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JUDICIAL DOUBLETHINK AND THE ESTABLISHMENT CLAUSE: THE FALLACY OF ESTABLISHMENT BY INHIBITION

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The first amendment to the United States Constitution declares that Congress shall "make no law respecting an establishment of religion." Until the mid-twentieth century the Supreme Court was seldom asked to construe the establishment clause, and in no instance was a constitutional challenge sustained.¹ Beginning with the Court's 1947 decision in *Everson v. Board of Education*,² however, the clause began to take on new life. Although *Everson* upheld a New Jersey law authorizing government reimbursement of bus fares for children attending private schools, its "wall of separation" dicta suggested that the establishment clause might become a formidable barrier to government action in support of religion.³ This intimation proved well-founded when, a year later, the Supreme Court invalidated an Illinois program for released time religious education on public school premises as an unconstitutional establishment of religion.⁴

The subsequent development of establishment clause jurisprudence was by no means sure-footed, but with the 1971 parochial case of *Lemon v. Kurtzman*,⁵ the law became crystallized into the current "black letter" constitutional rule. To pass muster a challenged statute must satisfy each of three requirements.

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."⁶

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1. See *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930); *Arver v. United States*, 245 U.S. 366 (1917); *Quick Bear v. Leupp*, 210 U.S. 50 (1908); *Bradfield v. Roberts*, 175 U.S. 291 (1899).

2. 330 U.S. 1 (1947).

3. *Id.* at 15-16. For discussion of "wall of separation" see *infra* text accompanying notes 46-49.

4. *McCullum v. Board of Educ.*, 333 U.S. 203 (1948). *But see Zorach v. Clauson*, 343 U.S. 306 (1952), where the Court upheld a New York City program for released-time religious education *off* school premises.

5. 403 U.S. 602 (1971).

6. *Id.* at 612-613.

While the application of this rule has not been easy, or even consistent,⁷ since 1971 the three-part *Lemon* test has been the normal starting point for most establishment clause analyses. Its applicability to statutes treating some religions more favorably than others, as contrasted with laws benefitting religion generally, was challenged in *Larson v. Valente*, a 1982 decision to be discussed below.⁸ Nevertheless, the *Lemon* test remains the accepted rule, at least with respect to "laws affording a uniform benefit to all religions."⁹

Critics of the *Lemon* test have been plentiful,¹⁰ but few have addressed the problem which is the central focus of this paper. I will argue that much of the muddled analysis emanating from establishment clause cases is attributable to a false premise underlying the second and third prongs of *Lemon*, namely, that religion can be established by being inhibited.¹¹ Judging from recent trends in the lower courts, the confusion is likely to grow worse unless the Supreme Court chooses to rectify the error. In the following pages this argument will be developed under several headings: first, a brief comment on the meaning of religious establishment and the theoretical problems raised by *Lemon*; second, a look at the genesis and subsequent utilization of the "inhibits" test; third, an examination of "entanglement"

7. See comments of Justice White on the Court's lack of clarity as quoted *infra* in the text accompanying notes 103-104.

8. 102 S. Ct. 1673 (1982). See discussion *infra* in text accompanying notes 122-163.

9. 102 S. Ct. at 1687. See also *Larkin v. Grendel's Den, Inc.*, 103 S.Ct. 505 (1982), and *Lynch v. Donnelly*, 52 U.S.L.W. 4317 (1984), in which the *Lemon* test was applied by the Court during its most recent terms. See also *Marsh v. Chambers*, 103 S. Ct. 3330 (1983), where the Court ignored *Lemon* and relied on historical analysis in upholding Nebraska's right to hire a clergyman to offer prayer in sessions of the legislature. Justice Brennan, in dissent, found the practice in violation of all three prongs of the *Lemon* test. *Id.* at 3337 (Brennan, J., dissenting). Both the district court in *Chambers v. Marsh*, 504 F. Supp. 585 (D. Neb. 1980), and the Eighth Circuit in *Chambers v. Marsh*, 675 F.2d 228 (8th Cir. 1982), had held the Nebraska practice invalid under the *Lemon* test.

10. See, e.g., R. CORD, SEPARATION OF CHURCH AND STATE 198-200 (1982); Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205, 209-212 (1980); Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147; Ripple, *The Entanglement Test of the Religion Clauses—A Ten-Year Assessment*, 27 U.C.L.A. REV. 1195, 1216-1218 (1980).

11. Although this point has been little noted in the literature, one seminal exception is Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981). The Laycock piece centers primarily on the free exercise right of church autonomy, but it also carefully delineates the relationship between the two religion clauses.

as another form of establishment by inhibition; fourth, an analysis of *Larson v. Valente* and its implications for establishment clause jurisprudence; and finally, an assessment of *Lemon's* impact on the lower courts.

What is Religious Establishment?

The traditional concept of an established church, as well as its dictionary meaning, is that of a favored church.¹² As Cooley put it in his late nineteenth century treatise, "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others."¹³ Historically, the hallmarks of an establishment were state sponsorship, support of the established religion from public funds and, in its most egregious forms, legally compelled acceptance of particular creeds and modes of worship.¹⁴ Establishment was often accompanied by political intermeddling in the affairs of the state church,¹⁵ including doctrinal matters and key ecclesiastical appointments,¹⁶ and in other instances by intermeddling of the church in the

12. See, e.g., WEBSTER'S NEW COLLEGIATE DICTIONARY 391 (1975), where "establish" is in part defined as "to put into a favorable position" or "to make (a church) a national institution"; and THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 897 (1971): "From 16th c. often used with reference to ecclesiastical ceremonies or organization, and to the recognized national church or its religion... Hence in recent use: To place (a church or a religious body) in the position of a national or state church."

13. T. COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW 224-225 (1898). See also Fahy, *Religion, Education, and the Supreme Court* 14 LAW & CONTEMP. PROB. 73, 80 (1949).

14. For example, O. BARCK and H. LEFLER, COLONIAL AMERICA 387 (2d ed. 1968), discuss the enactment in several colonies of "blue laws" designed to promote orthodox observance of the "Lord's Day." O. ARNOLD, RELIGIOUS FREEDOM ON TRIAL 28 (1978) also observes,

In many of the early colonies Protestant church membership was required for the holding of public office; taxes were levied for church maintenance; and each colony had its sorry record of repression and out and out persecution of Jews, Quakers, and dissenters, varying only in intensity. Only Rhode Island began and maintained a consistent policy and record of religious freedom.

See also C. ANTIEAU, A. DOWNEY, AND F. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 3 (1964). For individual cases of strict enforcement of religious orthodoxy by a state-supported church in Europe, see W. DURANT, THE REFORMATION 567-77 (1957).

15. Note, e.g., the adoption by Parliament in 1534 of the Act of Supremacy, which created the Church of England "and gave the King all those powers over morals, organization, heresy, creed, and ecclesiastical reform which had heretofore belonged to the Church." W. DURANT, *supra* note 14, at 548-49. See also C. ANTIEAU, A. DOWNEY, AND F. ROBERTS, *supra* note 14, at 3-4.

16. In fifteenth-century England, for example, a large proportion of the House of Lords was composed of abbots and bishops. "To offset this, Henry VII—and later

affairs of the state.¹⁷ Although state churches undoubtedly were inhibited in some respects by the government connection, the essence of establishment was state support, not inhibition.¹⁸ The state-imposed burdens rested primarily on the disfavored religions, not the established church.

The framers of the first amendment religion clauses recognized that governments were capable of burdening the exercise of religious liberties as well as conferring favors upon an established religion. Indeed, the one might logically follow from the other; in historical experience it had frequently done so. Adherents of the established church were often in a position to deny religious liberties to the others.¹⁹ But no one supposed that the religious beliefs and practices of the persecuted dissenters were thereby being established. Rather, the unwilling victims of enforced religious conformity were being subjected to penalties, quite the converse of establishment. The first amendment's two-part religious proscription addressed both of these concerns: governmental benefits to a preferred religion and governmentally enforced burdens upon anyone's religious liberty. Thus Congress was enjoined to "make no law respecting an establishment of

Henry VIII—insisted on the right of the kings to nominate the bishops and abbots of England from the eligible clergy; and this dependence of the hierarchy on the monarchy eased the clerical surrender to Henry VIII's assertion of royal supremacy over the English Church." W. DURANT, *supra* note 14, at 115.

The same author discusses the adoption by the Scottish Reformation Parliament of the Confession of Faith, written by John Knox, as the officially sanctioned creed of the Presbyterian Church of Scotland (1560). Thus a compulsory religious dogma was, theoretically at least, imposed on a nation by legislative fiat. *Id.* at 618-19.

17.

No small part of the clergyman's influence lay in his close association with the state, principally in New England. His election day sermons were heard with deference and respect, and the civil government frequently referred civil matters to church congregations and synods for settlement. Moreover, in the Southern colonies, where the Anglican Church was established by law, its commissaries, as well as parish vestries, exerted considerable political and educational influence.

O. BARCK AND H. LEFLER, *supra* note 14, at 387.

18. Clearly the inhibition does not create the establishment. It is rather the price paid in the coin of free exercise for the state support and sponsorship which constitutes the establishment. For a brief catalog of restraints that a religion may suffer by reason of its establishment, see Laycock, *supra* note 11, at 1382-1384.

19. Thus, in Congressional debates on the proposed Bill of Rights, James Madison interpreted "establishment" to mean "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship in any manner contrary to their conscience," 1 ANNALS OF CONG. 730 (Gales & Seaton ed. 1834). Obviously, one effect of enforced observance of the established religion would be infringement upon the religious liberties of dissenters.

religion or prohibiting the free exercise thereof." No argument was heard that the guarantee of free exercise was redundant of the ban on religious establishment and therefore unnecessary. It was well understood that establishment referred to preferences, not burdens, and the whole range of religious freedoms could not logically be protected by reference only to establishment.²⁰ The establishment guarantee would undoubtedly offer protection against laws imposing religious conformity in aid of an established church, but it simply could not speak to government infringement of religious liberties based on reasons independent of preference for a state sponsored religion.

In one important respect the drafters of the establishment clause did intend to prevent Congress from inhibiting religion, although their purpose is irrelevant to any current controversy. I refer to the concern that the new national government might interfere with existing state establishments of religion.²¹ As originally reported by a committee of the U.S. House, the proposed constitutional amendment read, "[N]o Religion shall be established by law, nor shall the equal rights of conscience be infringed."²² On its face this wording could be construed to prohibit state as well as federal establishments, and it posed a threat to states with established churches.²³ Ultimately the wording was changed to place limits only upon *Congress*, and the prohibition on establishment was expanded to include any law "respecting" an establishment so that Congress might neither establish a religion nor interfere with existing state establishments.²⁴ The establishment clause was thus intended to prevent Congress from "inhibiting" established

20. See, e.g., comments of L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 839 (1978), who ignores the "inhibits" dictum of *Lemon* and states the law as it should be:

[I]f the essential effect of the government's action is to influence—either positively or negatively—the pursuit of a religious tradition or the expression of a religious belief, it should be struck down as violative of the free exercise clause if the effect is negative, and of the establishment clause if positive.

21. At least seven states gave legal preference to one religion over another at the time the first amendment was adopted. These included Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, and South Carolina. See Kruse, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 *WASHBURN L.J.* 65,94-107 (1962).

22. 1 *ANNALS OF CONG.* 729 (Gales & Seaton ed. 1834).

23. See, e.g., comments of Huntington of Connecticut and Tucker of South Carolina, *id.* at 730, 755.

24. See comments of W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1068 (1953); 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1879 (3d ed. Bos. 1858); Kruse, *supra* note 21, at 67-72; Hansen, *Comment, Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 *B.Y.U.L. REV.* 645, 651-653.

state religions. This has no practical significance today in view of the incorporation of the first amendment as an element of due process applicable to the states through the fourteenth amendment.²⁵

Recognition of the need for language addressed to individual rights of conscience as well as to religious establishments is also illustrated in proposals from several of the State Ratifying Conventions urging that the newly created Constitution be supplemented with a Bill of Rights including, among other things, guarantees against intermeddling by the national government in religious affairs.²⁶ The Maryland Convention proposed, "That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty."²⁷ A "Declaration or Bill of Rights" approved by the Virginia Ratifying Convention included a proposition asserting "that all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others."²⁸ Likewise, the New York Convention proclaimed:

that the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others.²⁹

In all these proposals, as in the Amendment itself, a law respecting

25. Incorporation of the religion clauses dates from *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Although *Cantwell* involved a free exercise issue, *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947), confirmed that the establishment clause had been absorbed by the fourteenth amendment as well.

26. The First Amendment at its inception was of course limited in application to the national government. The Fourteenth Amendment, as subsequently interpreted by the Court, has made the religion clauses a limitation on the states as well. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). See also *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

27. J. ELLIOTT, *DEBATES ON THE FEDERAL CONSTITUTION* II, 553 (1901).

28. *Id.* III, at 659.

29. *Id.* I, at 328. See also resolutions adopted by the North Carolina and Rhode Island Conventions, *id.* I, at 334, IV, at 244. A very helpful discussion of the genesis of the establishment clause is found in R. CORD, *supra* note 10, at 3-15 and *passim*. Cord presents a convincing and well-documented argument that, historically, the first amendment was not intended to preclude nondiscriminatory governmental aid to religion nor to provide "an absolute separation or independence of religion and the national state." *Id.* at 15. Rather, it was intended to safeguard individual freedom of conscience and preclude any national establishment or denominational preference.

establishment is conceived as preference or support, while the burdens or disabilities are associated with governmental actions inhibiting the free exercise of religious belief and worship.³⁰

Lemon and the Theory of Establishment

The second prong of the *Lemon* test (the statute's "principal or primary effect must be one that neither advances nor inhibits religion") stands in stark contrast to the traditional notion of establishment. By its implication that burdening a religion is just the same as supporting or preferring a religion, for purposes of the establishment clause, *Lemon* tore the concept loose from its moorings with history and all common understanding. Intellectually, if not contextually, the attempt to equate "inhibiting" with establishment is of one piece with the peculiar vision of reality reflected in Big Brother's insistence that "War is Peace," "Freedom is Slavery," and "Ignorance is Strength."³¹

Although, these Orwellian slogans are rough intellectual equivalents of *Lemon's* insistence that "inhibiting is establishing," the incongruity of Orwell is rather more obvious on its face that the fallacy of *Lemon*. That is partly because the terms "inhibit" and "establish" are less sharply defined opposites that "war" and "peace" or "freedom" and "slavery." It is less obvious also because restraints upon religious liberty are in some circumstances properly associated with the establishment of religion. I would argue, however, that laws inhibiting religion raise legitimate establishment questions only when the disabilities are imposed in aid of a state-preferred religion or mode

30. For subsequent commentary confirming that "establishment" was seen by the framers as inhering in preference, assistance, and support, see, e.g., 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §§ 1870-1874 (3d ed. Boston 1858); T. COOLEY, CONSTITUTIONAL LIMITATIONS 470-71 (1868); M. MALBIN, RELIGION AND POLITICS, THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 12-15 (1978). The proposition that "establishment" means support or preference would seem so obvious as not to require any extensive argument or citation. Since the United States Supreme Court, by repeated dictum, has insisted that inhibiting religion may be an alternate means of establishing it, however, the citations may be necessary to buttress the point that the framers never entertained such a concept. Some writers, of course, have simply accepted the Court's dictum as gospel, regardless of its incongruence with history or good sense. Pfeffer, for example, observes: "Advancing religion obviously constitutes establishment, but inhibiting religion means prohibiting its free exercise, and that too, the Court has held, constitutes a violation of the establishment clause." Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561, 566 (1980). See also Pfeffer, *Unionization of Parochial School Teachers*, 24 ST. LOUIS U.L.J. 273-89 (1980), which accepts at face value the notion that inhibiting religion is one form of establishment.

31. ORWELL'S NINETEEN EIGHTY-FOUR: TEXT, SOURCES, CRITICISM (E. Howe ed. 1982). The slogans appear throughout the book but are discussed in depth at 122-144.

of worship.³² If a state, for example, were to ban all forms of worship except that prescribed by a particular Christian sect, the resulting massive denial of religious liberties could surely be attacked as a violation of the free exercise clause. Because religious repression of this nature would reflect a policy of giving state preference to a single religion, it would also be a violation of the prohibition on laws "respecting an establishment of religion." Here at least in theory, is an area in which the coverage of the two religion clauses plainly overlaps, since the same facts (religious persecution) give rise to claims under both clauses. But the two claims relate to analytically different effects of the persecution: free exercise is violated by the burdens placed upon the repressed victims; establishment is violated by the support this gives to the state church. As a practical matter, this hypothetical example presupposes a type of fact situation whose probability of arising anywhere in the United States is approximately zero. Yet this is the case envisioned by the *Everson* allusions to the coercive aspects of establishment: repression in aid of a preferred religion.

The case that does occur with some frequency is the governmental regulation which has the effect of burdening one or a number of religions selectively and is challenged as an "establishment" of the exempted religions. Such a challenge, for example, was raised by Bob Jones University when the Internal Revenue Service revoked the school's tax exempt status because of its policies against student interracial dating and marriage.³³ Similar attacks were made against statutes regulating charitable contributions in Minnesota and North Carolina which provided a religious exemption for churches receiving more than half their total contributions from members.³⁴ In each case the exclusion of particular religious organizations from a broad

32. Laycock discusses three possible ways in which inhibitions of religion may result from religious establishments: 1) repression of some religions in aid of a preferred religion or religions; 2) loss of church autonomy as a result of strings attached to governmental aid programs; and 3) secularization of the aided religion through watering down government-sponsored rituals (e.g., school prayer) or draining the meaning from church symbols (e.g., Sunday closing laws). Laycock, *supra* note 11, at 1382-84. He nevertheless makes a persuasive case that burdens arising from discrimination or loss of autonomy are best approached as free exercise questions. Secularization of religious symbols, on the other hand, may be susceptible only to an establishment challenge based on the government effort to support religion, since complainants "would be hard pressed to make out a claim that the government has secularized the symbol for them against their will." *Id.* at 1384.

33. *Bob Jones Univ. v. United States*, 103 S. Ct. 2017 (1983). A companion case, *Goldsboro Christian Schools, Inc. v. United States*, was decided in the same opinion.

34. *Larson v. Valente*, 102 S. Ct. 1673 (1982); *Heritage Village Church v. North Carolina*, 299 N.C. 399, 263 S.E.2d 726 (1980).

religious exemption was alleged to be an establishment of the religious organizations to which an exemption had been granted. Here the establishment clause analysis is at least colorably consistent with the theory that establishment involves aid and support rather than burdens, because the analytical focus is on the preferential status of the exempted religions.

The reasoning underlying this application of the establishment clause has some force when used, for example, to attack a Sunday closing law as an unconstitutional aid to religions having Sunday as their holy day. The aid constitutes the alleged establishment, and the requested remedy is to terminate the aid by invalidating the law.³⁵ But the logic of the analysis breaks down completely when applied to the revocation of Bob Jones University's tax exemption or to the state statutes regulating charitable contributions. In those cases the offended religious organizations did not contend that conferral of a general religious exemption was unlawful establishment of religion, nor did they ask that the religious exemption cease. Instead, the complaining organizations wanted the benefit extended to them. This would eliminate the objectionable preference, but it certainly would not eliminate the aid to religion. A complaint that seeks to remove burdens upon particular religions, rather than terminating government aid to religion, may sound in free exercise or equal protection but not in establishment.

The reference to free exercise points to another theoretical flaw in the notion that the establishment clause may be violated by government acts that inhibit religion as well as those that advance it. Burdening religions is the essence of a free exercise violation. If the establishment clause is also violated when religion is inhibited, the selfsame act that burdens free exercise also raises an establishment issue. Almost by definition, every free exercise case becomes a potential establishment case. In the absence of any clear distinction between free exercise burdens and establishment burdens, that is an open invitation to analytical redundancy. *Lemon's* effect in thus obscuring the boundary between establishment and free exercise is discussed further below.³⁶

35. That the Court has upheld Sunday closing laws takes nothing away from the logic. The Court simply denied the factual premise, i.e., that Sunday closing laws were intended to aid religion. See *McGowan v. Maryland*, 366 U.S. 420 (1961).

36. *Infra* at text accompanying notes 50-57. See also *infra* at text accompanying notes 58-111 for discussion of the *Lemon* "entanglement" test as another version of establishment by inhibition.

Genesis of the "Inhibits" Test: The Everson Legacy

An inquiry into the genesis of the inhibition test may help explain how the United States Supreme Court maneuvered itself into this curious position. Certainly the second *Lemon* prong was not cut out of whole cloth by Chief Justice Burger for the purpose of striking down various aids to parochial schools legislated by Pennsylvania and Rhode Island. Its antecedents are traceable to *Everson v. Board of Education*,³⁷ where Justice Black gave this expansive and much quoted interpretation of the establishment clause:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.* No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or *vice versa*. In the words of Jefferson, the clause against establishment of religions by law was intended to erect "a wall of separation between church and state." *Reynolds v. United States*, *supra* at 164.³⁸

Most of the proscriptions in the quoted paragraph are traditional establishment concerns—aid, preference, financial support, government participation in the affairs of religious organizations.³⁹ The italicized sentences, however, can be taken as authority that government action which inhibits religion—or at least some kinds of inhibitions—may also run afoul of the establishment clause. Certainly, forcing a person

37. 330 U.S. 1 (1947).

38. *Id.* at 15-16 (emphasis added).

39. Justice Black's statement that the clauses prohibited aid to all religions as well as discrimination among religions has become the settled law of the Court, but it was not then and is not now universally accepted as a correct interpretation of the First Amendment. For extensive documentation of a contrary view see R. CORD, *supra* note 10.

“to remain away from church” or to “profess a belief or disbelief in any religion,” and punishing him for “professing religious beliefs” or for church attendance would have the effect of inhibiting religion. But, as Laycock notes, such language does “not support a general rule that any inhibition of religion is an establishment.”⁴⁰ And, given the context of these two sentences, sandwiched between definitions of establishment as preference and support, the recited practices are best interpreted as infringements on individual religious liberty that might flow from vigorous state support of a favored religion.

This interpretation is strengthened by Justice Black’s earlier discussion, in the same opinion, of the historical circumstances which gave rise to the framers’ concern about religious establishments. He dwells in some detail on the familiar story of religious persecutions which impelled many Europeans to seek haven in the New World and which, unfortunately, continued to be visited upon dissenters in many of the colonies. These included, in his words, punishments for “speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.”⁴¹ The entire discussion leaves no doubt that establishment involves state support for a favored church, and persecution of non-believers was simply one aspect or consequence of that support.⁴²

Justice Black himself made this very point some fifteen years later when speaking for the Court in *Engel v. Vitale*,⁴³ the school prayer case. The establishment clause, he asserted, rested in part

upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. The Founders knew that only a few years after the Book of Common Prayer became the only accepted form of religious services in the established Church of England, an Act of Uniformity was passed to compel all Englishmen to attend those services and to make it a criminal offense to conduct or attend religious gatherings of any other kind. . .⁴⁴

Although some fifteen years separate the two opinions, Justice Black had in mind such practices as the Act of Uniformity when he wrote in *Everson* that the establishment clause precluded government from

40. Laycock, *supra* note 11, at 1381.

41. 330 U.S. at 9.

42. *Id.* at 8-11.

43. 370 U.S. 421 (1962).

44. *Id.* at 432.

coercing belief or disbelief and church attendance or non-attendance. He obviously regarded such laws as a serious restraint upon religious liberty, but he also recognized that they would fall under the establishment clause proscription if perpetrated in aid of an established church. Viewed in this context, Justice Black's definition of the scope of the establishment clause, as set forth in *Everson*, is quite consistent with traditional and accepted definitions of establishment and in no way supports the proposition that any law which inhibits religion is necessarily a violation of the establishment clause.⁴⁵

Everson, interpreted in light of *Engel*, did not mandate such expansive applications of the establishment clause, but its ambiguity provided an opening large enough to accommodate the camel's nose. Subsequent courts, perhaps bemused by the "wall of separation" imagery, have pushed the entire camel into the establishment tent. *Everson* undoubtedly contributed to this development by its erroneous characterization of the establishment clause as the sole foundation of the "wall." Justice Black's "wall of separation" metaphor was drawn from Jefferson's well-known letter dated January 1, 1802, to the Danbury Baptist Association and was correctly quoted as far as it went.⁴⁶ Unfortunately the words quoted were sufficiently out of context to misconstrue the meaning in a way having significant implications for the scope of the establishment clause.

The *Everson* statement, including the attribution to Jefferson, ran as follows: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"⁴⁷ What Jefferson actually said was this:

45. Despite this strong affirmation of the separation doctrine, the Court held that the New Jersey law in question did not violate the establishment clause by reimbursing parents for the cost of bus fares of parochial school pupils. In dissent, Justice Rutledge argued that the New Jersey law could not survive the strictures of the establishment clause, but he defined it expressly in terms of government *aid* or *support* (which was of course the issue at hand):

The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid and support for religion.

330 U.S. at 31-32 (Rutledge, J., dissenting).

46. The full text of the letter is found in S. PADOVER, *THE COMPLETE JEFFERSON* 518-19 (1943) [hereinafter cited as S. PADOVER].

47. 330 U.S. at 16.

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplated with sovereign reverence that act of the whole American People which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State.⁴⁸

According to *Everson* the wall of Jeffersonian metaphor was founded upon the establishment clause. According to Jefferson, it was built upon *both* clauses.

If one takes the separation metaphor seriously, as the Court seems to do, the discrepancy in the premise can have important logical consequences. The wall, speaking in terms of the governmental action against which the Amendment was directed, could be breached in two ways: by government support of religion or by governmentally inflicted burdens upon religion. The religion clauses, taken together, provide against both eventualities. The establishment clause outlaws religious preferences and the free exercise clause proscribes governmental burdens upon religious worship and belief. If, however, the wall rests solely upon the establishment clause, that clause must necessarily be a barrier both to benefits and burdens, or leave the job only half done. Delineating with precision the morphology of a metaphorical wall would ordinarily not be thought a matter of great constitutional moment. In this case the distinction between a one-clause wall and a two-clause wall is important because the Court has appeared to premise its analysis upon the idea that the establishment clause must perform both functions.⁴⁹

Schempp: Establishment Swallows Free Exercise

The crucial leap from *Everson's* ambiguity to the clear-cut illogic of establishment by inhibition was made in *Abington School District*

48. S. PADOVER, *supra* note 46, at 518-19.

49. Laycock regards *Everson's* misconstruction of Jefferson as the origin of the misconception that laws may establish by inhibiting: "The 'inhibits' part of the establishment clause test began by misquotation and exists by repetition. It is time to examine the question afresh." Laycock, *supra* note 11, at 1381. Justice Reed undoubtedly perceived the growing effect of the "Wall of Separation" metaphor when he observed a year after *Everson*, in *McCollum v. Board of Educ.*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting): "A rule of law should not be drawn from a figure of speech."

v. Schempp,⁵⁰ the Pennsylvania school Bible reading case. The appropriate passages of Justice Clark's opinion, joined by seven other members of the Court,⁵¹ must be quoted at length to reveal the conceptual difficulties created by his new formulation:

The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concept of dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years⁵² and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. *The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Everson v. Board of Education, supra; McGowan v. Maryland, supra, at 442.* The Free Exercise Clause, likewise, considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise

50. 374 U.S. 203 (1963).

51. Only Justice Stewart dissented. Justices Douglas, Goldberg, and Brennan joined the opinion but submitted separate statements as well.

52. The eight cases to which he referred were *Engle v. Vitale*, 370 U.S. 421 (1962); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Zorach v. Clauson*, 343 U.S. 306 (1952); *McCullum v. Board of Educ.*, 333 U.S. 203 (1948); *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); and *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.⁵³

Although the italicized sentences unequivocally assert that the establishment clause is violated by either the advancement or inhibition of religion, the quoted passage taken as a whole is not totally free from ambiguity. It begins with a reasonably accurate statement of what the two religion clauses were traditionally thought to prohibit. The establishment clause is described as prohibiting “official support” of “the tenets of one or of all orthodoxies,” while the free exercise clause protects religious liberties from “state compulsion.”⁵⁴ Yet the distinction between establishment as support, and denial of free exercise as compulsion, is virtually obliterated in Justice Clark’s formulation of his establishment clause “test.” This is because support (to advance religion) and compulsion (to inhibit it) are both embraced within the concept of establishment, and either, apparently, is sufficient to trigger the strictures of the clause.⁵⁵

So what remains of the distinction between the two clauses? According to Justice Clark, invocation of the free exercise clause requires a coercive effect, while an establishment clause violation “need not be so attended.”⁵⁶ Standing by itself, this statement is accurate enough. It is consistent with the idea that the free exercise clause speaks to burdens, restrictions, or compulsion upon religious belief and conduct. It is not inconsistent with the concept of establishment as support.

But coercion is not a criterion that distinguishes very well the

53. 374 U.S. at 222-23 (emphasis added).

54. The reference to “overlap” of the two clauses is also unexceptionable, since the establishment of a state church had always been recognized as a threat to the religious freedom of non-established religious groups.

55. Note that *Everson* (without page citation) and *McGowan*, at 442, are given as authority for this test. The relevant portion of *Everson* is quoted *supra*, text accompanying note 38, and *McGowan* simply quotes the same passage from *Everson*. This is not strong authority for the *Clark* test.

56. See Laycock, *supra* note 11, at 1385, for a cogent examination of “coercion” as a basis for distinguishing the two clauses.

boundaries between the two clauses, at least not in those instances where an establishment clause violation is attended by coercion. A sensible view of establishment might minimize this problem by identifying the establishment clause with coercion only where the coercion is an incident of a law intended to advance one religion over another—the Act of Uniformity being the extreme case. Unfortunately, Justice Clark has ruled out this saving interpretation by his test. If either the effect or the purpose of the law is “the advancement or inhibition of religion,” the case falls within the establishment clause. Coercion thus provides no useful distinction at all. Governmental action that coerces religious conduct or belief is, by definition, a violation of free exercise; but since coercion must necessarily have some inhibiting effect, it invokes the establishment clause as well.

Unavoidably, therefore, under the definitional analysis of *Schempp*, every free exercise case must also be an establishment clause case (unless “coerce” has a broader meaning than “inhibit” in this context, and no Court opinion has ever suggested that). Such a conclusion is, of course, semantic and constitutional nonsense, but it follows ineluctably from the test enunciated by Justice Clark and since repeatedly endorsed by the courts. No court has yet stated that the establishment clause has totally absorbed the free exercise clause, and the Supreme Court has never yet applied the “inhibits” test to invalidate a governmental act. But given the premises, the conclusion is inescapable that establishment logically embraces the whole range of free exercise questions.⁵⁷

Entanglement: Another Form of Establishment by Inhibition

With *Schempp* the first two prongs of the establishment test were formulated in essentially their present form. *Walz v. Tax Commission*⁵⁸ provided the basis for the third prong of the *Lemon* test. *Walz* upheld, against an establishment clause challenge, the validity of state property tax exemptions granted to religious organizations on properties used solely for religious worship. The opinion of the Court, written

57. The syllogism runs as follows: Major premise: Any law that inhibits religion violates the establishment clause. Minor premise: Any free exercise violation inhibits religion. Conclusion: Any law that violates the free exercise clause also violates the establishment clause. If the Court isn't saying this, what is it saying?

58. 397 U.S. 664 (1970). One intervening establishment clause case, *Board of Educ. v. Allen*, 392 U.S. 236 (1968), upheld a New York state law providing textbooks on loan to parochial school students. *Allen* was another exercise in line-drawing but offered no new doctrinal developments. It merely quoted the advance/inhibit test of *Schempp*. *Id.* at 243.

by Chief Justice Burger, concluded that the legislative purpose of the tax exemption was neither to advance nor inhibit religion.⁵⁹ But the Court went beyond this test by inquiring whether the exemption constituted "excessive government entanglement with religion."⁶⁰ Entanglement was represented as an additional test directed toward the "end result" or "effect" of the law,⁶¹ rather than its purpose, and in this respect was a departure from *Schempp*, which held that the advance/inhibit test was applicable to both purpose and effect.⁶² In his analysis of entanglement the Chief Justice talked of "confrontations and conflicts" that would follow from "official and continuing surveillance" and "enforcement of statutory or administrative standards."⁶³ These indices or incidents of entanglement looked more like burdens than benefits, thus making the new test appear as a specialized form of the *Schempp* test for effects that inhibit. The Court decided that granting tax exemptions to churches would bring lesser government involvement than taxing them and hence was sustainable under the entanglement test.

In *Lemon v. Kurtzman*,⁶⁴ Chief Justice Burger combined the purpose and effect tests of *Schempp* with the entanglement test of *Walz* to provide the current three-part test for establishment clause violations, at least for laws conferring benefits upon religions in general. At issue in *Lemon* was the constitutionality of statutes in Rhode Island and Pennsylvania providing state financial aid to supplement teachers'

59. The discussion suggested that Chief Justice Burger may have had both the establishment and the free exercise clauses in mind when he referred to "advancement" and "inhibition." At least, he identified "establishment" with sponsorship and free exercise with "interference." He wrote, "For the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* at 668. And further:

The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Id. at 669. See also *id.* at 673 where "noninterference" is expressly identified with the free exercise clause.

60. *Id.* at 674.

61. *Id.*

62. *Lemon* resolved this difficulty by making "entanglement" an *additional* test of effects. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

63. 397 U.S. at 674, 675.

64. 403 U.S. 602 (1971). The companion cases to *Lemon* were *Robinson v. DiCenso* and *Earley v. DiCenso*, which involved similar facts arising in Rhode Island.

salaries in church-related schools. The Court conceded that the laws in both states had a secular legislative purpose, i.e., enhancing the quality of secular education,⁶⁵ but the second test—whether the primary effect of the law was to advance or inhibit religion—was never reached. Instead the Court focussed on the third prong and concluded that the statutes constituted impermissible entanglement of church and state.⁶⁶ In an effort to forestall a successful establishment clause challenge, both states had restricted the use of state monies to the teaching of secular subject matter only. The Court seized on these restrictions, with their potential for government surveillance and interference in the religious education process, as a reason for invalidating the aid programs.⁶⁷

Once again, the state acts that constituted, or at least threatened, unconstitutional entanglement had the appearance of burdens rather than benefits. The entanglement was in no way characterized as sponsorship or endorsement. Rather, the Court talked of “comprehensive, discriminating, and continuing state surveillance,”⁶⁸ “a relationship pregnant with dangers of excessive government direction of church schools,”⁶⁹ and the “danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.”⁷⁰ While the entanglement rationale purported to address an aspect of establishment not covered by the purpose and effect tests, it was in reality but another way of addressing effects which inhibit religion. Granted, the entanglement holding of *Lemon* reaches a somewhat narrower spectrum of effects than the broad dictum of *Lemon's* second prong, but at bottom it is equally devoid of common sense and in conflict with traditional notions of religious establishment. It still rests on the untenable premise that the state may establish religion by placing burdens upon it.⁷¹

65. *Id.* at 613.

66. *Id.* at 613-14.

67. *Id.* at 619-22.

68. *Id.* at 619.

69. *Id.* at 620.

70. *Id.*

71. In the same case Justice Douglas concurred in the judgment but did not fall into the same error:

Intermeddling, to use Madison's word, or 'entanglement,' to use what was said in *Walz*, has two aspects. The intrusion of government into religious schools through grants, supervision, or surveillance may result in establishment of religion in the constitutional sense when what the State does enthrones a particular sect for overt or subtle propagation of its faith. Those activities of the State may also intrude on the Free Exercise Clause

In the *Lemon* opinion the Chief Justice laid primary emphasis upon the kind of entanglement that might arise from administrative interference by governmental agencies in the affairs of "church schools and hence of churches."⁷² As we have repeatedly emphasized, this is governmental action which burdens religion rather than supports it, even though the entanglement may be a consequence of state efforts to grant aid to parochial schools without thereby "advancing religion." In elaborating his entanglement rationale, however, Chief Justice Burger also detected a kind of entanglement that neither inhibits nor advances religion but yet is proscribed by the establishment clause, that is, "the divisive political potential of these state programs."⁷³ The school aid programs of Pennsylvania and Rhode Island were an unconstitutional establishment of religion, at least in part, simply because they created the prospect of serious "political division along religious lines."⁷⁴

The concept of "political entanglement," as distinguished from "administrative entanglement,"⁷⁵ has never yet served as the sole basis for invalidating a state or federal regulation. It has figured as a subsidiary rationale in several cases,⁷⁶ however, and Justices Brennan and Marshall have urged that political divisiveness be considered independently as a "fourth factor" in the establishment clause test.⁷⁷ The political divisiveness element of entanglement is, to say the least, an anomaly. It has nothing to do with either the advancement or inhibition of religion but speaks rather to impacts upon the body politic. While one might plausibly argue that framers of the religion clauses hoped thereby to mute the role of religious conflict in the political arena, it surely does not follow that they intended to make the intensity of political conflict on religious questions a test of constitutionality. In light of the accompanying first amendment guarantees of free speech, such a conclusion seems untenable. This aspect of the "entanglement" test does not bear directly on the twisted logic by which

by depriving a teacher, under threats of reprisals, of the right to give sectarian construction or interpretation of, say, history and literature, or to use the teaching of such subjects to inculcate a religious creed or dogma.

Id. at 634 (Douglas, J., concurring). Justice Douglas obviously recognized that entanglement which inhibits creates a free exercise, not an establishment, problem.

72. *Id.* at 620.

73. *Id.* at 622.

74. *Id.*

75. Tribe uses these terms. L. TRIBE, *supra* note 20, at 866.

76. *See, e.g.,* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 797-98 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 627-28 (1971) (Douglas, J., concurring).

77. *Meek v. Pittenger*, 421 U.S. 349, 374-75 (1975) (Brennan, J., concurring).

inhibition has been converted into establishment, but it does further illustrate how far afield the Court has gone in search of a rationale for its establishment clause opinions.⁷⁸

The addition of the entanglement test to establishment clause analysis has created something approaching a catch-22 dilemma for proponents of state aid to church-related schools. Aid without restrictions on the use of state-supplied resources runs a serious risk of impermissibly advancing religion; but government controls intended to avert that risk may bring impermissible entanglements.⁷⁹

As applied to church-affiliated colleges the formula has been given an interpretation loose enough to accommodate a substantial amount of government aid. A companion case to *Lemon*, *Tilton v. Richardson*,⁸⁰ sustained the Higher Education Facilities Act of 1963⁸¹ which provided federal construction grants to colleges and universities. Grants were conditioned upon using the buildings so constructed "for secular purposes only"⁸² for a period of twenty years. While upholding the grant program, the Court invalidated the time limit because use of the buildings for religious purposes after twenty years would have the effect of advancing religion.⁸³

In *Hunt v. McNair*⁸⁴ the Court repelled a taxpayer challenge to a South Carolina statute permitting a Baptist college to obtain low-interest construction loans through state-issued revenue bonds, subject again to the proviso that no facilities so financed could be used for religious purposes. *Roemer v. Maryland Public Works Board*⁸⁵

78. Perhaps in recognition of difficulties inhering in the doctrine, a five-member majority of the Court, in *Mueller v. Allen*, 103 S. Ct. 3062, 3071 n.11 (1983), offered as dictum the observation that "the rather elusive inquiry" into political divisiveness should be "confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools." For a thorough critique of the "political divisiveness" doctrine, see Gaffney, *supra* note 10. For other critical views of the doctrine see J. NOWAK, R. ROTUNDA, and J. YOUNG, CONSTITUTIONAL LAW 867-68 (1978) [hereinafter cited as J. NOWAK, R. ROTUNDA, and J. YOUNG]; and Nowak, *The Supreme Court, the Religion Clauses and the Nationalization of Education*, 70 NW. U.L. REV. 883, 905-908 (1976). *But see* TRIBE, *supra* note 20, at 865-869.

79. This paradox was not lost on the court: "As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state." *Lemon v. Kurtzman*, 403 U.S. at 620-21.

80. 403 U.S. 672 (1971).

81. 20 U.S.C. § 701 *et. seq.* (1970). See also Pub. L. No. 88-204, 77 Stat. 363 (1963).

82. 20 U.S.C. § 1132e-1(B) (1977).

83. 403 U.S. at 682-84.

84. 413 U.S. 734 (1973).

85. 426 U.S. 736 (1976).

upheld a similarly restricted program of non-categorical grant-in-aid to institutions of higher education. In each case the government aid was accompanied by some form of audit or reporting on the use of the funds, and in each case dissenters argued that the potential for entanglement was excessive in view of the need to ensure that the aid was not in some way applied to religious purposes.⁸⁶ Although a majority found neither the aid nor the entanglement to be unconstitutional, all of the opinions that considered entanglement to be an issue treated it as a burden upon religion.⁸⁷

Although the Court has found room in the establishment clause for public aid to higher education, three 1973 cases demonstrated that aid to elementary and secondary parochial schools would have much tougher going. Since *Lemon* had stressed the evils of entanglement, the State legislatures of New York and Pennsylvania proceeded to enact programs of aid with minimal strings attached. This approach avoided the entanglement problem but, unfortunately, had the effect of impermissibly advancing religion through inadequately restricted aid. Thus *Levitt v. Committee for Public Education*⁸⁸ invalidated New York's attempt to reimburse private schools for costs of testing and record-keeping mandated by the state because in the Court's view, "no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction."⁸⁹ *Committee for Public Education v. Nyquist*⁹⁰ struck down other New York statutes providing partial tuition reimbursement, parental tax deductions, and direct grants for "maintenance and repair" to private schools serving a large proportion of low income families. Each form of aid was held to be insufficiently restricted to avoid the primary effect of advancing religion.⁹¹

86. 426 U.S. 770 (Brennan, J., dissenting); 773 (Stewart, J., dissenting); 775 (Stevens, J., dissenting).

87. The burden was of course intertwined with the subsidy. This was noted by Justice Stevens in his brief dissent in *Roemer*: "...I would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it. The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith." 426 U.S. at 775 (Stevens, J., dissenting).

88. 413 U.S. 472 (1973).

89. *Id.* at 460.

90. 413 U.S. 756 (1973).

91. Because the aid violated the second prong of the *Lemon* test the Court saw no need to consider the issue of excessive entanglement. Justice Stewart, for the Court, nevertheless felt compelled to comment at length on the "grave potential for entanglement in the broader sense of continuing political strife over aid to religion." *Id.* at 794.

The third decision, *Sloan v. Lemon*,⁹² was particularly excruciating in light of the earlier holding of *Lemon v. Kurtzman*⁹³ that Pennsylvania's parochial system involved excessive entanglement of church and state. In order to avoid this problem the Pennsylvania legislature subsequently enacted a plan for partial reimbursement of tuition paid to non-public schools, specifically precluding state direction of any aspect of the schools' educational programs.⁹⁴ In *Sloan* the new Pennsylvania statute failed the effects test because there was no means of ensuring against the use of public funds to advance religion.⁹⁵

Subsequent school aid cases have added little to the underlying doctrine but much to the complexity, not to say inconsistency, of the line-drawing process that sorts out the permissible from the impermissible in public aid to parochial schools. *Meek v. Pittenger*⁹⁶ upheld the loan of school textbooks in another attempt by Pennsylvania to find some way of aiding parochial schools, but found unconstitutional other provisions of the law which would have funded auxiliary services (counseling, testing, remedial speech and hearing therapy), instructional materials (magazines, photographs, maps, charts, recordings, films), and instructional equipment (projectors, records, lab equipment). The forbidden aid had the primary effect of advancing religion.⁹⁷ *Wolman v. Walter*⁹⁸ approved Ohio aid to church-related schools in the form of textbooks, standardized tests drafted and scored by public employees, speech and hearing diagnostic services delivered in the

92. 413 U.S. 825 (1973).

93. 403 U.S. 602 (1971).

94. 1971 Pa. Laws, Act 92; 24 PA. STAT. ANN., §§ 5701-5709 (Supp. 1973-74). The enactment is printed in an appendix to the District Court's opinion in this case. See *Lemon v. Sloan*, 340 F. Supp. 1356-1368 (E.D. Pa. 1972).

95. The Court expressly recognized the problem but contended that it was created by the Constitution, not the Court:

[W]e are not unaware that appellants and those who have endeavored to formulate systems of state aid to nonpublic education may feel that the decisions of this Court have, indeed, presented them with the 'insoluble paradox' to which Mr. Justice White referred in his separate opinion in *Lemon v. Kurtzman*, 403 U.S. at 668. But if novel forms of aid have not readily been sustained by this Court, the "fault" lies not with the doctrines which are said to create a paradox but rather with the Establishment Clause itself . . .

413 U.S. at 835.

96. 421 U.S. at 349 (1975).

97. The textbook loan program undoubtedly had a similar effect, but the Court was not ready to overrule *Board of Educ. v. Allen*, 392 U.S. 236 (1968), which had validated a New York law providing for the loan of textbooks to students in parochial as well as public schools.

98. 433 U.S. 229 (1977).

private schools, and therapeutic, guidance, and remedial services rendered off the premises of the private schools. Provisions in the same Ohio law for funding instructional materials and equipment and field trips were invalidated because limiting their use to secular purposes would require close state supervision creating the danger of excessive entanglement.⁹⁹ *Committee for Public Education v. Regan*,¹⁰⁰ found another New York law consistent with the Constitution: cash reimbursements to parochial schools for administering and grading standardized tests (but not reimbursement for teacher-prepared tests) were held not to have the primary purpose of advancing religion, and accompanying audit procedures were found not to involve excessive entanglement.

Still more recently, a closely-divided Court in *Mueller v. Allen*¹⁰¹ upheld a Minnesota tax deduction for tuition, textbook and transportation expenses incurred by taxpayers in sending their children to elementary and secondary schools. The Court found it distinguishable from the New York parental tax deduction struck down in *Nyquist* because the Minnesota deduction appeared to be more genuinely related to a system of tax laws and was available for public as well as private school expenses. Four members of the Court dissented, thus emphasizing the continuing absence of any clear and persuasive rationale for establishment clause line drawing.¹⁰²

Indeed the previous 5-4 *Regan* decision had evoked from Justice White a frank admission that the establishment clause cases had sacrificed "clarity and predictability for flexibility."¹⁰³ He attributed this to divisions within the Court and the country: ". . . Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country."¹⁰⁴ What he might have said, also, was that the prospects for a more consistent application of the religion clauses would be vastly improved if the Court were to abandon the self-contradictory notion that religion can be established by inhibiting it.

As applied in the school aid cases, at least, the *Lemon* test forces

99. The five separate opinions in the case indicated substantial disagreement both in the result and the rationale. No opinion was joined by a majority of the Court.

100. 444 U.S. 646 (1980).

101. 103 S. Ct. 3062 (1983).

102. Justice Marshall was joined in dissent by Brennan, Blackmun, and Stevens. *Id.* at 3071 (Marshall, J., dissenting).

103. *Regan*, 444 U.S. at 662.

104. *Id.*

the Court to walk an uncertain line between aid that advances and controls that entangle. Such an excruciating choice is not imposed by any sensible interpretation of the establishment clause. The "entanglement" in these cases consists of reporting and surveillance designed to restrict public funds to secular educational uses. Reporting and surveillance requirements do not advance religion; their avowed purpose and primary effect are quite the opposite—to prevent government resources from being used for religious purposes. Viewed in this light, establishment by entanglement is no more than a specialized form of establishment by inhibition, which is a self-contradiction.

Entanglement might of course raise a genuine establishment issue if, as Justice Douglas pointed out in his *Lemon* concurrence, "what the State does enthrones a particular sect for overt or subtle propagation of its faith."¹⁰⁵ But here again the focus is on advancement, not inhibition. The legitimate establishment question, and the one the Court should address, is this: Does the law taken as a whole, aid combined with governmental regulation and restriction, have the primary effect of advancing religion? Such an approach would dramatically reduce the need to sacrifice "clarity and predictability for flexibility" because it would allow the Court to focus squarely on the real establishment issue: laws that advance religion.

The entanglement test has received its full share of criticism.¹⁰⁶ It has been deprecated as redundant of the first two *Lemon* tests,¹⁰⁷ lacking fixed content or readily ascertainable standards for its application,¹⁰⁸ and, in its "political divisiveness" aspect, very bad public policy.¹⁰⁹ All of these criticisms have merit, but they miss the central weakness of the entanglement doctrine, which is the untenable assumption that an establishment issue can be raised by governmental regulations that burden churches and church schools. Devoting public funds to support of parochial schools raises an obvious establishment ques-

105. *Lemon*, 403 U.S. at 634 (Douglas, J., concurring).

106. See, e.g., J. NOWAK, R. ROTUNDA and J. YOUNG, *supra* note 78, at 863-68 (1978); Choper, *The Religion Clauses of the First Amendment, Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680 (1980); Gaffney, *supra* note 10; Giannella, *supra* note 10; Ripple, *supra* note 10; Serritella, *Tangling with Entanglement: Toward a Constitutional Evaluation of Church-State Contacts*, 44 LAW & CONTEMP. PROBS. 143 (Spring 1981).

107. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 767-70 (1976) (White, J., concurring).

108. Laycock, *supra* note 11, at 1380, speaks of "unstructured expansiveness." Ripple, *supra* note 10, at 1238-39, calls it "a criticism without an internal discipline" which leaves the Court little but its own "personal predilections" in determining whether entanglement is "excessive."

109. Gaffney, *supra* note 10, at 234-36.

tion; but any objection to the accompanying regulations which create and enforce restrictions upon the use of the money surely must sound in free exercise, not establishment. The Court might properly examine administrative entanglement to determine if it has a promotional aspect, but in no case has the Court done so.¹¹⁰ Instead, the Court has recognized the government regulation as burdensome, oppressive, and a threat to church autonomy in the conduct of its affairs, but nevertheless held this to be "establishment."¹¹¹ A sacrifice of clarity indeed!

Pausing at the Brink: The Inhibits Test Still Dictum

The one bright spot in recent establishment clause jurisprudence is the Court's refusal thus far to remove the "inhibits" test from the realm of dictum by an outright holding that anything which inhibits religion is thereby in violation of the establishment clause. At least four times during recent years the Court has been presented such an opportunity outside the parochi aid setting but has chosen to dodge the issue rather than meet it head on. When the Tennessee Supreme Court denied to the Reverend Paul A. McDaniel the right to seek election as a delegate to his state constitutional revision convention,¹¹² by virtue of a Tennessee statute that made ministers of religion in-

110. Not one of the many separate opinions in the establishment clause cases has attempted to rest the entanglement analysis on this basis. Even the Douglas concurring opinion, *see* note 71, stopped short of making the application even though it made the correct theoretical distinction between governmental intrusion which establishes and that which threatens free exercise.

111. The Court's treatment of entanglement as a burdensome intrusion upon religion ought also, logically, to raise a question of standing. Laycock's comments on this point are cogent:

If government support and government control are inextricably linked in the challenged government policy, it seems natural to review support and control as a package, and the cases on aid to church schools have done so. But that has had unfortunate consequences. The Court has explained why taxpayers have standing to challenge government support of religion, but it has never explained why taxpayers have standing to argue that an aid program entangles the state in a church's affairs. Only the church is harmed by such interference, and only it should have standing to complain. An atheist plaintiff asserting a church's right to be left alone even at the cost of losing government aid is the best possible illustration of why there are standing rules. And if the church itself complained, its claim would sound most naturally in the free exercise clause. Thus, fear that support will lead to interference is reason to want an establishment clause, but it is the support, and not the interference, that is the establishment.

Laycock, *supra* note 11, at 1383.

112. *Paty v. McDaniel*, 547 S.W.2d 897 (Tenn. 1977).

eligible for such service,¹¹³ he asked the United States Supreme Court to overturn the decision as a violation of both the free exercise and establishment clauses.¹¹⁴ The Court declined the opportunity to consider whether this religious disqualification was a law inhibiting religion in violation of the establishment clause, but confined its holding to the free exercise clause, which was held to be infringed.¹¹⁵

*N.L.R.B. v. Catholic Bishop of Chicago*¹¹⁶ furnished another opportunity for the Court to apply the "inhibits" test, this time in the context of a challenge to the National Labor Relation Board's jurisdiction over labor disputes in two Roman Catholic high schools. On the face of it, the constitutional issue should have been free exercise since no school aid of any kind was involved: the N.L.R.B. was simply interfering with the church's efforts to handle its own labor disputes. Intervention by the N.L.R.B. was, of course, a form of entanglement, and since everyone knew that "entanglement" was a label associated with the establishment clause, that clause was naturally implicated (regardless of the common sense of matter). The issue of establishment by inhibition did not come to the Court focussed very sharply because the Appeals Court, probably sensing the anomaly, based its decision on the "Religion Clauses" in the plural,¹¹⁷ and counsel for the Catholic Bishop also argued that both clauses were implicated. The facts offered the Court a tailor-made opportunity either to clarify past confusion by admitting that only free exercise was involved, or to compound past error by holding that government restrictions on church freedom of action are indeed a form of establishment. The

113. 1976 Tenn. Pub. Acts, ch. 848, § 4.

114. *McDaniel v. Paty*, 435 U.S. 618 (1978) (Appellant's Brief at 2).

115. *Id.* The Chief Justice wrote for a plurality of four. Justice Stewart concurred, also on free exercise grounds, *id.* at 642 (Stewart, J., concurring); and Justice White concurred on equal protection grounds, *id.* at 643 (White, J., concurring). Justice Brennan, in a concurrence joined by Justice Marshall, was not so reluctant to face the establishment issue. Not only did the Tennessee law violate the free exercise clause; it also had "a primary effect which inhibits religion" (a very believable conclusion), *id.* at 636 (Brennan, J., concurring), and, as such, ran afoul of the establishment clause as well. "The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it is done here; *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963)." *Id.* at 641. The whole burden of the present essay runs to the contrary: the establishment clause, properly understood, is a shield against government efforts to advance religion, not to inhibit it; the free exercise clause performs the latter function. But, however misconceived, Justice Brennan's application of the clause is consistent with what the Court has been saying since *Schempp*.

116. 440 U.S. 490 (1979).

117. *Catholic Bishop of Chicago v. N.L.R.B.*, 559 F.2d 1112, 1131 (7th Cir., 1977).

118. 440 U.S. at 502, 503, 504, 507.

Court did neither. Rather than facing the constitutional question, the Court concluded that the significant risk of a first amendment violation mandated a construction of the statute precluding N.L.R.B. jurisdiction of church-operated schools. In discussing the risk of constitutional violation the Court focussed on the establishment precedents dealing with entanglement but, in the end, adopted the Appellate Court's position that both religion clauses would be implicated.¹¹⁸ "The substantial religious character of these church-related schools," said the Court, citing *Lemon* as authority, "gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid."¹¹⁹ Given the Court's assertion that the establishment clause was implicated at least in part, the conclusion logically follows that burdensome government regulation may violate the establishment clause even when totally divorced from the aid context. Because the case ultimately turned on statutory construction, however, that proposition remains in the realm of dictum rather than holding.

In two other cases the Court chose to avoid substantive discussion of the establishment clause altogether. In *St. Martin Evangelical Lutheran Church v. South Dakota*,¹²⁰ the Court was urged to find that the Federal Unemployment Tax Act (FUTA)¹²¹ could not, consistent with the establishment clause, be applied to a secondary school operated by the petitioner church.¹²² The Court bypassed the constitutional question by construing the statute in favor of exempting the church from its coverage. The statutory construction escape valve was not available in *Widmar v. Vincent*,¹²³ where respondent Vincent also argued that the establishment clause was violated by refusal of the University of Missouri at Kansas City to allow a religious group, on an equal basis with other student groups, to hold meetings in University facilities.¹²⁴ The Court, however, continued to avoid a decision directly premised on "establishment" by hostile governmental action and instead rested its holding on the more credible first amendment principle that state regulation of speech must be content-neutral. In this case the University's policy discriminated against speech because of its religious content.

119. *Id.* at 503.

120. 451 U.S. 772 (1981).

121. 26 U.S.C. §§ 3301-3311 (1977).

122. Petitioner's Brief at 30, *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981).

123. 454 U.S. 263 (1981).

124. *Widmar v. Vincent*, 454 U.S. 263 (1981) (Respondent's Brief at 44 *et seq.*).

Larson v. Valente: A New Rule But the Same False Premise

*Larson v. Valente*¹²⁵ and *Bob Jones University v. United States*¹²⁶ also required the Court during its 1981 and 1982 terms to confront establishment clauses challenges to burdensome government regulations. In neither was the issue of establishment by inhibition directly raised, however, because the complaining parties focused on the discriminatory impact of the regulations as an unconstitutional preference for religious not so burdened. In form at least, such an argument is consistent with the idea that establishment means support. But an aggrieved religious organization can all too easily allege unconstitutional "preference" when the real basis of the complaint is the disability and not the preference. In *Bob Jones* the Court avoided this trap. The University had contended that the revocation of its tax exempt status, because of policies against interracial dating and marriage, was an unconstitutional preference for religions whose tenets do not require such discrimination. The Court simply brushed aside the argument with a footnote assertion "that a regulation does not violate the Establishment Clause merely because it 'happens to coincide or harmonize with the tenets of some or all religions'."¹²⁷

In *Larson v. Valente*,¹²⁸ however, the Court agreed that Minnesota's Charitable Contributions Act violated the establishment clause because some, but not all, religious organizations were exempted from its regulations. Justice Brennan, for the majority, was careful to identify "preference" for the favored religions as the basis of the decision, and in this instance the Court suspected that the legislative provision was drafted with the *intent* of preferring some denominations over others.¹²⁹ But even in *Larson*, the problem turned out to be the burden on the disfavored religions rather than the benefit to the favored ones—which can only encourage use of the preference

125. 102 S. Ct. 1673 (1983).

126. 103 S. Ct. 2017 (1983).

127. *Bob Jones Univ.*, at 2035 n.30, quoting *McGowan v. Maryland*, 366 U.S. 420, 422 (1961).

128. 102 S. Ct. 1673 (1983).

129. *Id.* at 1688. A similar suspicion was entertained by the lower courts that heard the case. See, *Valente v. Larson*, 637 F.2d 562, 566 (8th Cir. 1981), where the court said:

The statutory discrimination between such organizations smacks of 'religious gerrymandering,' an apparently intentional favoritism for the religious organizations obtaining some but less than half of their funds from the public...; intentional discrimination is a very real issue, in the absence of any explanation for the sizable loophole created for some religious organizations.

rationale in other situations where no intent to aid any religion is apparent.¹³⁰ In this and other ways *Larson* illustrates the continuing effects of the "establishment by inhibition" premise, and must therefore be examined in greater detail.

Larson v. Valente originated in a challenge to provisions of the Minnesota Charitable Contributions Act¹³¹ which imposed registration and reporting requirements upon most organizations soliciting contributions from the public but expressly exempted religious organizations that received more than half of their total contributions from their own members or from affiliated organizations.¹³² Plaintiffs were the Holy Spirit Association for the Unification of World Christianity (Unification Church) and four of its members who alleged that the Act as applied to them was an abridgement of their first amendment rights of free speech and religion and their fourteenth amendment right to equal protection. Although each of these claims was argued in the lower courts, only the establishment issue was presented to the Supreme Court.¹³³

130. If *Larson's* scope is limited to statutes which make "explicit and deliberate distinctions between different religious organizations," as Justice Brennan suggested in a footnote, a finding of unconstitutional preference would be unlikely, or at least uncommon, since very few statutes make explicit classifications based on religious affiliation. In that event, however, the rule itself would have a very limited application and therefore little effect upon establishment clause jurisprudence. In Justice White's opinion such a finding could not be made even in the present case, since the Minnesota statute named no churches or denominations and based the exemption on secular criteria, i.e., "the source of their contributions, not on their brand of religion." Hence, "To say that the rule on its face represents an explicit and deliberate preference for some religious beliefs over others is not credible." 102 S. Ct. at 1692 (White, J., concurring).

Even counsel for Valente argued that the case was one of a kind: "Indeed, the guarantee of neutrality is so fundamental to our democratic system that, in the almost two hundred years since the adoption of the First Amendment, the Court has not until now been presented with a law that expressly divides religious organizations into separate categories for different governmental treatment." *Id.* (Petitioner's Brief at 15).

131. MINN. STAT. §§ 309.50-309.61 (1969 and Supp. 1980).

132. MINN. STAT. § 309.515-1(b) (1969). From 1961, when the statute was first enacted, until 1978, all religious organizations were exempt from the Act's requirements. The 50% rule was added by amendment effective March 30, 1978, 1978 Minn. Laws, ch. 601 § 5. Other organizations were also exempted by § 309.515 of the Act, for example, patriotic and fraternal societies that limit solicitation to voting members, certain organizations whose public solicitations are less than \$10,000 annually, and educational institutions supervised by a state board or a national accrediting association. The non-religious exemptions were not challenged.

133. In dissent Justice Rehnquist, joined by the Chief Justice, Justice White and Justice O'Connor, contended that the plaintiffs had no standing to challenge the

The Appellate Court had rested its decision primarily upon the first prong of the *Lemon* test, i.e., there was "no ascertainable 'secular legislative purpose'" for granting an exemption to churches obtaining less than 50% of their contributions from nonmembers.¹³⁴ The lower court also concluded that the exemption failed the effects test because it relieved favored religions from the burdens of registration and reporting.¹³⁵ The Supreme Court, taking an approach that must have caught most observers by surprise, declared the *Lemon* test inapplicable to the present case. The *Lemon* test, according to the Court, was "intended to apply to laws affording a uniform benefit to all religions, and not to provisions, like § 309.515-1(b)'s fifty per cent rule, that discriminate among religions."¹³⁶ Instead a stricter standard applies. Laws "granting a denominational preference" must be "justified by a compelling governmental interest" and closely fitted to further that interest."¹³⁷

In the true spirit of *stare decisis*, Justice Brennan suggested that such had been the rule all along. As he read prior cases, "when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudicating its constitutionality."¹³⁸ Further support for the preexistence of the rule was found in *Lemon v. Kurtzman*,¹³⁹ where the three-prong test was first enunciated. As authority for the various parts of the test, *Lemon* had cited *Board of Education v. Allen*¹⁴⁰ and *Walz v. Tax Commission*,¹⁴¹ each of which had upheld a statute that provided benefits without denominational restriction. For Justice Brennan the citation of these cases had special significance. It meant that the *Lemon* rule was, and presumably always had been, limited to laws having a nondiscriminatory application as between religions.¹⁴²

limitation on the religious exemption because the Unification Church had not yet been proved to be a religious organization and hence would not necessarily benefit from a decision invalidating the limitation.

134. *Valente v. Larson*, 637 F.2d 562, 567 (8th Cir. 1981).

135. *Id.* at 566-69.

136. 102 S. Ct. at 1687 (1982) (emphasis in original).

137. *Id.* at 1684-85.

138. *Id.* at 1684. The precedents cited as a basis for this conclusion were *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Zorach v. Clauson*, 343 U.S. 306 (1952); and, perhaps significantly, *Railway Express Agency v. New York*, 336 U.S. 106 (1949), a leading equal protection case.

139. 403 U.S. 602, 612-13 (1971).

140. 392 U.S. 236, 243 (1968).

141. 397 U.S. 664, 674 (1970).

142. "As our citations of *Allen* and *Walz* indicated, the *Lemon v. Kurtzman* 'tests' are intended to apply to laws affording a uniform benefit to all religions, and

Justice Brennan's attempt to back date the new rule was not convincing. To be sure, *Allen*, *Walz*, and *Lemon*—and most of the other establishment clauses cases—addressed laws which, facially at least, provided a uniform benefit to all religions. But nothing in *Lemon*, or *Allen*, or *Walz* suggested that the rule should be limited to such cases. The distinction was certainly lost on the lower courts: since *Lemon*, nearly every state and federal court confronting an establishment clause issue has grappled with some aspect of the *Lemon* test. The lower courts in *Larson v. Valente* applied *Lemon* without hesitation. Even the Supreme Court, as recently as November, 1980, recited the *Lemon* test in the process of invalidating, by summary reversal, a Kentucky statute that required the posting of the Ten Commandments on the wall of each public classroom in the state.¹⁴³ The offending statute in that case certainly did not afford "a uniform benefit" to non-Christian, non-Jewish faiths; but for some reason the Court thought *Lemon* was applicable. Indeed, the first two prongs of the *Lemon* test, in approximately their present form, were enunciated in *Abington School Dist. v. Schempp*¹⁴⁴ where the Court struck down a Pennsylvania law which required the reading of at least ten verses from the Holy Bible at the opening of each day in the public schools. By no stretch of the imagination could such a law be said to provide a uniform benefit to all religions.¹⁴⁵

The new doctrine, certainly, had copious antecedents. The notion of strict neutrality as between different religions has strong historical roots¹⁴⁶ and has frequently been reiterated in the establishment cases.¹⁴⁷ Indeed, *Epperson v. Arkansas*, in an oft cited expression, had characterized the constitutional prohibition on religious favoritism as

not to provisions, like § 309.515-1(b)'s fifty percent rule, that discriminate among religions." *Larson v. Valente*, 102 S. Ct. at 1687 (emphasis in original).

143. *Stone v. Graham*, 449 U.S. 39, 40 (1980).

144. 374 U.S. 203 (1963). *Lemon* added the entanglement test of *Walz* to the two-pronged *Schempp* test to produce the three-prong *Lemon* test.

145. Not quite everyone had missed the point, however. To counsel for *Valente* and the Unification Church it was clear that the Minnesota law was discriminatory on its face, and hence invalid without more since the *Lemon* tests were unnecessary "where a law conflicts on its face with the establishment clause's core guarantee of neutrality..." Appellee's Brief at 31, emphasis in the original. See also discussion by appellee, *id.* at 14-28.

146. See, e.g., 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §§ 1872, 1876-1877 (3d ed. Boston 1858). See also 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 974-75, (W. Carrington ed. 1927).

147. See, e.g., *United States v. Gillette*, 401 U.S. 437, 449-50 (1971); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Walz v. Tax Comm'n*, 397 U.S. 664, 695 (1970); *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); and *Everson v. Board of Educ.*, 330 U.S. 1, 15-16, 18 (1947).

"absolute."¹⁴⁸ But the shape of the new rule, with its requirement that a denominational preference be "justified by a compelling state interest" and "closely fitted to further that interest,"¹⁴⁹ suggested that it had more in common with recent precedents arising in equal protection, freedom of expression, and free exercise of religion than with establishment clause decisions.

Justice Brennan cited *Widmar v. Vincent*¹⁵⁰ and *Murdock v. Pennsylvania*¹⁵¹ as specific authority for this formulation. In *Widmar*, decided earlier the same term, a state university's denial of campus facilities to a student religious group (while accommodating other student groups) had raised free exercise and establishment issues as well as free speech. The Court based its decision only on the speech clause, however. The university policy was found to be a discriminatory, content-based exclusion of religious speech from a public forum which violated first amendment speech guarantees because it was not "necessary to a compelling state interest" and "narrowly drawn to achieve that end."¹⁵² *Murdock* raised no issues of establishment at all. Rather it upheld, on free speech and free exercise grounds, the right of Jehovah's Witnesses to engage in door-to-door tracting and solicitation.

In *Larson v. Valente*, recourse to precedents dealing with freedom of expression would surely have been appropriate had the issue been raised before the Court.¹⁵³ The public solicitation of funds clearly falls within the range of protected expressive activities.¹⁵⁴ But the precedents cited were not directly on point because freedom of expression was not invoked on appeal and the Court did not purport to be using free speech analysis. Presumably, having decided that

148. 393 U.S. at 106 (1968).

149. *Larson v. Valente*, 102 S. Ct. 1673 (1981).

150. 454 U.S. 263 (1981).

151. 319 U.S. 105, 116-17 (1943).

152. 454 U.S. at 274, 278. For other cases using a similar test, see, e.g., *Schad v. Mt. Ephriam*, 452 U.S. 61 (1981); *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530 (1980); *In re Primus*, 436 U.S. 412 (1978); *United States v. O'Brien*, 391 U.S. 367 (1968).

153. In *Widmar* for example, the speech clause was argued as an alternative ground for attacking the university exclusion policy, and this turned out to be most persuasive to the Court. *But see* Justice White's objection to treating religious speech as indistinguishable from other speech protected by the first amendment, 454 U.S. at 281-83 (White, J., dissenting).

154. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Hynes v. Mayor of Oradell*, 435 U.S. 610 (1976); *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

strict scrutiny was appropriate, the Court simply looked to tests applied in other areas where strict scrutiny was also the rule. This may account for the affinity of the new establishment test with free exercise and equal protection analysis. In those areas of the law strict scrutiny tests are constructed from such concepts as "substantial" or "compelling" governmental interests and "closely fitted," "narrowly drawn", or "least restrictive" means.¹⁵⁵

Substantively, *Larson v. Valente* is analyzed more appropriately under the free exercise clause than the establishment clause. The plaintiff was complaining primarily about the burden imposed by the law, not the preference. He sought only to make the exemption generally applicable to all religions. Alternatively, the facts present a strong equal protection claim based on the discriminatory classification or, as noted above, a question of freedom of expression. The Court necessarily responded to the establishment clause question, as that was the principal issue of substance presented on appeal. However, it did so with free speech precedents using analysis most analogous to the strict scrutiny of suspect classifications under the equal protection clause.

The Court did not quarrel with the substantiality of the state's interest in protecting the public against fraudulent solicitation or with the reasonableness of the reporting requirements as a means to the end.¹⁵⁶ Rather, the sticking point was the inability of the state to justify *classification* of religious organizations on the basis of funds received from public solicitations. The essence of an equal protection violation is unjustified, discriminatory classification, and this is the precise respect in which the Court found the statute lacking. The regulation may have been "addressed to a sufficiently 'compelling' state government interest,"¹⁵⁷ but the classification was not "closely fitted" to further that interest.¹⁵⁸ In so holding, the Court rejected Minnesota's argument that membership control would be an adequate safeguard against abusive public solicitation only if the organization received less than

155. Among the free exercise cases see *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Braunfeld v. Brown*, 366 U.S. 599 (1961). And for equal protection versions of strict scrutiny see, e.g., *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

156. "We do not suggest," said the Court, "that the burdens of compliance with the Act would be intrinsically impermissible if they were imposed evenhandedly." *Larson v. Valente*, 102 S. Ct. at 1688.

157. *Id.* at 1685.

158. *Id.* at 1687.

half its funds from nonmember contributions. This is straight equal protection analysis of the strict scrutiny variety—but the Court performed it under the rubric of the establishment clause rather than equal protection.

The cause of clarity and principled analysis would have been better served had the Court been able to proceed under the equal protection label. There is ample precedent for applying the equal protection clause to first amendment free speech concerns, and those cases are linked to *Larson v. Valente* by a very short chain of citations.¹⁵⁹ Such a use of equal protection strict scrutiny to guard against discriminatory content regulation also has a strong theoretical base if one accepts the Karst position that equality “is not just a peripheral support for the freedom of expression, but rather a part of the ‘central meaning of the first amendment.’”¹⁶⁰ Furthermore, if strict scrutiny of equal protection claims can be invoked in favor of “fundamental” rights and interests not expressly mentioned in the Constitution, such as the right to vote in state elections¹⁶¹ or the right to interstate travel,¹⁶² it surely should be available for the protection of rights fundamental enough to be expressly embodied in that document.¹⁶³

159. *Larson* cited *Widmark* as authority for its strict scrutiny test, although *Widmark* was a free speech case. *Widmark's* authority for the same test was *Carey v. Brown*, 447 U.S. 455 (1980) which, like *Widmark*, involved content-based restrictions on expressive activity but, unlike *Widmark*, was decided on equal protection grounds. The Court in *Carey* applied strict scrutiny to an Illinois ban on residential picketing and found a denial of equal protection because labor picketing was excluded from the ban. *Carey*, in turn, relied heavily on *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972) which similarly had invalidated an anti-picketing ordinance on equal protection grounds because it exempted peaceful labor picketing.

See also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 103 S. Ct. 948 (1983); *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *Williams v. Rhodes*, 393 U.S. 23 (1968); and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

160. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975). The quoted words are taken from *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

161. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

162. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974). *But see Jones v. Helms*, 452 U.S. 412 (1981).

163. G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 908 (10th ed. 1980), calls “traditional” the notion that an equal protection mode of analysis may be applied when governmental action discriminatorily burdens a right clearly embodied in the Constitution—e.g., the First Amendment. In that traditional situation, heightened scrutiny is triggered because of the presence of a basic right drawn from a constitutional source other than the equal protection clause.

To date such equal protection analysis has been applied mainly to the speech and association guarantees of the first amendment, but the guarantees of religious liberty are equally fundamental and no obvious reason appears for distinguishing between religion and speech in this context. In Karst's terms, equality is as "central" to the religion clauses as to the speech clause: the very core of the establishment clause guarantee is the prohibition against treating religions unequally by elevating one above the others.¹⁶⁴

The decision of the Court in *Larson v. Valente* may therefore be entirely justified on equal protection grounds. Unfortunately, as a religion clause decision it adds another level of confusion to the already muddled Supreme Court doctrines of establishment by suggesting that the central issue is forbidden support for favored religions when the real problem is the burden on the less favored religions arising from the discriminatory classification. The remedy prescribed exposes the transparency of the attempt by the Court to imply that the root evil is *support* for religion. Instead of invalidating the exemption for the favored religious organizations, the Court extends the exemption to *all* religious organizations. It does not eliminate the benefit, which should be the proper remedy for an establishment violation; rather it eliminates the burden. The latter is appropriate to a free exercise violation but not to a law respecting establishment, except to the extent that denying a benefit to a favored religion coincidentally lifts a burden from the less favored. No such exceptional case is found here: the Court simply declares benefits to religion all around.¹⁶⁵ Cases from *Everson* onward have adamantly avowed that the establishment clause is violated by "laws which aid one religion, aid all religions, or prefer one religion over another."¹⁶⁶

164. Application of strict scrutiny to religious classifications would, however, require disregarding the dictum in *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974), that strict scrutiny of fundamental rights under the equal protection clause may not be invoked unless the fundamental right itself is violated. This conclusion is clearly wrong because it makes the fundamental rights strand of equal protection analysis wholly redundant. If the underlying constitutional right has been violated, there is no purpose in showing that equal protection is also violated. Furthermore, as the facts of *Larson* illustrate, the underlying right and the equal protection clause may address different concerns. Free exercise might not require that all churches be exempt from state financial regulations, but the state ought to have a compelling justification for regulating some churches and not others. For a discussion of the general problem, see Laycock, Book Review, 59 TEX. L. REV. 343, 391-393.

165. This also ought to be contrary to the establishment clause if the *benefit* to religion is the real problem.

166. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). A uniform exemption for all religious organizations would not necessarily run afoul of the establishment

The analytical shortcomings of *Larson* flow directly from the basic error of the Court's establishment clause doctrine: the notion that religion is established when it is inhibited as well as when it is advanced. If that proposition is correct, then of course the Court need not be concerned with whether it is dealing with burdens or benefits. Either may be removed in the name of the establishment clause. But that proposition is correct only by fiat of the Court, in defiance of all good sense and historical experience with religious establishments.¹⁶⁷

Despite the new doctrine that *Lemon* is not applicable to cases of "denominational preference," the Court nevertheless felt obliged to demonstrate that the Minnesota law failed the *Lemon* entanglement test as well as the new strict scrutiny standard. In reaching this conclusion the Court emphasized the political divisiveness aspect of the test, as well as the burdens of administrative entanglement and excessive governmental direction of churches.¹⁶⁸ The analysis retained at least a tenuous link with reality through its reference to the advantage conferred upon nonregulated religions, but this did not appear to be a very essential part of the reasoning. The "politicizing"

clause. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) upheld property tax exemptions for church property used for religious purposes as part of a larger category of charitable exemptions. The Minnesota statute, as amended by the Supreme Court, would present a closer case because it singles out religious organizations for a special exemption rather than exempting them as part of a larger class, as in *Walz*.

167. To insist that *Larson* presents no genuine issue of establishment does not imply that denominational preferences are permitted by the establishment clause. They clearly are not. But the question is, what constitutes a preference? Is it limited to laws *intended to advance* particular religious organizations? Laws which have the *primary effect of advancing* religion? Laws *intended to inhibit* certain religious groups, or having that *effect* despite their secular purpose? I would argue that a "preference" which exists only as an exemption from some burden that one or more other religious organizations must bear, and which is not intended to advance any religious belief or organization, does not raise an establishment issue. The law which benefits or prefers a religion only in the sense that some other religion is burdened is really a free exercise problem. Thus, revocation of a church-related school's tax exemption because of the school's racially discriminatory policies does *not* amount to a preference that establishes all the other schools. See *Bob Jones Univ. v. United States*, 468 F. Supp. 890 (D.S.C. 1978), which held that it did, but was reversed, *Bob Jones Univ. v. United States*, 639 F.2d 147 (4th Cir. 1980), *aff'd* 103 S.Ct. 2017 (1983). The appeals court agreed that a "preference" existed but deemed that it was outweighed by the compelling government interest in racial equality. The Supreme Court found no substantial establishment issue. There is no theoretical reason, however, why *Bob Jones* could not raise an equal protection issue in such a situation, although again the interest in racial equality might override the unequal application of the tax laws as between religious organizations.

168. *Larson v. Valente*, 102 S. Ct. at 1687 (1982).

of religion and the administrative burdens on the disfavored sects were sufficiently obvious in the Court's mind, to violate the establishment clause, even though no church was aided by the political conflict or the burdensome regulations.

The Inhibits Test in the Lower Courts: Over the Brink

The Supreme Court has thus far shrunk from converting its "inhibits" dictum into holding, but lower courts have carried the doctrine to its logical conclusion. This occurred explicitly in *Chess v. Widmar*,¹⁶⁹ the lower court version of *Widmar v. Vincent*.¹⁷⁰ There the Eighth Circuit found that denying a student religious group the privilege of using campus facilities at the University of Missouri at Kansas City, on equal terms with other student groups, was unconstitutional establishment because of its inhibiting effect upon religion. In the court's words:

. . . UMKC's current regulation has the primary effect of inhibiting religion, an effect which violates the Establishment Clause just as does governmental advancement of religion. *Lemon v. Kurtzman*, *supra*, 403 U.S. at 612-613 . . . The University's policy singles out and stigmatizes certain religious activity and, in consequence, discredits religious groups.¹⁷¹

The court did not expand its analysis of the establishment clause violation but chose to place primary emphasis on the University's abridgement of free speech through unjustified content regulation.¹⁷² The establishment clause was discussed mainly for the purpose of showing that the University's policy was not justified by its interest in avoiding an establishment of religion, which, it claimed, would result from opening campus facilities to student religious groups. The court disagreed with this assertion.¹⁷³ Nevertheless, the court clearly held that the policy was invalid as a violation of the establishment clause as well as the free speech guarantees of the First Amendment. As previously noted, the Supreme Court prudently avoided the establishment issue when reviewing the case and rested its decision on the speech clause.¹⁷⁴

169. 635 F.2d 1310 (8th Cir. 1980).

170. 454 U.S. 263 (1981).

171. 635 F.2d at 1317.

172. *Id.* at 1312-1317, 1320.

173. *Id.* at 1318-1320.

174. 454 U.S. 263 (1981). See also discussion *supra* in text accompanying notes 123-124. Briefs for Student-Respondents also argued the establishment clause viola-

While *Chess v. Widmar* is perhaps the clearest instance of a lower court applying the "inhibits" test to invalidate governmental action, it does not stand alone. In granting a preliminary injunction against assertion of N.L.R.B. jurisdiction over a labor dispute involving lay teachers in a parochial school, the court in *McCormick v. Hirsch*¹⁷⁵ based its action at least in part on a finding that the burden of N.L.R.B. intrusion into school affairs was an effect proscribed by the second prong of *Lemon*.

...From the description of the powers of the NLRB in the above discussion, nothing more need be said here as to the likely harm to the church that would be caused by the Board's intrusion upon such areas as the religious running of the institution. The effect would be both direct and substantial and the end result would be a policy that inhibits religion.¹⁷⁶

In *Guterman v. Schweiker*¹⁷⁷ the holding was somewhat less explicit but, by implication, the court appeared to adopt the rationale of the "inhibits" test. Plaintiff Guterman was required by the tenets of his religious faith to walk to his place of worship. There being no public housing or other housing that he could afford within walking distance, his rent was subsidized by Jewish Family Services. Because of the subsidy, however, Guterman lost a portion of his social security benefits (SSI). In holding the loss of benefits to be a violation of Guterman's constitutional rights, the court focused primarily on the free exercise clause. Nevertheless, in an unelaborated statement near the end of the opinion the court observed: "In order to avoid violation both of the Free Exercise and of the Establishment Clauses, defendant must adjust plaintiff's SSI benefits. . ."¹⁷⁸ Since the court had spoken only of burdens, and the facts would admit no "entanglement" argument, the establishment clause violation could only have reference to the inhibiting effect of the reduced payment.¹⁷⁹

tion. See Brief in Opposition to Petition for Certiorari at 13-14, and Respondent's Brief at 44-48. The attorneys for the Respondent tried to make sense of the concept by talking of the "neutrality" required by the religion-clauses and by suggesting that inhibiting religion meant "advancing" secularism. Such a rationale does not eliminate the problem of distinguishing between establishment and free exercise guarantees, but at least it ties establishment to support of some kind of ideology, if only the nonreligious idea of secularism.

175. 460 F. Supp. 1337 (M.D. Pa. 1978).

176. *Id.* at 1357. The court also found impermissible entanglement and a violation of free exercise.

177. 520 F. Supp. 91 (E.D. Mich. 1981).

178. *Id.* at 93.

179. In *Attorney General v. Bailey*, 436 N.E.2d 139 (Mass. 1982) the plaintiff challenged a Massachusetts statute requiring church schools to report the name, age,

"Entanglement" in the Lower Courts

While only a few lower courts have accepted *Lemon's* invitation to invalidate governmental acts by application of the inhibits test, a great many have looked for unconstitutional establishment in the potentiality for burdensome governmental entanglement. Frequently the issue has arisen from attempts by the Federal Equal Employment Opportunity Commission to enforce employment discrimination provisions of Title VII of the 1964 Civil Rights Act.¹⁸⁰ In no meaningful sense can federal efforts to regulate employment practices in parochial schools or other church-related institutions be treated as a form of support or advancement. On its face it is all burden and no benefit, at least as viewed from the institutional perspective of the church. Yet, because of the state of the law, the church has frequently been in the anomalous position of arguing that it is being unconstitutionally established by the burdensome entanglement. In most of the cases the court has rejected the argument—not for the obvious reason that burdens do not create an establishment but because the entanglement was not sufficiently burdensome to violate the first amendment.¹⁸¹

The issue of entanglement, unconnected with any form of aid

and residence of every child enrolled. The plaintiff argued that the law violated the establishment clause "because it inhibits religion and fosters an excessive government entanglement with religion." *Id.* at 146. The Court concluded that the primary effect of the law could not be regarded "as inhibiting religion." *Id.* at 147. *See also* E.E.O.C. v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), where the court analyzed the impact of Title VII on a church college as an entanglement problem but frankly recognized that entanglement was just another form of establishment through the imposition of burdens:

Although the Supreme Court generally has construed the establishment clause in the context of governmental action that benefitted a religious activity [citations omitted], it is now clear that the establishment clause is implicated by a statute that potentially burdens religious activities. *See* N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 500-502 (1979). The three-prong test employed in *Lemon* to determine whether government entanglement is excessive applies with equal force to such cases.

Id. at 487.

180. 42 U.S.C. § 2000e *et seq.* (1977).

181. *See* E.E.O.C. v. Pacific Press Publ. Ass'n, 676 F.2d 1272 (9th Cir. 1982); E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981); E.E.O.C. v. Mississippi College, 626 F.2d 477 (5th Cir. 1980); *Russell v. Belmont College*, 554 F. Supp. 667 (M.D. Tenn. 1982) (also involving an Equal Pay Act challenge); *Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980). *But see* E.E.O.C. v. Southwestern Baptist Theological Seminary, 485 F. Supp. 255 (N.D. Tex. 1980), where a federal district court held that the application of Title VII to a church seminary would lead to "excessive governmental entanglement with religion violative of the establishment clause," as well as infringement of the free exercise clause. *Id.* at 261. The decision was reversed on appeal, E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 286 (5th Cir. 1981).

to religion, has been litigated in a variety of other contexts besides Title VII. Exercise of N.L.R.B. jurisdiction over labor disputes in parochial schools has been held to risk unconstitutional entanglement,¹⁸² as has denial of the use of state university facilities to student religious groups on an equal basis with other student groups.¹⁸³ The same is true of state regulation of charitable solicitation by religious organizations,¹⁸⁴ and solicitation of information on the costs of operating private schools.¹⁸⁵ Courts have held both ways in adjudicating the constitutionality of unemployment compensation laws as applied to church schools. The South Dakota Supreme Court found unconstitutional entanglement,¹⁸⁶ while a federal district court in North Carolina held the entanglement not to be excessive.¹⁸⁷ In two cases involving the Internal Revenue Service the reexamination of a church's tax exempt status¹⁸⁸ and the issuance of an IRS administrative summons to the pastor of a church were held not to constitute burdensome entanglement.¹⁸⁹ Likewise, state courts in New Jersey¹⁹⁰ and Tennessee¹⁹¹ have rejected entanglement challenges in upholding the application of state licensing and accreditation requirements to church

182. *Catholic Bishop of Chicago v. N.L.R.B.*, 559 F.2d 1112 (7th Cir. 1977); *McCormick v. Hirsch*, 460 F. Supp. 1337 (N.D. Pa. 1978).

183. *Chess v. Widmar*, 480 F. Supp. 907, 914 (W.D. Mo. 1979), *aff'd* 635 F.2d 1310, 1318 (8th Cir. 1980).

184. *Heritage Village Christian Church v. State*, 263 S.E.2d 726 (N.C. 1980). The Court also found establishment in the exemption of some religious organizations from regulation.

185. *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979), *rev'g* 460 F. Supp. 121 (D.C. Puerto Rico 1978), in which the district court found the degree of entanglement insufficient to raise the constitutional issue.

186. *In the Matter of Northwestern Lutheran Academy*, 290 N.W.2d 845 (S.D. 1980).

187. *Ascension Lutheran Church v. Employment Sec. Comm'n of N.C.*, 501 F. Supp. 843 (W.D.N.C. 1980). The North Carolina Supreme Court examined the same entanglement question but ultimately concluded that religious schools were statutorily exempt from unemployment compensation laws. *Grace Lutheran Church v. North Dakota Employment Sec. Bureau*, 294 N.W.2d 767 (N.D. 1980).

188. *United States v. Coates*, 526 F. Supp. 248 (E.D. Cal. 1981) *aff'd* 692 F.2d 629 (9th Cir. 1982).

189. *United States v. Freedom Church*, 613 F.2d 316 (1st Cir. 1979).

190. *New Jersey State Bd. of Higher Educ. v. Bd. of Directors of Shelton College*, 448 A.2d 988 (N.J. 1982).

191. *Tennessee ex rel. McLemore v. Clarksville School*, 636 S.W.2d 706 (Tenn. 1982). *But see* *Bangor Baptist Church v. Maine*, 549 F. Supp. 1208 (D.C. Me. 1982), where a federal district court denied the State's motion for summary judgment in a suit to enjoin enforcement, as against religious schools, of a state requirement that private schools offer "equivalent instruction" to public schools. The court believed that the plaintiff church should be entitled to prove, if it could, that the "burden on [its] religious practices" would constitute excessive entanglement. *Id.* at 1222.

colleges. Although the outcome of such cases has varied with the facts, they illustrate how extensively the notion of establishment through burdensome governmental entanglement with religion has penetrated the jurisprudence of state and lower federal courts.

Lemon in the Lower Courts: Summation

The impact of the *Lemon* test on lower court opinions has been substantial, and its applications have extended well beyond anything the Supreme Court has thus far been willing to approve in its own decisions. While the Supreme Court has limited its use of the "inhibits" test to dicta, and has found unconstitutional entanglement only where government regulation is in some way related to the administration of public aid to religious organizations, state and lower federal courts have carried *Lemon* to its logical conclusion by finding unconstitutional establishment in governmental action that merely burdens religion. This can only create confusion for lawyers and judges alike, promoting bad analysis as participants in the judicial process struggle to apply rules that turn the traditional concept of religious establishment on its head.

Over time, of course, the meaning of a concept may change and a new meaning may become widely accepted even though it contradicts the old in some respects. When the Supreme Court propagates the new meaning there is obvious incentive for others, in the legal profession at least, to fall into line. Thus, the concept of establishment of religion may cease to mean governmental promotion of a particular church or religious doctrine or observance, but rather be expanded to include any governmental action that has a significant effect on religion, whether to advance or inhibit. Confusion is created during the transition period, but ultimately lawyers can adjust to the new meaning. In constitutional law another cost is imposed by such conceptual evolution: the framers' intent becomes less relevant because they used the concept in its former meaning. Still, lawyers and judges have been able to accept that too, some even arguing that the framers' intent is not a very essential element of constitutional interpretation anyway.¹⁹² Whether we should have to live with the costs of transitional confusion and disregard of the framers' original understanding is another thing. Costs can be willingly paid to obtain a thing of

192. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 BOSTON U. L. REV. 204 (1980); A. BICKEL, *THE LEAST DANGEROUS BRANCH* 98-110 (1962). See also *Trop v. Dulles*, 356 U.S. 86, 101 (1958): "[T]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

greater value. Unfortunately, what thing of greater value we obtain by the Supreme Court's perversion of the establishment concept is not yet evident. In the lower courts we currently have confusion of meaning but no corresponding benefit.

Furthermore, the confusion is more than semantical. To the extent that the court's new concept of establishment is adopted, the *Lemon* formula obfuscates—indeed almost obliterates—the distinction between the establishment and the free exercise clauses. This is especially well illustrated by the first circuit opinion in *Surinach v. Pesquera de Busquets*¹⁹³ where the court felt obliged to examine the same facts twice, once in light of the free exercise clause and once as an establishment issue. Puerto Rico's request for cost information from church schools was found to entail a burden on free exercise as well as excessive entanglement, thus violating both the free exercise and the establishment clauses. The court obviously recognized it was left with no meaningful distinction between the two types of burdens and ultimately lumped both clauses together in finding a constitutional violation:

Given our conclusion that the Secretary's demands for the financial data of these schools both burden the free exercise of religion and pose a threat of entanglement between the affairs of church and state, the Commonwealth must show that "some compelling state interest" justifies that burden [citations omitted] and that there exists no less restrictive or entangling alternative.¹⁹⁴

It is of interest that the court relied upon the free exercise standard of review—compelling state interest and less restrictive alternatives, perhaps tacitly recognizing that the essence of the matter was the burden on free exercise. Still, the logic of *Lemon* had forced the court into a confusing and redundant establishment clause analysis.¹⁹⁵

Happily, there are a few exceptional lower court opinions that have not abandoned common sense in their efforts to apply confusing

193. 604 F.2d 73 (1st Cir. 1979).

194. *Id.* at 79.

195. In a similarly redundant analysis, *McCormick v. Hirsch*, 460 F. Supp. 1337 (N.D. Pa. 1978), found the assertion of N.L.R.B. jurisdiction over church schools a violation of both religion clauses because of the burdens it imposed. See also *E.E.O.C. v. Mississippi College*, 451 F. Supp. 564 (S.D. Miss. 1978), where the court with little analysis concluded that the first amendment precludes the E.E.O.C. "from investigating charges of sex discrimination at a religious institution," and cited, without much discussion, both free exercise and establishment precedents in support of its conclusion.

Supreme Court precedents. One of the best is an opinion authored by Justice Huskins of the North Carolina Supreme Court in *Heritage Village Church v. State*,¹⁹⁶ dissenting in part from the court's invalidation of the North Carolina Solicitation of Charitable Funds Act. His cogent establishment clause analysis merits quotation at length:

In the second part of its opinion the majority . . . concludes that the *exemption* granted under G.S. 108-75.7(a)(1) constitutes an establishment because it fosters an excessive government entanglement in religion. This conclusion is clearly incorrect. The pertinent inquiry in an establishment case is whether the *aid* or *benefit* granted by the state to religion in general or particular religions is of a type which violates the constitutional command of state neutrality with respect to religion. See, e.g., *Walz v. Tax Commission*, supra. In terms of the entanglement test the pertinent inquiry is whether the *aid* or *benefit* being granted by the state to religion is of a type which cannot be administered without excessive government involvement in the affairs of religion or religious organization...Analysis of the *benefit* granted by the state in the instant case compels the conclusion that the . . . exemption in section 75.7(a)(1) does not carry with it the seeds of an extensive and continuing government entanglement. Quite to the contrary, the *benefit* accorded by the exemption is one of freedom from further state regulation...

The majority's conclusion in Part II that the Act fosters an excessive entanglement with religion is based on the regulatory *burdens* that would be imposed on plaintiffs were they to be denied an exemption under section 75.7(a)(1). The majority reasons that exposure to the regulatory mechanisms of the Act would unduly burden plaintiffs' religious activities. In effect, the majority's analysis focuses on the extent of the *burden* imposed by *other sections* of the Act on plaintiffs' *free exercise* of religion. Thus, the issue raised by the majority in Part II of its opinion is not whether the exemption in section 75.7(a)(1) constitutes an establishment; rather, the true issue raised is whether the provisions of the Act impermissibly infringe upon the free exercise of religion.¹⁹⁷

196. 263 S.E.2d 726, 736 (1980) (Huskins, J., dissenting).

197. *Id.* at 741 (emphasis in original).

Justice Huskins saw clearly the distinction between establishment as *benefit* and violation of free exercise as *burden*. While I would question the appropriateness of ever finding burdensome entanglement to be an establishment of religion, even when imposed in connection with parochial school subsidies,¹⁹⁸ Justice Huskins unquestionably puts the present Supreme Court precedents in their most favorable and sensible light. If the entanglement concept can ever be reconciled with the traditional meaning of establishment, it must be done through reasoning such as that of Justice Huskins.¹⁹⁹

Conclusion

To quote once again the words of Justice White, "Establishment Clause cases are not easy; they stir deep feelings . . ." ²⁰⁰ This is true regardless of the specific content of the *Lemon* test or any other relevant rules of law. It is no coincidence that the line of establishment clause cases commencing with *Everson* has corresponded in time with the growing secularization of American society. This is a setting for conflict in the constitutional arena, as elsewhere, and no one should anticipate that establishment clause litigation will soon run its course.

In such a sensitive subject area it is particularly unfortunate that the paths to judicial resolution of conflict so often wind through swamps of avoidable doctrinal confusion. The *Lemon* premise that

198. Of course the aid itself might constitute establishment if the governmental restrictions on its use for religious purposes were not sufficiently effective.

199. In *United States v. Holmes*, 614 F.2d 985, 989 (5th Cir. 1980), dealing with a religion clause challenge to an IRS request to examine church financial records, the court was similarly lucid in distinguishing free exercise from establishment:

. . . Plaintiff here phrases one of his objections to disclosure in terms of the "excessive entanglement" it creates between Church and State. Despite this language, plaintiff does not raise an establishment clause challenge to the administration of the tax statute. Rather, the essence of plaintiff's claim is that the government subpoena is an unwarranted invasion of internal church affairs. Conceptually this argument is grounded in the free exercise clause and not the establishment clause.

See also *Christian School Ass'n v. Commonwealth of Pa.*, 423 A.2d 1340 (Pa. Commw. 1980), which treated the application of unemployment compensation statutes to church schools as strictly a free exercise problem, rather than falling into the entanglement-establishment trap like the courts cited in notes 181-191 *supra*. *Keegan v. Univ. of Delaware*, 349 A.2d 14 (Del. Super. Ct. 1975), likewise used free exercise analysis in dealing with the University's refusal to let a student religious group use a dormitory commons room, although the room was available to other student organizations. Cf. *Chess v. Widmar*, 480 F. Supp. 907 (W.D. Mo. 1979), which found a similar policy at the University of Missouri-Kansas City to be an unconstitutional establishment of religion.

200. *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 662 (1980).

religion is established by burdensome government regulation is surely such an avoidable error. It has no basis in history or semantics; it is pure judicial error compounded by repetition. Although *Everson* is the beginning of the confusion, *Everson*—properly read—did not embrace the expansive *Lemon* premise. Interpreted in light of Justice Black's subsequent opinion in *Engel v. Vitale*, the inhibitions proscribed by *Everson* dictum were only those traditionally recognized as incidents of state support of an established church. Yet, with its broad language and its inaccurate characterization of the establishment clause as the sole foundation of Jefferson's "wall of separation," *Everson* opened the door to the follies of *Schempp* and *Lemon*. With *Schempp* the establishment clause was permitted to swallow free exercise by bringing within its purview any law that either advances or inhibits religion. Thus any government action properly raising a free exercise question must necessarily raise an establishment question also. *Lemon* completed the structure of the three-prong test by adding as a third element the concept of unconstitutional "entanglement" earlier elaborated in *Walz v. Tax Commission*. The addition of the entanglement prong was very important in giving practical effect to the erroneous doctrinal concept of establishment by inhibition because, in contrast to the inhibits element of the second prong, which remains Supreme Court dictum, the entanglement test has actually been applied to strike down burdensome state regulation of religious institutions. As one might anticipate, the error produced by the United States Supreme Court has been compounded in state and lower federal courts struggling to follow and apply a rule so greatly at variance with traditional and common sense notions of religious establishment.

The modification of establishment clause doctrine suggested by this paper would do nothing to undermine important values inhering in the religion clauses. Establishment of a state church is still proscribed. So is any form of governmental support, as long as its primary effect is the advancement of religion. Thus the underlying value of voluntarism continues to be fully vindicated. Nor is the principle of neutrality as between religious sects or groups in any way diminished. Laws preferring one religion over another could not survive the "advancement" test; neither could governmental action that selectively places disabilities upon some religions but not others, if the purpose or primary effect is in fact the advancement of the others. Obviously, if the law were to advance the others only in the sense that a loss to one religion is gain to all the others, no genuine establishment question should be found, even though one religion suffers. But here free exercise comes to the rescue since governmental burdens upon church-affiliated organizations and upon religious worship are still subject

to review as prohibitions upon free exercise. No additional "inhibition" test under the establishment clause is required to invalidate laws burdening religious freedom. The free exercise guarantee also underpins the value of neutrality as between religion and irreligion. While establishment speaks to violations of the neutrality principle through governmental support of religion, free exercise raises a barrier to governmental breaches of neutrality arising from discrimination against religion.

Jefferson's "wall of separation" metaphor has great appeal because it embodies values deeply embedded in our constitutional and societal tradition. These are the values of governmental neutrality and private voluntarism in religious affairs. Each religion clause addresses a somewhat different aspect of the problem. Together they fully protect those cherished values. Nothing is gained by attempting to make one clause do the work of the other; but much is lost through the ensuing sacrifice of "clarity and predictability."