 1378 (1981).

55 413 U.S. 756 (1973).

> imate end under the State's police power is immune from further examination.[56]

Second, the Court interpreted the distinction as requiring the invalidation of any law having an effect adverse to the clause that is "direct and substantial" as opposed to "remote and incidental."[57]

In subsequent years, the Court has frequently either cited the *Nyquist* interpretation of "primary effect" as authoritative[58] or simply reiterated its terms.[59] This interpretation of "primary effect," however, is too vague and confusing to provide an adequate basis for objective and consistent decisionmaking. The possibility for confusion inheres in its contrast of "direct and substantial" effects with "remote and incidental" ones. Presumably, the Court intended these words to identify opposite ends of two separate spectrums; otherwise the contrast makes little sense. As labels for opposite ends of two separate spectrums, however, these words are exceptionally poor choices. Rather than two spectrums, the words give the impression of three or four. Subsequent cases occasionally remedy this problem to some extent by characterizing permissible effects as "indirect and incidental" rather than "remote and incidental";[60] and *Nyquist* itself speaks of "indirect and incidental" effects at places in the opinion outside of the discussion addressed to the meaning of "primary effect."[61] By speaking in terms of "direct and substantial" effects versus "indirect and insubstantial" ones, the Court could remedy this problem entirely.

If the Court's dichotomy in *Nyquist* is so understood, two significant problems of vagueness in the *Nyquist* interpretation come to the fore. First, it is unclear what directness means in this context. The term is not expressly defined in *Nyquist* nor in any of the Court's later decisions. Second, it is unclear how courts should respond to effects that are direct and insubstantial or substantial and indirect. *Nyquist* does not specify the status of such effects, and none of the Court's subsequent cases offers ready insight into the matter by characterizing a particular effect as direct and insubstantial or as substantial and indirect.

As to the first of these vagueness problems, a discussion of primary effect in *Sloan v. Lemon*,[62] a companion case to *Nyquist*, strongly

---

56 *Id.* at 783-84 n.39.

57 *Id.* at 784-85 n.39.

58 *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373, 394 (1985); Meek v. Pittenger, 421 U.S. 349, 366 (1975).

59 *See, e.g.*, Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985); Wolman v. Walter, 433 U.S. 229, 250 (1977).

60 *See, e.g.*, *Grand Rapids*, 473 U.S. at 394; *Meek*, 421 U.S. at 364.

61 Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 775, 793 (1973).

62 413 U.S. 825 (1973).

suggests that the Court uses "direct" in this context to mean "intended." The Court in *Sloan*, as in *Nyquist*, invalidated a program providing tuition reimbursement to parents of parochial school students. In finding that the program had a primary effect of advancing religion, Justice Powell, the author of the Court's opinion in both *Sloan* and *Nyquist*, explained:

> The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions. We think it plain that this is quite unlike the sort of "indirect" and "incidental" benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children.[63]

The Court's determinations in *Nyquist*,[64] *Sloan*,[65] and other cases[66] that aid given directly to parents of parochial school students or to the students themselves had a "direct" effect of supporting the parochial schools tend to confirm that the Court generally equates "direct" in this context with "intended." They do so by apparently eliminating as a plausible interpretation of "direct" the principal competition to "intended"—i.e., an interpretation referring to proximity or immediacy in space or time.

Also significant as confirmation of the proposed interpretation is its value in helping to reconcile the Court's various announcements in cases since *Nyquist* that an effect is or is not "direct." Consider, for example, the Court's conclusion in *Wolman v. Walter*[67] that state funding of transportation for parochial school field trips had a "direct" effect of supporting religion[68] and its conclusion in *Wolman* and *Meek v. Pittenger*[69] that state funding of speech and hearing diagnostic services to be provided in parochial schools did not.[70] The different conclusions may be understood as reflecting different perceptions on the part of the Court as to the real intent behind the laws. In funding for parochial school students field trip transportation of the kind already provided for public school students, the state in *Wolman* arguably was seeking to do no more than provide for the educational enrichment of all the children of the state. The

---

63 *Id.* at 832.
64 413 U.S. at 780-83.
65 413 U.S. at 830-32.
66 *See Grand Rapids*, 473 U.S. at 395-96; *Wolman*, 433 U.S. at 248-51.
67 433 U.S. 229 (1977).
68 *Id.* at 252-55.
69 421 U.S. 349 (1975).
70 433 U.S. at 241-44; 421 U.S. at 371 n.21.

Court, however, apparently saw the state's action in a different light. In its view, the state's real purpose was to provide financial support for religion: to relieve parochial schools that already offered such trips of a cost of operation; and to help parochial schools that did not already offer such trips make themselves more attractive to parents contemplating sending their children to parochial school. Although the funding of diagnostic services in parochial schools could also be seen as an attempt to support religion with public funds, the Court apparently did not so regard it. In the Court's view, the state in providing in parochial schools these diagnostic services available in public schools was simply seeking to promote the welfare of all children in the state.

With regard to the second problem of vagueness noted above, the Court's applications of the primary effect distinction indicate that it interprets the distinction as permitting laws with a substantial and indirect effect adverse to the clause. The Court's willingness to uphold laws that in its view have a substantial and unintended effect adverse to the clause is exemplified by its approval of states' providing funds for the delivery in parochial schools of various types of basic health care offered free of charge in the states' public schools.[71] Such funding has an effect of supporting parochial schools with public monies that cannot fairly be called insubstantial. To the extent that the funding provides for health care that the school would purchase itself, it diminishes the school's operating expenses. To the extent that it provides for additional health care, it enhances the school's attractiveness to parents contemplating sending their children there.

The Court in *Meek v. Pittenger* characterized the adverse effect of this funding as "indirect and incidental."[72] So doing, the Court at least arguably indicated that it regarded the effect as both unintended and insubstantial. The Court's remarks in *Meek* in support of this characterization, however, strongly suggest that its sole concern was the unintended nature of the adverse effect and that it was using "incidental"—an uncommonly vague term that may mean "unintended" as well as "insubstantial"—simply to emphasize the notion of lack of intent. On the one hand, the Court made no reference to substantiality of effect. On the other hand, it called attention to factors indicative of lack of any intent to support religion: Funding of this sort is "part of general legislation made available to all students" and provides for "secular and nonideological services unrelated to the primary, religion-oriented educational function of the

71 *See Wolman*, 433 U.S. at 242 & n.10; *Meek*, 421 U.S. at 364-65.

72 421 U.S. at 364.

sectarian school."[73] Tacitly, then, the Court in *Meek* appeared to be saying that this funding was intended to provide for students' health, not to finance religion, and that this disposed of the question of an impermissible primary effect.

Also illustrative of the Court's receptivity to laws having an effect adverse to the clause that it regards as substantial and indirect is its affirmation on a number of occasions that the establishment clause does not bar municipalities from providing fire protection for religious institutions.[74] Again, the substantiality of the effect of supporting religion with public funds is evident. By providing this service, a municipality relieves religious institutions of a material operating expense. If the municipality did not provide this service, the institutions would be forced to secure protection of this sort on their own.

Here, too, the Court has not expressly confirmed or denied the substantiality of the effect. Moreover, the apparent reason for its inattention to the matter again appears to be a perception that the effect is unintended. According to the Court in *Nyquist*, municipal provision of this service has an "indirect and incidental" effect of supporting religion. In its view, this service, "provided in common to all citizens, [is] 'so separate and so indisputably marked off from the religious function' that [it] may fairly be viewed as reflect[ing] a neutral posture toward religious institutions."[75] In short, from the Court's perspective, a municipality's intent in providing religious institutions with fire protection is not to support them with public funds but rather to safeguard persons and property, and this intent validates the effect of supporting religion, however substantial such effect may be.

The Court's approach to laws having an effect adverse to the clause that it regards as insubstantial and direct is more difficult to ascertain. The first prong of the *Lemon* test seems to commit the Court to the view that courts should invalidate a law having an adverse effect that is insubstantial but paradigmatically "direct": If a law has an adverse effect that is reasonably explicable only in terms of the illicit intent to achieve it, the first prong appears to require invalidating the law regardless of the substantiality of this effect. It is not clear, however, where the Court stands as to laws having an adverse effect that is insubstantial and intended but not so obviously intended as to run afoul of the first prong. Not only are there no cases in which the Court in applying the second prong characterized

---

73 *Id.*

74 *See, e.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 781-82 (1973); Everson v. Board of Educ., 330 U.S. 1, 17-18 (1947).

75 413 U.S. at 781-82 (quoting *Everson*, 330 U.S. at 18).

the effect in question as insubstantial and direct; it is difficult to point with confidence to any particular case as one in which the Court in applying the second prong must have recognized the effect as insubstantial and direct.[76] For reasons set forth below, I doubt that the Court gives serious consideration under the second prong to any effect that it regards as insubstantial.

Basically, I suggest that the primary effect distinction is best understood as stating a requirement relevant to laws having a substantial effect adverse to the clause: A law must not have a substantial effect adverse to the clause unless the effect is obviously unintended. In making this suggestion, I rely on the preceding analysis of the Court's application of the primary effect distinction but also on what I perceive to be the logic underlying the Court's attention under the second prong to whether or not an effect adverse to the clause is intended. According to the Court in *Lemon*, the establishment clause's prohibition on laws "respecting an establishment of religion" encompasses any law that constitutes a "step that could lead"[77] to an established religion. I suggest that the Court at least intuitively is operating on a theory of the establishment clause that assumes that the only type of law that constitutes a tangible "step that could lead" to an established religion is one predicated on an intent to bring about one of the evils that the clause was designed to prevent. If the Court indeed is operating under this theory of the clause, it makes a great deal of sense for it to go beyond the requirements of the first prong in taking illicit intent into account. Whether applied as the Court currently applies it or as I propose in this Article,[78] the first prong only requires the invalidation of laws that challengers have borne the difficult burden of proving rest on an intent to achieve an effect adverse to the clause. It leaves standing laws that, though not proven to rest on illicit intent, in fact were motivated by such intent. A reasonable way of weeding out these less apparent but tangible "step[s] that could lead" to an established religion is to attach a presumption of unconstitutionality to laws that there is good reason to suspect are based on illicit motives. If one may assume that a law that achieves a *substantial* effect of a certain kind probably was intended to achieve that effect, laws having a sub-

---

76 On the one hand, although there are some cases in which the Court expressly acknowledged the existence of a direct effect and did not specify whether or not it was substantial, none of these cases appears to involve an effect so plainly insubstantial that the Court must have tacitly recognized it as such. On the other hand, as the Court's practice of using the terms "incidental" and "remote," rather than "insubstantial," virtually ensures, there appear to be no cases in which the Court expressly acknowledged the existence of an insubstantial effect and did not specify whether or not it was direct.

77 Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

78 *See supra* Part I-A.

stantial effect adverse to the clause are plainly laws of this description. Unless the suspicion of illicit intent aroused by their substantial adverse effect is dispelled by evidence negating such intent—that is, unless the substantial effect is obviously unintended—these laws therefore should be struck down.[79]

Although an exception for "obviously unintended" substantial effects may reflect a sound interpretation of the establishment clause, it undoubtedly leaves something to be desired as a basis for objective and consistent application. With this in mind, I suggest that a substantial effect adverse to the clause should be regarded as "obviously unintended" if the law having such effect is necessary to serve a substantial governmental interest. A law would meet this description if it serves an interest of material importance to the general welfare more precisely than any alternative means that is both less drastic in terms of effects adverse to the establishment clause and not beyond the state's capacity to implement.[80] This suggestion reflects the assumption that there is no good reason to suspect that a law is designed to serve an unlawful objective if it is the best available means of serving a lawful objective worthy of serious attention.

C. The Alternative Formulation

Based on the preceding analysis, I therefore propose that the Court revise the second prong of the *Lemon* test to state the following requirement:

> A law must not have a substantial effect adverse to the clause unless the law is necessary to serve a substantial governmental interest.

In addition, drawing on the criteria suggested earlier for deciding the existence of an effect adverse to the clause, I recommend that, if the Court adopts this requirement, it provide an explanation along the following lines as to the type of effect that qualifies as a substantial one adverse to the clause:

---

79 For an approach that shares this view of illicit intent as central to an interpretation of the clause but that does not attach any presumption of illicit intent on the basis of effects, see P. KURLAND, *supra* note 41. Professor Kurland's basic thesis—that the establishment and free exercise clauses "should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden," *id.* at 18—is critically examined in Merel, *supra* note 34, at 807-09; Kauper, Book Review, 41 TEX. L. REV. 467 (1963); Pfeffer, Book Review, 15 STAN. L. REV. 389 (1963).

80 The latter qualification, "not beyond the state's capacity to implement," is intended to remove from consideration means prohibited to the state by federal constraints other than the establishment clause and means that the state could not adopt without impairing severely its ability to function effectively. *See* Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663, 679-80, 687 n.121 (1977).

> A law has an effect adverse to the clause if it has an effect of sponsoring religion, supporting religion with public funds, or involving the state actively in religious activity. A law has a substantial effect of sponsoring religion if it either: communicates to nonadherents of religion a material preference on the part of the state that they adhere to some religion; communicates to nonadherents of a particular religion, religious belief, or religious practice a material preference on the part of the state that they adhere to such religion, religious belief, or religious practice; or communicates to adherents of a particular religion, religious belief, or religious practice a material preference on the part of the state that they abandon such religion, religious belief, or religious practice. A law has a substantial effect of supporting religion with public funds if it authorizes an expenditure of public funds that materially benefits the operations of a religious institution or that materially increases the likelihood that an individual will exercise freedom of choice in favor of a religious alternative. A law has a substantial effect of involving the state actively in religious activity if it materially interferes with the authority of a religious group or organization to decide a matter of religious doctrine.

There can be little question that this alternative formulation of the second prong generally requires less tolerance for laws having an effect adverse to the clause than the Court has displayed in the past. Analysis of the laws upheld by the Court in *Board of Education v. Allen*[81] and *Mueller v. Allen*[82] illustrates the lesser tolerance required for laws having an effect of supporting religion with public funds.

The state law sustained in *Board of Education v. Allen* requires local school boards to purchase and loan to parochial school students nonreligious books for use in their courses. The law has a substantial effect of supporting religion with public funds regardless of whether the parochial school in which the books are used previously purchased the books for the students or required the students' parents to purchase them.[83] On the one hand, if the school previously purchased the books, the law materially benefits the school by relieving it of a nontrivial operating expense. On the other hand, if the parents previously purchased the books, the law, by relieving the parents of a nontrivial expense of educating their children outside the public schools, materially increases the likelihood that parents

---

81 392 U.S. 236 (1968). For a thoughtful comment on *Board of Education v. Allen* in particular and parochial school aid in general, see Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969).

82 463 U.S. 388 (1983).

83 With regard to the practices of the schools in the districts involved in the instant litigation, see Board of Educ. v. Allen, 392 U.S. at 244 n.6.

contemplating sending their children to parochial schools will opt to do so.

Under the proposed approach, the law is therefore unconstitutional unless it is necessary to serve a substantial state interest. The state's interest in ensuring that the children of the state are educated in secular subjects with books of good quality is undoubtedly substantial: The state's interest in providing the children of the state with a good secular education is an interest of the highest order, and few persons would deny that a basic prerequisite to a good secular education is good textbooks. The textbook loan program is not necessary to serve this substantial interest, however—and therefore must fall—because the state need not be the one to supply the books. The interest is served with equal precision by the less drastic means of requiring parochial schools, as a condition for licensing by the state, to purchase or require parents to purchase secular textbooks that are conducive to quality education.

To be sure, if this requirement imposed an unreasonable burden on parochial schools' ability to remain solvent or to perform their religious function effectively, *Pierce v. Society of Sisters*[84] would eliminate it as an available less drastic means. Relying on the fourteenth amendment's due process clause,[85] the Court in *Pierce* held that states must allow parents to satisfy compulsory education laws by sending their children to nonpublic schools licensed by the state. As the Court tacitly suggested in *Pierce*[86] and made explicit soon after,[87] states interfere impermissibly with the parental right recognized in *Pierce* insofar as they prescribe licensing requirements that unreasonably burden nonpublic schools' operation.[88] A require-

---

84 268 U.S. 510 (1925).

85 "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

86 268 U.S. at 534 ("No question is raised concerning the power of the State *reasonably* to regulate all schools . . . .") (emphasis added).

87 *See* Farrington v. Tokushige, 273 U.S. 284, 298-99 (1927).

88 *Pierce* was one of the many substantive due process decisions handed down by the Court during the heyday of the discredited substantive due process of the *Lochner* era. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 11.3 (3d ed. 1986). On various occasions since its repudiation in the late 1930's of *Lochner*-style substantive due process, however, the Court has reaffirmed its allegiance to the holding in *Pierce*, *see, e.g.*, Santosky v. Kramer, 455 U.S. 745, 753 (1982); Roe v. Wade, 410 U.S. 113, 152-53 (1973); Griswold v. Connecticut, 381 U.S. 479, 481-83 (1965); Thomas v. Collins, 323 U.S. 516, 531 (1945), though citing *Pierce* at times as a first amendment case, *see, e.g.*, *Griswold*, 381 U.S. 479; *Thomas*, 323 U.S. 516. In addition, in Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 788 (1973), the Court indicated that, as regards parochial schools, the holding in *Pierce* is required by the free exercise clause. *See also* Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972) (strongly intimating this view).

I regard *Pierce* as readily defensible under the free exercise clause insofar as it concerns parochial schools. On the one hand, a refusal by the state to allow parents to satisfy compulsory education laws by sending their children to parochial school signifi-

ment to furnish or require parents to furnish textbooks of proper quality, however, cannot sensibly be characterized as an unreasonable burden on parochial schools. This requirement, like one to hire teachers competent to teach the required secular education subjects or one to provide adequate heating and ventilation in the classrooms, is a natural burden of the parochial school enterprise—a *sine qua non* to the educational endeavor that the parochial school purports to be undertaking. *Pierce* therefore does not arguably bar imposing the requirement on the schools.

The law upheld in *Mueller v. Allen* allows parents of elementary and secondary school students a state income tax deduction of $500 or $700 (depending on the child's grade) for expenses incurred for tuition, textbooks, and transportation. By virtue of its applicability to parents of parochial school students,[89] the law has a substantial effect of supporting religion with public funds. Although a tax deduction is not an expenditure of public funds in form, it plainly is so in fact. Moreover, by relieving parents of a tangible part of the cost of educating their children in parochial school, this deduction materially increases the likelihood that parents contemplating sending their children to parochial school will decide to do so.

Like the aid to parochial education in *Board of Education v. Allen*, this aid therefore must be necessary to serve a substantial state interest in order to survive review under the proposed approach. Also like the aid in *Board of Education v. Allen*, this aid does not satisfy this demand. The Court in *Mueller* recognized two interests of material importance to the general welfare served by allowing parents of parochial school students to take this tax deduction: (1) ensuring that the people of the state are well-educated; and (2) keeping within reasonable bounds the cost to taxpayers of providing everyone with

---

cantly interferes with parents' free exercise of religion. It prevents them from educating their children in an environment in which the inculcation of religious values is the paramount objective and in which instruction in secular subjects is informed by these values. On the other hand, although the state has a powerful interest in the proper education of the young, it has little justification for serving this interest by requiring attendance at public rather than parochial school. It can serve the interest adequately by the less drastic means of regulating parochial schools with regard to minimum hours of instruction in secular subjects, minimum qualifications for instructors of secular subjects, and the like. For present purposes, I assume no more than that *Pierce* is correctly decided as it pertains to parochial schools.

89 The principal beneficiaries of the law plainly are parents of parochial school students. Though applicable by its terms to parents of public school students, this Minnesota statute generally has little significance for such parents because, with rare exception, they pay no tuition and have no substantial deductible expenses of any other sort. *See* Mueller v. Allen, 463 U.S. 388, 408-09 (1983) (Marshall, J., dissenting). In addition, although parents of children attending private nonreligious school are able to take advantage of the law as much as parents of parochial school students, the number of children in Minnesota attending parochial school appears to be approximately twenty times greater than the number attending private nonreligious school. *See id.* at 391.

a good education.[90] The tax deduction for parochial education bears virtually no relation to the first of these interests. It encourages parents contemplating sending their children to parochial school to do so, but this has nothing to do with ensuring a well-educated populace. If parents do not receive this encouragement, they may decide not to send their children to parochial school. However, they will not—indeed, they cannot—decide not to provide for their children's proper education. They will so provide simply by sending them to public school.

The tax deduction for parochial education bears a closer relationship to the second interest, but not arguably a necessary one. By encouraging parents to send their children to parochial school, the tax deduction reduces the costs to the state of educating its population. It is not clear, however, that the state could not achieve similar savings by a combination of various economizing measures having no effects adverse to the establishment clause. Moreover, even assuming that alternative means would not achieve this result, it is dubious that the deduction is necessary to serve the state's interest in keeping its education bill within reasonable bounds. If, as the Court has maintained, "education is perhaps the most important function of state and local governments,"[91] the term "reasonable bounds" sensibly must be understood in a very unrestrictive way.

Analysis of the laws sustained by the Court in *Zorach v. Clauson*[92] and *Marsh v. Chambers*[93] makes clear that the proposed approach also requires the Court to be less tolerant than it has been in the past of laws having an effect of sponsoring religion. *Zorach* involved a city's "released time" program for its public schools. Under this program, a school sets aside one hour of classroom time every week to allow students who wish to attend religious centers for religious training to do so. During this hour, the students who elect not to attend a religious center are not free to leave the school, and classes are essentially suspended so that the absent students do not fall behind.[94]

The program in *Zorach* has a substantial effect of sponsoring

---

90 463 U.S. at 395.

91 Brown v. Board of Educ., 347 U.S. 483, 493 (1954); *see also* Plyler v. Doe, 457 U.S. 202, 222 (1982) ("What we said 28 years ago in [*Brown*] still holds true: 'Today, education is perhaps the most important function of state and local governments.' ").

92 343 U.S. 306 (1952).

93 463 U.S. 783 (1983).

94 Several years prior to *Zorach*, the Court invalidated a released-time program in which the optional religious training was offered in the public school classrooms by instructors from religious centers. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948). For insight into the interactions among the Justices in *Zorach* and *McCollum*, see Note, *The "Released Time" Cases Revisited: A Study of Group Decisionmaking by the Supreme Court*, 83 YALE L.J. 1202 (1974).

religion because students who do not adhere to any religion or who do not wish to receive any formal religious training reasonably would perceive of it as expressing a material preference on the part of the government that they adhere to a religion and receive such training.[95] Furthermore, the program lacks the necessary relationship to a substantial state interest that the proposed approach demands of any law having such an effect. In his opinion for the Court in *Zorach*—an opinion containing the rather startling assertion that "[w]e are a religious people whose institutions presuppose a Supreme Being"[96]—Justice Douglas characterized the challenged program as a means to "accommodate the religious needs"[97] of the students. As stated, however, this interest of accommodating the students' *religious* needs does not arguably provide a basis for sustaining the program, because it is an illicit interest of sponsoring religion. By singling out only the students' religious needs as worthy of accommodation, it amounts to a statement that the demands of religion are entitled to special respect. As such, it implies a preference on the part of the state for religion over nonreligion.

The program in *Zorach* may be defended somewhat more plausibly as a means of serving the broader interest of accommodating students' strongly felt needs. This interest is legitimate and, no doubt, substantial. It is inconceivable, however, that the released time program is necessary to serve it. First of all, unless the school accommodates the students' various strongly felt needs, the program is grossly underinclusive in serving this interest. Second, even if the school is responsive to a wide range of needs, the program is not essential to accommodate the particular need of attending religious centers for religious training. There are more than enough hours in the week when school is not in session for students to satisfy this need. Finally, assuming for purposes of argument that the school week does encroach upon the time needed for religious training, the released time program would still be an unnecessary form of religious sponsorship. The schools could accommodate the students' need for adequate time at religious centers by the less drastic means of shortening the school day and releasing all students at an earlier time.[98]

As discussed earlier,[99] *Marsh v. Chambers* involved a state's prac-

---

95 *See* Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 388-91 (1963).

96 343 U.S. at 313.

97 *Id.* at 315.

98 *See id.* at 324 (Jackson, J., dissenting). For a defense of *Zorach* in terms of an "expanded notion of free exercise neutrality," see Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development* (pt. 2), 81 HARV. L. REV. 513, 570-72 (1968).

99 *See supra* text accompanying notes 7-9.

tice of opening its legislative sessions with prayer. Like the program in *Zorach*, this practice has a substantial effect of sponsoring religion. Legislators who do not share the beliefs articulated in a particular prayer, or who do not believe in the value of prayer or in praying in a forum so public and nonreligious in nature as a legislative chamber, reasonably would perceive of the practice as expressing a material preference on the part of the state that they join in such prayer and embrace the articulated beliefs.

Also like the program in *Zorach*, this practice is unconstitutional under the proposed approach for want of a necessary relationship to a substantial state interest. Legislative prayer bears some relationship to the state's substantial interest in ensuring that legislators approach their responsibility to provide for the general welfare with seriousness and integrity. That it bears a necessary relationship to this interest, however, is not even arguable. On the one hand, legislative prayer does little to ensure that legislators approach their responsibility in this way. It is actually a detriment in this respect for legislators offended by such prayer, because it distracts them from the task at hand. As to other legislators, legislative prayer may have some uplifting effect but none likely to influence materially their performance inside or outside the legislative chamber. On the other hand, whatever contribution legislative prayer may make to ensuring that legislators act with due regard for their task is matched or exceeded by various other means—e.g., reading aloud excerpts from great documents in American history—having no effects adverse to the clause.[100]

Although the proposed standard requires the Court to be less tolerant than in the past of laws having an effect adverse to the clause, I emphasize that it hardly requires the rejection of all laws having such an effect. It accommodates laws with an insubstantial adverse effect and laws that have a substantial adverse effect but that are necessary to serve a substantial state interest.

Examples of laws having an insubstantial adverse effect are the Sunday closing legislation upheld in *McGowan v. Maryland*[101] and the state funding of speech and hearing diagnostic services in parochial schools approved in *Meek v. Pittenger*[102] and *Wolman v. Walter*.[103] The Sunday closing legislation in *McGowan* has an effect of

---

100 According to Justice Brennan, "[W]hatever secular functions legislative prayer might play . . . could so plainly be performed in a purely nonreligious fashion that to claim a secular purpose for the prayer is an insult to the perfectly honorable individuals who instituted and continue the practice." Marsh v. Chambers, 463 U.S. 783, 797-98 (1983) (Brennan, J., dissenting).

101 366 U.S. 420 (1961).

102 421 U.S. 349, 371 n.21 (1975).

103 433 U.S. 229, 241-44 (1977).

sponsoring religion because non-Christians reasonably would perceive of it as expressing a preference on the part of the state that they belong to a Christian sect and attend church on Sundays. The effect is insubstantial, however, because the legislation is so riddled with exceptions for activities of a nonreligious nature[104] that the preference reasonably perceived by non-Christians is a very weak one. Similarly, the funding of speech and hearing diagnostic services has an effect of supporting religion with public funds because it makes parochial schools more attractive to parents contemplating sending their children there. The effect is insubstantial, however, because the services funded enhance the appeal of parochial schools only minimally.

Municipal fire protection for religious institutions, approved by the Court in *Nyquist* and elsewhere,[105] offers an obvious example of governmental action having a substantial adverse effect but necessary to serve a substantial state interest. Provision of this service has a substantial effect of supporting religion with public funds because, as discussed earlier,[106] it relieves religious institutions of a material operating expense. It is necessary, however, to serve the state's substantial interest in protecting persons and property from the destruction wrought by fire. In the abstract, it may seem that the government is obliged to adopt as a less drastic means a requirement that religious institutions, as a condition for remaining open to students or the general public, make appropriate provision for fire protection.[107] This requirement may be seen as nothing more than an insistence that the institutions bear a natural burden of operation. Under existing circumstances, however, the imposition of this requirement would be an unreasonable burden on religious institutions—a burden far in excess of any natural one that may exist. By essentially taking over the business of fire protection, local government has made it immeasurably more difficult and expensive for religious institutions to secure adequate protection of this sort on their own.

Another, less routine, example of governmental action having a substantial adverse effect but necessary to serve a substantial state interest is the financial aid found permissible in *Witters v. Washington*

---

104 Among the activities permitted in all or part of the state for all or part of the day are the sale of tobacco and alcoholic beverages, the operation of beaches and amusement parks, and stock car racing. *See* McGowan v. Maryland, 366 U.S. 420, 422-24, 448 (1961).

105 *See supra* note 74.

106 *See supra* text accompanying notes 74-75.

107 Compare the analysis of Board of Educ. v. Allen, 392 U.S. 236 (1968), *supra* at text accompanying notes 83-88.

Department of Services for the Blind.[108] The financial aid at issue in *Witters* was aid that an individual sought under the state's vocational rehabilitation assistance program for the blind. This aid, which a state agency denied to avoid a perceived establishment clause violation, was to be used to finance the recipient's training at a Christian college to become a pastor, missionary, or church youth director.

The availability of such aid would have a substantial effect of supporting religion with public funds because it would increase materially the likelihood that a person inclined to pursue such religious training would do so. The aid is permissible under the proposed standard, however, because it would bear a necessary relationship to a substantial state interest. The state has an interest of obvious importance in enabling blind persons to achieve, in the words of the statute creating the aid program, "the maximum degree of self-support and self-care."[109] Furthermore, due to a combination of factors, the aid in question would be necessary to serve this interest. First, although state funding of vocational training costs for blind persons may not serve this interest with complete precision, it probably serves it as precisely as possible in light of the inherent difficulties of serving an interest of this sort. Second, this funding is considerably more likely to achieve the desired result if aid recipients can apply it to training for the vocation that they prefer to pursue. Very simply, even with the assistance provided by the state, blind persons must overcome formidable obstacles to equip themselves properly for a vocation. It is essential that their task not be made any more difficult by requiring that, as a condition of receiving this assistance, they pursue a vocation other than the one to which they are most committed.

State funding of basic health care in parochial schools, acknowledged by the Court as valid,[110] offers an interesting example of governmental action that falls neither entirely within nor entirely without the category of laws having a substantial adverse effect but necessary to serve a substantial state interest. As previously discussed,[111] this funding of health care of the sort made available in the state's public schools has a substantial effect of supporting religion with public funds. It also plainly serves the state's substantial interest in ensuring a certain minimum level of health care for all children. Whether it serves this interest with the requisite necessary relationship, however, depends upon the type of health care that it purchases.

---

108 106 S. Ct. 748 (1986).

109 WASH. REV. CODE. § 74.16.181 (1981).

110 *See supra* note 71.

111 *See supra* text accompanying notes 71-72.

On the one hand, to the extent that the funding goes to provide for the type of nursing care that sensibly must be readily available on premises in an institution housing large numbers of children for much of the day, this necessary nexus does not exist. The state's interest is served equally well by requiring the schools to furnish such care, and this alternative is available to the state because the provision of this care is properly seen as a natural burden of operating the schools.

On the other hand, to the extent that the funding goes to provide health care not designed simply to respond to the events of the day at the school, the requisite necessary relationship appears to exist. First, it is dubious that all or even almost all children will actually receive the care unless it is brought to them at the school. Second, although a requirement that the parochial schools fund such care themselves would serve the state's interest equally well, this alternative is not open to the state. Such care is plainly not mandated by the nature of the parochial school endeavor. For the state to impose this requirement therefore would unreasonably burden the schools' operation.

III
EXCESSIVE ENTANGLEMENT

The third and final prong of the *Lemon* test provides that the law under review "must not foster 'an excessive government entanglement with religion.' "[112] The Court's understanding of this requirement is illustrated by the way in which the Court applied it in *Lemon* to a state law funding salary supplements for teachers of secular subjects in parochial schools. In invalidating the law under the *Lemon* test's third prong, the Court began with the assumption that the aid would be impermissible if used to fund religious education. The Court then reasoned that there was a very real danger that the aid allocated by this law would be misused because "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral."[113] In the Court's view, a "comprehensive, discriminating, and continuing state surveillance"[114] therefore would be essential to ensure that the teachers receiving salary supplements under this law teach their secular subjects in a religiously neutral way. According to the Court, however, these "prophylactic contacts" would involve "excessive and endur-

112 Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

113 *Id.* at 618.

114 *Id.* at 619.

ing entanglement between state and church,"[115] and the law therefore must fall.[116]

Unlike the first two prongs of the *Lemon* test, this prong should not be reformulated. It should be eliminated. First of all, this prong invites courts to decide the fate of a law based upon a set of circumstances that does not exist. There is simply no reason, however, for courts not to decide the validity of any law under the establishment clause entirely on the basis of what the state already has done. On the one hand, if the law under review has an impermissible effect as currently administered, it should be struck down. For a court to speculate whether measures could be adopted to avoid this effect and, if so, whether such measures would be permissible is simply to render an advisory opinion. On the other hand, if the law under review does not have an impermissible effect as currently administered, it should be upheld unless the means of implementation are impermissible and the law would have an impermissible effect if these means were struck down.

Second, this prong requires courts to decide the permissibility of means of implementing a law in terms of "excessive entanglement." By implication, it excludes any other measures of permissibility. A court should subject the means of implementing a law, however, to the requirements for permissibility applicable to the law itself.[117] The means of implementing a law, no less than the law that they implement, are action on the part of the state. Unless a court decides the permissibility of particular state action in terms of the purpose and effect requirements proposed in Parts I and II above, there is no assurance that the state action does not present one of the "three main evils" that the clause was designed to prevent.

Furthermore, if a court subjects the means of implementing a

---

115 *Id.*

116 In applying the entanglement prong, the Court at times has considered whether the law under review threatens to generate political division along religious lines. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 414 (1985); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 794-98 (1973); Lemon v. Kurtzman, 403 U.S. 602, 622-24 (1971). At least in the past few years, however, there appears to be general agreement on the Court that political divisiveness is not an independent basis for invalidating a law but at most a "warning signal" that establishment clause values may be in jeopardy. *See* Lynch v. Donnelly, 465 U.S. 668, 684 (1984); *id.* at 689 (O'Connor, J., concurring); *id.* at 703 & n.9 (Brennan, J., dissenting). I question both the practicality of any inquiry into potential for political divisiveness and the existence of authority in the establishment clause for making the inquiry. In light of the current status of the inquiry, however, I see no need to press my objections here. For commentary critical of the inquiry, see Choper, *supra* note 41, at 683-85; Johnson, *supra* note 6, at 829-31.

117 *Cf.* Aguilar v. Felton, 473 U.S. 402, 429-30 (1985) (O'Connor, J., dissenting) (advocating elimination of the entanglement prong but acknowledging that "[p]ervasive institutional involvement of church and state may remain relevant in deciding the *effect* of a statute which is alleged to violate the Establishment Clause") (emphasis in original).

law to the proposed purpose and effect requirements, it has no basis for subjecting them to an "excessive entanglement" test as well. The court would only be justified in doing so if entanglement were both an evil that the clause was designed to prevent and an evil independent of the "three main evils" taken into account by the proposed purpose and effect requirements. As the Court implicitly has conceded, however, entanglement simply does not fit this description. According to the Court in *Aguilar v. Felton*,[118] the third prong's prohibition on excessive entanglement is "rooted in two concerns":

> When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters.[119]

The first of the "two concerns" identified by the Court is the acknowledged evil of sponsoring religion; the second is the one of active state involvement in religious activity. By the Court's own admission, entanglement is therefore not an independent evil that the clause was designed to prevent. Rather, it has significance for establishment clause purposes only insofar as it implicates two of the "three main evils" that the clause was designed to prevent.

To the extent that an "excessive entanglement" test leads courts to strike down laws that they would invalidate under the proposed purpose and effect requirements, it is no worse than superfluous. I emphasize, however, that this test is not always so innocuous. It invites courts to invalidate state action that they would allow to stand under these two requirements closely tailored to the evils that prompted adoption of the clause. Insofar as this may not be obvious, the Court's rationale for its focus on entanglement is again instructive. This rationale tacitly recognizes that entanglement may exist in the absence of sponsorship or active state involvement in religious activity. According to the Court in *Aguilar*, sponsorship comes into play when "the state becomes enmeshed with a given denomination in matters of religious significance" and active state involvement in religious activity does so when there is "governmental intrusion into sacred matters." Entanglement, however—a rather vague concept that the Court essentially has equated with any contact between church and state[120]—frequently may take a form that does not involve the state in the slightest in "matters of reli-

---

118 473 U.S. 402 (1985).

119 *Id.* at 409-10.

120 Particularly instructive in this regard is the discussion in Walz v. Tax Comm'n,

gious significance" or "sacred matters."[121]

CONCLUSION

This Article calls upon the Supreme Court to make various changes in its approach to establishment clause problems. Most notably, it urges that the first prong of the *Lemon* test be revised to require that the decision to adopt a law not depend upon the consideration of nonsecular purposes, that the second prong be revised to require that a law not have a substantial effect adverse to the clause unless the law is necessary to serve a substantial governmental interest, and that the third prong focusing on entanglement be eliminated. The Court's recent decisions reaffirming its allegiance to the *Lemon* test[122] are to be applauded for their implicit rejection for the time being of a materially less demanding approach.[123] If the values underlying the establishment clause are to be given their due, however, reaffirmation of the *Lemon* test must be only a beginning. The *Lemon* test is in need of significant reform.

---

397 U.S. 664 (1970), that laid the foundation for the Court's recognition in *Lemon* of an entanglement prong:

> [There must not be] an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of [church property] or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.
>
> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and separation. . . .

Id. at 674-75 (footnote omitted). Note also the discussion of entanglement in Lemon v. Kurtzman, 403 U.S. 602, 614-22 (1971).

121 For criticism of the entanglement prong from other perspectives, see Choper, *supra* note 41, at 681-83 (adverse implications of avoiding entanglement for "legitimate secular pursuits or the more general value of preserving religious liberty"); Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195, 1216-24 (1980) (practical problems in implementation).

122 *See supra* text accompanying notes 17-19.

123 *See supra* text accompanying notes 7-16.