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*Lemon*¹ Is a Lemon:² Toward a Rational Interpretation of the Establishment Clause³

Thomas C. Marks, Jr.*
Michael Bertolini**

I. INTRODUCTION

This article will demonstrate the flaws in the three-part test propounded by the United States Supreme Court in *Lemon v. Kurtzman*⁴ for determining if an act of government violates the Establishment Clause of the First Amendment to the United States Constitution. Having demonstrated *Lemon*'s flaws, we will then suggest two alternatives to *Lemon*. The first alternative is based upon the "incidental impact" test from *United States v. O'Brien*,⁵ as modified by *Turner Broadcasting System, Inc. v. F.C.C.*⁶ The second is the somewhat different incidental impact test from *Employment Division, Department of Human Resources v. Smith*.⁷ The juxtaposition of these two tests can be seen by comparing the plurality opinion of Chief Justice Rehnquist with the opinion of Justice Scalia, concurring only in the judgment, in *Barnes v. Glen*

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1. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

2. "One that is unsatisfactory or defective." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1030 (3d ed. 1996).

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

4. 403 U.S. 602 (1971).

5. 391 U.S. 367 (1968). This is a freedom of expression case.

6. 512 U.S. 622 (1994). This also is a freedom of expression case. *Turner* actually recognizes the blending of the balancing test used in content-neutral time, place or manner regulation of expression in a public forum with the *O'Brien* type of balancing of competing interests when a law's impact on protected expression is merely incidental. See *infra* notes 71-76 and accompanying text.

7. 494 U.S. 872 (1990). This is a free exercise of religion case.

*Theatre, Inc.*⁸ By applying these two tests to various acts of government⁹ which trigger Establishment Clause concerns, we expect to demonstrate that either is far superior to the *Lemon* test. It will ultimately be left to the reader to determine which of the two alternatives is preferable, although we will make our own suggestions in this article's conclusion.

II. THE HOPELESSLY FLAWED *LEMON* TEST AND ITS PREDICTED DEMISE

Perhaps the beginning of the end of the *Lemon* test¹⁰ is found in Justice Scalia's opinion, concurring only in the result, in *Lamb's Chapel v. Center Moriches Union Free School District*:

8. 501 U.S. 560 (1991). This is a freedom of expression case.

9. The First Amendment of its own force applies only to the United States. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833). The First Amendment does however, now apply to the States and their local governments by way of incorporation into the Due Process Clause of the Fourteenth Amendment. As to the Establishment Clause, see *Everson v. Board of Education*, 330 U.S. 1 (1947).

10. *Lemon*, 403 U.S. 602. The test asked three questions.

Every analysis in [the Establishment Clause] area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion, . . .; finally, the statute must not foster an "excessive government entanglement with religion." [citation omitted.]

Id. at 612-613.

The entanglement issue can take one of two forms. First, in an attempt to insure that the primary effect of a law does not advance religion, government monitoring of how the aid provided to a school with religious affiliation is used may create impermissible entanglement.

The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular the government's post-audit power to inspect and evaluate the church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.

Id. at 621-622.

Also:

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Id. at 622.

As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six-feet under: our decision in *Lee v. Weisman* conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.¹¹

The place to begin understanding what is wrong with the *Lemon* test is within the text of Chief Justice (then-Justice) Rehnquist's dissenting opinion in *Wallace v. Jaffree*,¹² which can be divided into three parts. First, Justice Rehnquist attempts (successfully, in our opinion) to demolish the link between Thomas Jefferson's "wall of separation" metaphor and the Establishment Clause. As Justice Rehnquist's dissent points out: "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."¹³

Justice Rehnquist then builds a convincing case that Jefferson's apparently incidental reference to "a wall of separation" in his letter to the Danbury [Virginia] Baptist Association¹⁴ did not represent (1) the views of the architects of the First Amendment, nor (2) the original understanding of the Establishment Clause. Both points can be encapsulated into the following explanation:

It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted

11. 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment) (citations omitted).

12. 472 U.S. 38, 98-114 (1985) (Rehnquist, J., dissenting). Chief Justice Rehnquist is one of the six justices referred to by Justice Scalia in his opinion concurring in the judgment in *Lamb's Chapel*. See *infra* text accompanying note 14.

13. *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting). It is useful to note that even in *Lemon* itself, the opinion's author, Chief Justice Burger, cautioned that, "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." 403 U.S. at 614.

14. *Wallace*, 472 U.S. at 92.

meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. Indeed, the first American dictionary defined the word "establishment" as "the act of establishing, founding, ratifying or ordaining," such as in "[t]he episcopal form of religion, so called, in England." 1 N. Webster, *American Dictionary of the English Language* (1st ed. 1828). The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.¹⁵

Not only was the Court's adoption of the wall of separation influenced by bad history, it created bad law:

Whether due to its lack of historical support or its practical unworkability, the *Everson* "wall" has proved all but useless as a guide to sound constitutional adjudication. It illustrated only too well the wisdom of Benjamin Cardozo's observation that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."

But the greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. The "crucible of litigation," is well adapted to adjudicating factual disputes on the basis of testimony presented in court, but no amount of repetition of historical errors in judicial opinions can make the errors true. The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.¹⁶

Finally, Justice Rehnquist turns to *Lemon*:

The Court has more recently attempted to add some mortar to *Everson's* wall through the three-part test of *Lemon v. Kurtzman*, which served at first to offer a more useful test for purposes of the Establishment Clause than did the "wall" metaphor. Generally stated, the *Lemon* test proscribes state

15. *Id.* at 106. "*Everson*" refers to *Everson v. Board of Education*, 330 U.S. 1 (1947).

16. *Wallace*, 472 U.S. at 107 (Rehnquist, J., dissenting) (citations omitted).

action that has a sectarian purpose or effect, or causes an impermissible governmental entanglement with religion.

Lemon cited *Board of Education v. Allen* as the source of the "purpose" and "effect" prongs of the three-part test. The *Allen* opinion explains, however, how it inherited the purpose and effect elements from *Schempp* and *Everson*, both of which contain the historical errors described above. Thus the purpose and effect prongs have the same historical deficiencies as the wall concept itself: they are in no way based on either the language or intent of the drafters.¹⁷

Having outlined the test, Justice Rehnquist then focuses more carefully on *Lemon's* first and third prongs. The point made about the first, or "secular purpose," prong is that if applied literally, it would either be virtually no barrier to government violations of the Establishment Clause, or it would preclude any aid to any organization that is affiliated with a religion. Thus, at the one extreme:

If the purpose prong is intended to void those aids to sectarian institutions accompanied by a stated legislative purpose to aid religion, the prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion. Thus the constitutionality of a statute may depend upon what the legislators put into the legislative history and, more importantly, what they leave out. The purpose prong means little if it only requires the legislature to express any secular purpose and omit all sectarian references, because legislators might do just that.¹⁸

At the other extreme:

[I]f the purpose prong is aimed to void all statutes enacted with the intent to aid sectarian institutions, whether stated or not, then most statutes providing any aid, such as textbooks or bus rides for sectarian school children, will fail because one of the purposes behind every statute, whether stated or not, is to aid the target of its largesse. In other words, if the purpose prong requires an absence of *any* intent to aid sectarian institutions, whether or not expressed, few state laws in this area could pass the test, and we would be required to void some state aids to religion which we have already upheld.¹⁹

17. *Id.* at 108 (citations omitted).

18. *Id.*

19. *Id.* at 108-09. For an example of "state aids to religion which we have already upheld."

Thus, Justice Rehnquist could conclude, with some force that, "[t]he secular purpose prong has proved mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate."²⁰

The third prong — the "Entanglement" prong — receives similarly harsh treatment. Justice Rehnquist quite correctly points out that, without "Walz's reflective inquiry into entanglement"²¹, application of the entanglement prong, there is a

[C]reat[ion of] an "insoluble paradox" in school aid cases: we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement. For example, in *Wolman* the Court in part struck the State's nondiscriminatory provision of buses for parochial school field trips, because the state supervision of sectarian officials in charge of field trips would be too onerous. This type of self-defeating result is certainly not required to ensure that States do not establish religions.²²

The Court's "insoluble paradox" reminds one of Joseph Heller's timeless novel, *Catch-22*:

There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. . . . If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. . . . "That's some catch, that Catch-22," [Yossarian] observed. "It's the best there is," Doc Deneeka agreed.²³

Justice Rehnquist cited *Board of Education v. Allen*, 392 U.S. 236 (1968), where the Court upheld against an Establishment Clause challenge the loan by the State of secular textbooks to children attending private schools with a religious affiliation. *Id.*

20. *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting).

21. *Id.* at 109 (referring to *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (the source of the entanglement prong)).

22. *Id.* at 109-10 (citations omitted).

23. JOSEPH HELLER, *CATCH-22* (1961), quoted in BARTLETT'S FAMILIAR QUOTATIONS 752 (16th ed. 1992). The *Catch-22* analogy appears to have been used first by then-Justice Rehnquist in his dissenting opinion in *Aguilar v. Felton*, 473 U.S. 402 (1985), overruled by *Agostini v. Felton* ___ U.S. ___, 117 S. Ct. 1997 (1997). "In this case the Court takes advantage of the 'Catch-22' paradox of its own creation, . . . whereby aid [to religiously affiliated private schools] must be supervised to ensure no entanglement but the supervision itself causes an entanglement." *Aguilar*, 473 U.S. at 420-21 (Rehnquist, J., dissenting). Justice Rehnquist refers to his dissenting opinion in *Wallace*, where he commented upon the "insoluble paradox": "[W]e have required aid

Not only does the paradox/*Catch-22* conundrum exist, but the entanglement part of the *Lemon* test

[A]lso ignores the myriad state administrative regulations properly placed upon sectarian institutions such as curriculum, attendance, and certification requirements for sectarian schools, or fire and safety regulations for churches. Avoiding entanglement between church and State may be an important consideration in a case like *Walz*, but if the entanglement prong were applied to all state and church relations in the automatic manner in which it has been applied to school aid cases, the State could hardly require anything of church-related institutions as a condition for receipt of financial assistance.²⁴

Even without substantive reference to the second, primary effect, prong of *Lemon*,²⁵ Justice Rehnquist states quite accurately the cause-and-effect of the *Lemon* test:

These difficulties arise because the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service. The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions depending upon how each of the three factors applies to a certain state action. The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results.²⁶

Justice Rehnquist's closing thoughts on the *Lemon* test are ideally not merely a description of the Court's declining admiration for it, but hopefully are prophetic, as well:

to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement." *Wallace*, 472 U.S. at 109 (Rehnquist, J., dissenting (citing *Roemer*, 426 U.S. at 768-69)). As Justice White so cogently put it in *Bowen v. Kendrick*, 487 U.S. 589 (1988), "[T]his litigation presents us with yet another 'Catch-22' argument: the very supervision of the aid to assure that it does not further religion renders the statute invalid." *Bowen*, 487 U.S. at 615 (White, J., dissenting (citing *Aguilar*, 473 U.S. at 421)).

24. *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting).

25. It is this second prong that to us seems the most result-oriented.

26. *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting) (citations omitted).

Although the test initially provided helpful assistance, we soon began describing the test as only a "guideline," and lately we have described it as "no more than [a] useful signpos[t]." We have noted that the *Lemon* test is "not easily applied," and as JUSTICE WHITE noted in *Committee for Public Education & Religious Educ. v. Regan*, under the *Lemon* test we have "sacrifice[d] clarity and predictability for flexibility." 444 U.S. at 662. In *Lynch* we reiterated that the *Lemon* test has never been binding on the Court, and we cited two cases where we had declined to apply it.

If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it. The "crucible of litigation[]" has produced only consistent unpredictability, and today's effort is just a continuation of "the sisyphian task of trying to patch together the 'blurred, indistinct and variable barrier' described in *Lemon v. Kurtzman*." We have done much straining since 1947, but still we admit that we can only "dimly perceive" the *Everson* wall. Our perception has been clouded not by the Constitution but by the mists of an unnecessary metaphor.²⁷

Justice Rehnquist is only one of the "five . . . currently sitting Justices [who] have, in their own opinions, personally driven pencils through the creature's heart . . ." ²⁸ Of course, Justice Scalia must count himself. The other three are Justices White, O'Connor, and Kennedy.²⁹ In addition, as pointed out by Justice Scalia, Justice Thomas must be added to the list because he similarly joined in an opinion that "dr[ove] a pencil through the creature's heart."³⁰

Justice White, as noted by Justice Scalia, has repeatedly driven those same metaphoric pencils through the creature's heart.³¹ Justice White's discontent with *Lemon* is evidenced in a separate opinion he authored in that case, and it is in large part based on the *Catch-22* paradox noted earlier.³²

[T]he majority then interposes findings and conclusions that the District Court expressly abjured, namely, that nuns,

27. *Id.* at 112 (citations omitted).

28. *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in the judgment).

29. *See id.* at 398-99.

30. *See id.* at 398.

31. *See id.* at 398-99.

32. *See supra* note 23 and accompanying text.

clerics, and dedicated Catholic laymen unavoidably pose a grave risk in that they might not be able to put aside their religion in the secular classroom. Although stopping short of considering them untrustworthy, the Court concludes that for them the difficulties of avoiding teaching religion along with secular subjects would pose intolerable risks and would in any event entail an unacceptable enforcement regime. Thus, the potential for impermissible fostering of religion in secular classrooms—an untested assumption of the Court—paradoxically renders unacceptable the State's efforts at insuring that secular teachers under religious discipline successfully avoid conflicts between the religious mission of the school and the secular purpose of the State's education program.

....

The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught—a promise the school and its teachers are quite willing and on this record able to give—and enforces it, it is then entangled in the "no entanglement" aspect of the Court's Establishment Clause jurisprudence.³³

Justice White's unhappiness with *Lemon* continues quietly enough in *Committee for Public Education and Religious Liberty v. Nyquist*: "I am quite unreconciled to the Court's decision in *Lemon v. Kurtzman*. I thought then, and I think now, that the Court's conclusion there was not required by the First Amendment and is contrary to the long-range interests of the country."³⁴ Again in *Roemer v. Board of Public Works*, White expresses his discontent as follows: "The threefold test of *Lemon I* imposes unnecessary, and, as I believe today's plurality opinion demonstrates, superfluous tests for establishing 'when the State's involvement with religion passes the peril point' for First Amendment purposes."³⁵ As in his *Nyquist* dissent,³⁶ Justice White again finds particular fault with the Entanglement prong of the *Lemon* test in *New York v. Cathedral Academy*:

33. *Lemon*, 403 U.S. at 666-668 (White, J., concurring in the judgments in two cases, and dissenting in two others).

34. 413 U.S. 756, 820 (1973) (White, J., dissenting) (citations omitted).

35. *Roemer v. Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., dissenting) (quoting *Nyquist*, 413 U.S. at 822 (White, J., dissenting)).

36. See *supra* notes 34-35 and accompanying text.

Because the Court continues to misconstrue the First Amendment in a manner that discriminates against religion and is contrary to the fundamental educational needs of the country, I dissent here as I have in *Lemon v. Kurtzman*; *Committee for Public Education v. Nyquist*; *Levitt v. Committee for Public Education*; *Meek v. Pittenger*; and *Wolman v. Walter*.³⁷

*Widmar v. Vincent*³⁸ contains little more than a reference to Justice White's opinions in *Lemon*³⁹ and *Nyquist*.⁴⁰ The same can be said of Justice White's combined dissent in *School District of Grand Rapids v. Ball*;⁴¹ *Aguilar v. Felton*;⁴² *Secretary, United States Department of Education v. Felton*;⁴³ and *Chancellor of the Board of Education v. Felton*.⁴⁴

Justice Scalia's basis for including Justice O'Connor among the "Lemon-acides" is due to her concurring opinion in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*.⁴⁵ Justice O'Connor's opinion is based on little more than complaints that the first (secular purpose) and the second (primary effects) prongs of *Lemon* are imbalanced – either proving too little or too much:

Although I agree with the judgment of the Court, I write separately to note that this action once again illustrates certain difficulties inherent in the Court's use of the test articulated in *Lemon v. Kurtzman*. As a result of this problematic analysis, while the holding of the opinion for the Court extends only to nonprofit organizations, its reasoning fails to acknowledge that the amended § 702, 42 USC § 2000e-1, raises different questions as it is applied to profit and nonprofit organizations.

37. 434 U.S. 125, 134-35 (White, J., dissenting) (citations omitted).

38. 454 U.S. 263 (1981).

39. See *supra* text accompanying notes 32-33.

40. See *supra* text accompanying notes 34-35.

41. 473 U.S. 373 (1985).

42. 473 U.S. 402.

43. 473 U.S. 402 (1985).

44. 473 U.S. 402 (1985). One could add to this list, *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472, 482 (1973) (White, J., dissenting without op.), *Meek v. Pittenger*, 421 U.S. 349, 387 (1975) (Rehnquist, J., concurring in part, and dissenting in part; joined by White, J.) and *Wolman v. Walter*, 433 U.S. 229, 255 (1977) (White and Rehnquist, JJ., concurring in part and dissenting in part for reasons stated in Rehnquist's separate opinion in *Meek v. Pittenger*, 421 U.S. 349 (1975) and in *Nyquist*, 413 U.S. 756, White, J., dissenting).

45. 483 U.S. 327 (1987) (O'Connor, J., concurring).

In *Wallace v. Jaffree*, I noted a tension in the Court's use of the Lemon test to evaluate an Establishment Clause challenge to government efforts to accommodate the free exercise of religion:

On the one hand, a rigid application of the Lemon test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an 'accommodation' of free exercise rights.⁴⁶

The basis for Justice Scalia's inclusion of Justice Kennedy among the six is it follows his tepid critique of *Lemon* in *Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*:

In keeping with the usual fashion of recent years, the majority applies the *Lemon* test to judge the constitutionality of the holiday displays here in question. I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area. Persuasive criticism of *Lemon* has emerged. Our cases often question its utility in providing concrete answers to Establishment Clause questions, calling it but a "helpful signpost[t]" or "guidelin[e]", to assist our deliberations rather than a comprehensive test. ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area"). Substantial revision of our Establishment Clause doctrine may be in order; but it is unnecessary to undertake that task today, for even the *Lemon* test, when applied with proper sensitivity to our traditions and our case law, supports the conclusion that both the creche and the menorah are permissible displays in the context of the holiday season.⁴⁷

46. *Id.* at 346-47 (quoting *Wallace*, 472 U.S. at 82) (citations omitted).

47. 492 U.S. 573, 655-56 (Kennedy, J., concurring in the judgment in part, and dissenting in part) (citations omitted).

Finally, Justice Thomas rounds out the sextet, based upon his concurrence with a Scalia dissent containing the following condemnation of *Lemon*:

Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test, which has received well-earned criticism from many members of this Court. The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision. Unfortunately, however, the Court has replaced *Lemon* with its psycho-coercion test, which suffers the double disability of having no roots whatever in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself.⁴⁸

Of course, the prediction of the demise of the *Lemon* test may be, as were certain reports of Mark Twain's death,⁴⁹ greatly exaggerated. Justice White's majority response in *Lamb's Chapel* to the Scalia opinion, portraying *Lemon* as the monster that cannot die,⁵⁰ would certainly suggest that, for the present at least, Scalia's description of *Lemon* may be correct. Justice White declared:

While we are somewhat diverted by JUSTICE SCALIA'S evening at the cinema, . . . we return to the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled. This case, like *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, presents no occasion to do so. JUSTICE SCALIA apparently was less haunted by the ghosts of the living when he joined the opinion of the court in that case.⁵¹

Nevertheless, there can be little doubt that *Lemon* has been significantly damaged. It would thus appear appropriate to consider an alternative to the three-part *Lemon* test based upon part of the Court's

48. *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J. dissenting) (citations omitted).

49. "The reports of my death are greatly exaggerated." Cable from Europe to the Associate Press as reproduced in BARTLET'S FAMILIAR QUOTATIONS, note 616 (12th ed., 1951).

50. See *supra* text accompanying note 11.

51. *Lamb's Chapel*, 508 U.S. at 395, n.7 (citations omitted).

freedom-of-expression jurisprudence. Equally appropriate for consideration is a second alternative, based on a formulation created by Justice Scalia for the other religion clause.

III. PROPOSED ALTERNATIVE TESTS

Both of our proposed alternatives are predicated upon the concept of a law that does not target a particular constitutional guarantee but, rather, is aimed at some other goal. The law in question does, however, have an incidental impact upon the constitutional guarantee.

A. The *O'Brien-Turner* Incidental Impact Test

The first approach apparently began with the Supreme Court's opinion in *United States v. O'Brien*.⁵² Petitioner O'Brien burned his draft card as a symbolic protest against the United States' involvement in the Vietnam War.⁵³ He was prosecuted by the United States because federal law forbade such an action.⁵⁴ O'Brien claimed that his symbolic expression in burning his draft card was protected by the First Amendment.⁵⁵ The Court expressed reluctance to characterize the burning of the draft card as speech, but even assuming *arguendo* that the characterization was *a propos*, the effect of the federal law effect upon it was no more than mere happenstance:

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea This Court has held that when "speech" and "nonspeech" elements are combined in the same court of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling;

52. 391 U.S. 367 (1968). None of the cases cited by the Court at notes 22-27 of its opinion appear to involve diminished constitutional scrutiny based upon an incidental, rather than a direct, impact upon a First Amendment freedom. For example, it could be argued that in *NAACP v. Button*, 371 U.S. 415 (1963), Virginia's aim was to prevent solicitation of clients by lawyers and that it had only an indirect or incidental impact on the similar, but protected, activities of the NAACP in organizing litigation to attack racial discrimination. The Court did not appear to treat the case that way. Indeed, it is cited by the *O'Brien* opinion to illustrate, along with the other cited cases, that the Court's language in describing the gravity of purpose necessary for government to withstand a First Amendment Challenge has not always been consistent. That is certainly true.

53. See *O'Brien*, 391 U.S. at 369, 376.

54. See *id.* at 370.

55. See *id.* at 376.

substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to § 12 (b) (3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.⁵⁶

The Court described the primary purpose of the law O'Brien was charged with violating as follows:

The issuance of certificates in indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.⁵⁷

It logically follows then that the impact of the law upon O'Brien's symbolic speech was incidental to the law's primary purpose. This justified the somewhat-reduced scrutiny enumerated by the Court.⁵⁸ There is, however, a serious question as to just how reduced the scrutiny actually was. Assuming, as did the Court, that burning one's draft card is speech,⁵⁹ and that the government prohibition was content-based (which it clearly was), the constitutional standard normally applied is strict scrutiny. The conclusion of an appropriate measure of scrutiny is accomplished through a determination of the existence of a compelling governmental interest and necessity of means which will achieve the government's purpose when a means with a lesser impact on speech does not exist. "For the [government] to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling [governmental] interest and that it is narrowly drawn to achieve that

56. *Id.* at 376-77 (footnotes omitted).

57. *Id.* at 377-78.

58. *See supra* text accompanying note 56.

59. There can now be little doubt that it is. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (burning the American flag as a form of protest was deemed to be speech).

end.”⁶⁰ The Court’s reduced scrutiny in *O’Brien* appears to affect only the requisite gravity of the government’s purpose — “compelling” is effectively reduced to merely “important.”⁶¹ However, when the Court described the means allowed as “no greater than is essential to the furtherance of that [important purpose]”⁶² it was simultaneously describing the “no less drastic means available” test: “We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates [draft cards] than a law which prohibits their wilful mutilation or destruction.”⁶³ The *O’Brien* Court’s reference to *Sherbert v. Verner* solidifies this point.⁶⁴

It presently appears that the Court has further reduced the level of scrutiny in *O’Brien*-type cases. In *Turner Broadcasting System, Inc. v. F.C.C.*,⁶⁵ it did this by merging, for purposes of the balancing tests, the “incidental impact” cases like *O’Brien* with the content-neutral time, place, or manner limitations in a public forum. The Court did so by describing an “intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech.” The Court additionally cited *O’Brien* and *Ward v. Rock Against Racism*,⁶⁶ the latter of which is clearly a content-neutral time, place, manner regulation case.⁶⁷ The Court in *Ward* clearly stated that in the context of content-neutral time, place, manner limitations in a public forum, the phrase “narrowly tailored” did not mean that the existence of less drastic means must be explored.⁶⁸ If it had not been clear before, it was readily apparent that the same modification had been made to the *O’Brien* test.⁶⁹

60. *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

61. See *supra* text accompanying note 56. That the Court does not always consult a thesaurus when using terms such as this is evidenced by the Court’s admission in *O’Brien* itself that “to characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms.” 391 U.S. at 376-77 (footnotes omitted).

62. *O’Brien*, 391 U.S. at 377.

63. *Id.* at 381 (citing *Sherbert v. Verner*, 374 U.S. 398, 407-408 (1963)).

64. “[I]t would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would [achieve the government’s purpose] without infringing First Amendment rights.” *Sherbert*, 374 U.S. at 407.

65. 512 U.S. 622 (1994).

66. 491 U.S. 781 (1989).

67. It involved a content-neutral regulation of the noise level at a bandshell in New York City’s Central Park. See *id.* at 784.

68. In other contexts “narrowly tailored” can mean that there must be no less drastic means. See *Boos v. Barry*, 485 U.S. 312 (1988), referred to in *Ward*, 491 U.S. at 798, note 6.

69. After stating that “the *O’Brien* test ‘in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions,’” the *Ward* Court continued:

Lest any confusion on the point remain, we reaffirm today that a regulation of

Adopting the reasoning from *O'Brien*, *Ward*, and *Turner* (the *O'Brien-Turner* incidental impact test), is then the first proposed alternative to the *Lemon* test. If government assistance to or in support of religion is based upon a valid purpose unrelated to religion, that purpose must be important or substantial, but not necessarily compelling. Furthermore, the means which have an incidental positive⁷⁰ impact on religion must be such that the purpose would be served less effectively absent their use. The incidental positive impact on religion must not be substantially more than is needed to achieve the government's purpose.

the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. . . ." To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. See *Frisby v. Schultz*, 487 U.S., at 485, 108 S. Ct., at 2502 ("A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil"). So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. "The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests" or the degree to which those interests should be promoted.

Ward, 491 U.S. at 798-800 (footnotes omitted).

This, then, is what the Court meant in *Turner* when it said:

Under *O'Brien*, a content-neutral regulation will be sustained if

"it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 377, 88 S. Ct., at 1679.

To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward, supra*, 491 U.S. at 799, 109 S. Ct., at 2758 (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 2906, 86 L. Ed. 2d 536 (1985)). Narrow tailoring in this context requires, in other words, that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward, supra*, 491 U.S. at 799, 109 S. Ct., at 2758.

Turner, 114 S. Ct. at 2469.

70. A negative impact would implicate not the Establishment Clause but the Free Exercise Clause.

B. The *Smith* Neutrality Test

The second approach also requires that any benefit to religion be incidental to some valid purpose unrelated to religion, but its treatment of means which accomplish that end is quite different from the *O'Brien-Turner* incidental impact test. *Employment Division, Department of Human Resources v. Smith*⁷¹ is illustrative of this approach. The *Smith* Court held that there was no Free Exercise right to the sacramental use of peyote in the face of a general prohibition on its possession or use.⁷² In so holding, the Court did not use the *O'Brien*⁷³ analysis but simply held that a law which is generally applicable to society at large and not directed at the free exercise of religion does not violate the First Amendment. Cases such as *Murdock v. Pennsylvania*⁷⁴ and *Wisconsin v. Yoder*,⁷⁵ which appear to hold otherwise, are explained as "involv[ing] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press or the right of parents to direct the education of their children."⁷⁶ Also limited to their facts were cases similar to *Sherbert v. Verner*, which struck down a state's denial of unemployment compensation when the recipient could not be employed because of religious scruples.⁷⁷ With these few exceptions, the Court has apparently adopted the rule announced in *Minersville School District v. Gobitis*:

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a

71. 494 U.S. 872 (1990).

72. *See id.*

73. *See supra* notes 52-70 and accompanying text.

74. 319 U.S. 105 (1943). This case "invalidat[ed] a flat tax on solicitation as applied to dissemination of religious ideas." *Smith*, 494 U.S. at 881.

75. 406 U.S. 205 (1972). This case "invalidat[ed] compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school." *Smith*, 494 U.S. at 881.

76. *Smith*, 494 U.S. at 881 (citations omitted).

77. 374 U.S. 398 (1963).

political society does not relieve the citizen from the discharge of political responsibilities.⁷⁸

C. The *O'Brien-Turner* Incidental Impact Test & The *Smith* Neutrality Test: A Comparison

The *Smith* approach can be compared with the *O'Brien-Turner* incidental-impact approach⁷⁹ by comparing the plurality opinion in *Barnes v. Glen Theatre, Inc.*,⁸⁰ with Justice Scalia's opinion in the same case, concurring only in the judgment. Chief Justice Rehnquist, writing for the plurality, applied the *O'Brien-Turner* "incidental impact" approach to allow Indiana to proscribe non-obscene nude dancing through the application to it of a broad public indecency statute which proscribed public nudity generally. The plurality declared, "[t]he perceived evil that Indiana seeks to address is not erotic dancing, but public nudity."⁸¹ In so stating, the plurality drew a direct parallel to *O'Brien*. The expressive burning of the draft card and the expressive nature of the nude dancing are equated, as are the laws prohibiting burning or mutilation of draft cards and public nudity. Thus, the plurality effectively applied the *O'Brien* test to the nude dancing.⁸² Of major importance in the plurality opinion is the plurality's finding that the second part of the *O'Brien* test is satisfied by the public indecency statute by furthering "a substantial government interest in protecting [societal order] and morality."⁸³ Such a finding bolsters the application of the police power to protect public morality even when it infringes, albeit indirectly, on expression protected to at least some extent by the First Amendment.

Justice Scalia's view is in sharp contrast to that of the plurality. His displeasure with the plurality's position is evident:

In my view . . . the challenged regulation must be upheld, not because it survives some lower level of First-Amendment scrutiny [as the plurality had held], but because, as a general

78. 310 U.S. 586, 595-95 (1940), *overruled by* Board of Educ. v. Barnett, 319 U.S. 624 (1943) (overruled on mixed expression and freedom of religion grounds). The *Smith* Court has also quoted this language from *Gobitis*. It should be noted that Congress by legislation restored the status quo ante when it enacted the Religious Freedom Restoration Act, 42 U.S.C.A. §§ 2000b. This was, however, declared unconstitutional by the Court in *Boerne v. Flores*, ___ U.S. ___, 117 S. Ct. 2157 (1997).

79. See *supra* notes 52-70 and accompanying text.

80. 501 U.S. 560 (1991).

81. *Id.* at 571.

82. See *id.* at 566-72.

83. *Id.* at 569.

law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all.⁸⁴

In other words, Justice Scalia would hold that a law generally regulating conduct which coincidentally impacts on expression would not be measured against the First Amendment *at all*, unless it could be shown that the intent of the law was plainly directed at expression. After all, Justice Scalia points out, the Court had already adopted *just such an approach* in a free exercise of religion case, *Employment Division, Department of Human Resources v. Smith*.⁸⁵

IV. THE APPLICATION OF THE TESTS

The Establishment Clause cases can be classified into two basic categories: (1) financial,⁸⁶ and (2) non-financial assistance to religion.⁸⁷ Financial cases can be further separated into public funding of private universities on one hand and of secondary and elementary schools having a religious affiliation on the other. Most of the non-financial assistance Establishment Clause cases fall into the realm of religious symbolism and prayer in public schools.

We will start our analysis of the effect the "neutrality" and "incidental-impact" tests would have with the financial assistance cases dealing with public funding or support of universities, and of secondary and elementary schools having a religious affiliation. In each instance, we will first consider our adaptation of the *Smith* neutrality test, as it is the less complex of the two. We will then consider the *O'Brien-Turner* incidental impact analysis or, rather, our adaptation of it. The *Lemon* test has yielded different results in the case of a university versus a secondary or elementary school.⁸⁸ The Court's rulings on public funding of

84. *Id.* at 572 (Scalia, J., concurring in the judgment).

85. *See supra* notes 71-78 and accompanying text.

86. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971); *see also* *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947); *Bd. of Educ. of Central School District No. 1 v. Allen*, 392 U.S. 236 (1968); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Comm. For Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Hunt v. McNair*, 413 U.S. 734 (1973); *Levitt v. Comm. for Public Educ. & Religious Liberty*, 413 U.S. 472 (1973); *Wheeler v. Barrera*, 417 U.S. 402 (1973); *MEEKS v. Pittenger*, 421 U.S. 349 (1975); *Roemer v. Bd. of Public Works*, 426 U.S. 736 (1976); *Wolman v. Walter*, 433 U.S. 229 (1977); *Mueller v. Allen*, 463 U.S. 388 (1983); *Aquilar v. Felton*, 473 U.S. 402 (1985); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

87. *See Engel v. Vitale*, 370 U.S. 421 (1962); *see also* *Sch. Dist. of Abington Township Penn. v. Ghepp*, 374 U.S. 203 (1963); *Larken v. Grendel's Den*, 459 U.S. 116 (1982); *Estate of Thorton v. Caldor, Inc.*, 472 U.S. 703 (1985).

88. *See Hunt v. McNair*, 413 U.S. 734, 746 (1973) (stating that within religion-based

universities under the *Lemon* test at times have closely resembled a neutrality or incidental-impact analysis and at times have been quite different.

A. Private Universities with a Religious Affiliation

In *Hunt v. McNair*, the State of South Carolina created an Education Facilities Authority which the State authorized to issue revenue bonds for the benefit⁸⁹ of all universities or colleges within the State.⁹⁰ The State created the bonds so investors could receive the tax-free interest income and the institution would pay a lower interest rate.⁹¹ In return for the revenue bond proceeds, the institution would create a sales/leaseback⁹² but the institution would remain the only party liable to the investors.⁹³ As per the requirements of the bonds, the institution could only use the proceeds from the bonds on projects which were wholly secular.⁹⁴

The Supreme Court used the *Lemon* test to hold that the revenue bonds did not violate the Establishment Clause.⁹⁵ The first element of the *Lemon* test relates to the secular purpose of the legislation.⁹⁶ South Carolina explicitly stated that institutions receiving revenue bond funds could not use the funds for sectarian projects.⁹⁷ The Supreme Court held the purpose of the statute to be secular because the benefits available under the program were available to all universities, not simply universities with a religious affiliation.⁹⁸ The second element of the

schools, religious indoctrination is not a significant portion of a university's teaching, whereas in secondary and elementary schools, religion permeates the teaching).

89. The Supreme Court defined the "state aid" in the *Hunt* case as merely a conduit. *Id.* at 745, n.7. The State made no expenditures on behalf of the program, nor did the State's funds finance any portion of the Authority's budget. *See id.* Thus, the State's involvement with the financial portion of the transaction was limited, "merely . . . a 'governmental service.'" *Id.*

90. *See id.* at 736. The institutions could use the bonds for construction, financing or refinancing of projects defined as facilities for education. *See id.*

91. *See id.* at 738-39.

92. A sales/leaseback is where the institution would use the proceeds of the bonds to complete the project and sell the finished project to the Authority. *See id.* at 738. The Authority would then lease the building to the institution and use the proceeds to pay-off the bonds. *See id.* As the bonds were retired the project would revert to the institution. *See id.*

93. *See id.* at 738-39.

94. *Id.* at 743-44. The Court looked to *Tilton v. Richardson*, 403 U.S. 672 (1971), to define "secular" in a university setting as one which "'shall not include' any buildings or facilities used for religious purposes." *Hunt*, 413 U.S. at 744. However, the Court made the presumption that lacking any evidence to the contrary, the projects are presumed to be used for secular purposes. *See id.*

95. *See Hunt*, 413 U.S. at 748-49.

96. *See Lemon*, 403 U.S. at 612. See also *supra* note 10 for a description of the first element of the *Lemon* test.

97. *See Hunt*, 413 U.S. at 741.

98. *See id.*

Lemon test was the effect the legislation had upon advancing religion.⁹⁹ In *Hunt*, the State could evaluate individual projects and by that eliminate any possible sectarian creation or usage of a project financed with revenue bonds.¹⁰⁰ The Court stated this was sufficient to establish that the primary effect of the statute was to benefit the citizens of the State and not to benefit religion.¹⁰¹

The most important analysis within *Hunt* apparently surrounded the State's involvement with the transactions.¹⁰² The financial entanglement was limited,¹⁰³ so the Court reviewed the Authority's power over the institution's use of the project.¹⁰⁴ The Authority could adjust rent as necessary and establish the rules and regulations for the use of the project.¹⁰⁵ Thus, the Court entered the gray area of entanglement between State and religion, but in *Hunt* the Court ruled that this type of entanglement was insignificant.¹⁰⁶ The Court stated that the powers were sweeping and that if there were a realistic likelihood of them being fully exercised, the entanglement problem would no longer be insignificant.¹⁰⁷

The *Smith* neutrality test,¹⁰⁸ if applied to *Hunt*, would arrive at the same conclusion, but through a much simpler analysis. The neutrality test, as modified for our purposes, asks one primary question: is the law based upon some valid purpose unrelated to religion and is it equally applicable to all?¹⁰⁹

In *Hunt*, the neutrality test would ask the one primary question based upon the established facts within the case. The statute which created the Authority was equal for all, since any university or college which desired the benefit of the revenue bonds need only apply.¹¹⁰ The legislature did not discriminate against a university based upon its affiliations.¹¹¹ As stated in *Smith*, "'valid and neutral law[s] of general applicability'" do not violate the Free Exercise Clause.¹¹² The statute was neutral to all parties, whether public, private, or religious, and consequently cleared the

99. See *Lemon*, 403 U.S. at 612. See also *supra* note 10 for a description of the second *Lemon* test.

100. See *Hunt*, 413 U.S. at 743.

101. See *id.*

102. See *id.* See *supra* note 92 for a description of the financial arrangements.

103. See *supra* notes 91-93 and accompanying text.

104. See *Hunt*, 413 U.S. at 747.

105. See *id.*

106. See *id.*

107. See *id.* The Court did not think there was such a likelihood. See *id.* at 748-49.

108. See *supra* notes 71-78 and accompanying text.

109. See *supra* text accompanying note 84

110. See *Hunt*, 413 U.S. at 741.

111. See *id.* at 741-42.

112. *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in judgment)).

first hurdle of the neutrality test. Therefore, under our adaptation of the *Smith* rule, the statute would not even be subject to Establishment Clause scrutiny.¹¹³

Applying the *O'Brien-Turner* incidental impact test would require asking whether the law was based upon some valid purpose unrelated to religion, and also have only an incidental effect on Establishment Clause concerns. The initial inquiry is then quite similar to that in the *Smith* neutrality test. South Carolina created the Authority to assist in the financing of capital projects within the State's universities and colleges.¹¹⁴ In addition, the State and Authority had no financial stake in the transaction. The Authority merely established the rent payable; and the rules and regulations as to the use of the project, as defined within the statute, and contained on the revenue bonds.¹¹⁵ The State's legislation was thus based on a valid purpose unrelated to religion, and would consequently have only an incidental effect on religion.

Once the mere incidental impact is established, unlike the *Smith* neutrality test, the *O'Brien-Turner* approach then queries whether the law furthers an important or substantial governmental interest.¹¹⁶ This form of revenue bond aid to higher education can easily be characterized as just such a governmental interest. One merely needs to read the declaration of purpose of the South Carolina Legislature, which the Supreme Court found, if only by indirection,¹¹⁷ to be a good faith statement of the purpose:

It is hereby declared that for the benefit of the people of the State, the increase of their commerce, welfare and prosperity and the improvement of their health and living conditions it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions for higher education within the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this chapter to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures

113. See *supra* text accompanying note 84.

114. See *Hunt*, 413 U.S. at 741-42.

115. See *id.* at 746-48.

116. See *supra* note 69.

117. "While a legislature's declaration of purpose may not always be a fair guide to its true intent, appellant makes no suggestion that the introductory paragraph of the Act represents anything other than a good-faith statement of purpose." *Hunt*, 413 U.S. at 741.

which are sorely needed to accomplish the purposes of this chapter, all to the public benefit and good, to the extent and manner provided herein.¹¹⁸

Finally, it must be determined if the "substantial government interest . . . would be achieved less effectively absent the regulation" and does not involve "substantially more [Establishment Clause concerns] than [are] necessary to further the government's legitimate interests."¹¹⁹

Here, as with the requisite gravity of the purpose, the answer is simple. Obviously, the goal of furthering all secular higher education would be "achieved less effectively" if not all institutions of higher learning could be included in this type of revenue bond aid. In addition, substantially no more Establishment Clause concerns were involved than were necessary because the revenue derived from the sale of the bonds could be used to further only the secular aspects of the particular college or university.¹²⁰ Thus, under the incidental-impact test, the revenue bonds would plainly not violate the Establishment Clause.

The financing cases dealing with public funding of private and religious universities become perhaps more complex when the State actually pays the institutions from public funds.¹²¹ In *Roemer v. Board of Public Works*, Maryland created a statute to subsidize all the private universities of higher learning within the State.¹²² Maryland's statute allowed for subsidies to all private universities, except universities which granted solely religious degrees. The universities could use these funds only for secular activities.¹²³ The State gave the Board of Public Works the authority to insure the grants were used only for secular activities.¹²⁴ The Board of Public Works employed various methods to insure compliance: Affidavits from the universities, utilization reports, and audits of the institutions' use of the grant money.¹²⁵ Again the Court used the *Lemon* test to establish that the grants did not violate the Establishment Clause.¹²⁶

118. *Id.* at 741-742 (citation omitted).

119. *Supra* note 69.

120. *See supra* note 94 and accompanying text.

121. The difference is between non-recourse revenue bond financing and direct grants of public monies.

122. 426 U.S. at 740.

123. *See id.* at 740-41. The statute stated "none of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes." Md. Ann. Code Ant. 77A, §68A (1975).

124. *See id.* at 742-43.

125. *See Roemer*, 426 U.S. at 736-37.

126. *See id.* at 766-67.

Maryland's statute easily passed the first two elements of the *Lemon* test: Secular Purpose and Primary Effect.¹²⁷ The statute's objective was to aid in the higher education of residents of the State, thus a secular purpose.¹²⁸ The Court stated, "[n]eutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity."¹²⁹ This statement appears closely related to the neutrality test in *Smith*. For primary effect the statute itself alleviates the problem through a system of checks and balances, assuring that the institutions were not using grant funds for sectarian purposes.¹³⁰ The statute therefore passed the first two *Lemon* elements, but because of the checks-and-balances system, entanglement became the issue.¹³¹

The Court needed to expand its reasoning in both *Tilton*¹³² and *Hunt*¹³³ in order to include State public funds going directly to private institutions with a religious affiliation. In *Roemer*, the Court looked to the district court's findings to establish the level of entanglement.¹³⁴ Upon reviewing the possibilities for entanglement — types of classes funded, when subsidies were paid out, character of the institution, form of aid, type of audits, and possibility of political divisiveness — the district court established that the entanglement here was not so great as to violate the Establishment Clause because it was not excessive even when viewed cumulatively.¹³⁵

The *Smith* neutrality test, had it been applied in *Roemer*, would have easily lead the Court to a more functional and understandable analysis than that achieved by applying the *Lemon*¹³⁶ test with potentially fairer results. Under the neutrality test, the law must be neutral, that is a law of general applicability.¹³⁷ In *Roemer*, the Maryland statute was based upon a valid purpose unrelated to religion and applied equally to all private higher education institutions whether they had a religious affiliation or not.¹³⁸ The statute did not include public higher education institutions because public institutions were already publicly funded. The law appears to satisfy the *Smith* neutrality test in being generally applicable to

127. *See id.*

128. *See id.*

129. *Id.* at 747.

130. *See id.* at 761-62.

131. *See id.* at 762.

132. *See Tilton v. Richardson*, 403 U.S. 672 (1971). *See infra* notes 281-97 and accompanying text.

133. *See supra* notes 89-107 and accompanying text.

134. *See Roemer*, 426 U.S. at 763-65.

135. *See id.*

136. *See supra* note 10.

137. *See supra* note 84.

138. *See Roemer*, 426 U.S. at 754.

all private higher education institutions.¹³⁹ Whether the law is of general applicability is all the inquiry that needs be made under the *Smith* approach. The Establishment Clause is simply not implicated.

A more complex question, although not nearly as subject to judicial whim as *Lemon*, is the applicability of the *O'Brien-Turner* incidental-impact test once it is established that the law is based upon some valid purpose unrelated to religion and thus has only an incidental impact on religion. The initial inquiry under the *O'Brien-Turner* incidental-impact test, it will be recalled, is essentially the same inquiry as that of the *Smith* neutrality test. As the Court stated in *Roemer*, the focus of that *Lemon* debate involved the second and third elements, "those concerning the primary effect of advancing religion, and excessive church-state entanglement."¹⁴⁰ Under the "incidental impact" test these two concerns are combined to question what effect the law will have on religion. In *Roemer*, the statute stated the institution could only use the funds for secular purposes.¹⁴¹ It appeared from the statute's language that the fund's effect on religion would be nominal, but the State's involvement in policing the policies might also effect religion to a greater degree. Nevertheless, all of this would be incidental to the clearly secular purpose and thus have the same relationship to it that the prohibition against burning a draft card had to the expressive element of *O'Brien's* act.

Given this incidental impact, the *O'Brien-Turner* analysis would proceed identically to the *Hunt v. McNair* revenue-bond scenario.¹⁴² The requirement of furthering a substantial or important government interest is satisfied for much the same reason as in *Hunt*: "[T]he purpose of Maryland's aid program is the secular one of supporting private higher education generally, as an economic alternative to a wholly public system."¹⁴³ The "purpose" part of the balancing test having been satisfied, the indirect impact of the "means" on Establishment Clause concerns must be examined. Would the substantial government interest identified above be achieved less effectively if the means chosen were not used, and do those means implicate "substantially more [Establishment Clause concerns] than [are] needed to further the government's legitimate interests[]"?¹⁴⁴ Here the answer is structured similarly to the answer in our *Hunt v. McNair* analysis.¹⁴⁵ The goal of "supporting higher education generally" would be "achieved less effectively" if Maryland could not

139. Except those that granted religious degrees. See *supra* text following note 122.

140. *Roemer*, 426 U.S. at 754-55.

141. See *id.* at 760.

142. See *supra* notes 112-20 and accompanying text.

143. *Roemer*, 426 U.S. at 754.

144. See *supra* note 69 and accompanying text.

145. See *supra* notes 114-20 and accompanying text.

include "all institutions of higher learning[]."146 Nor would the related goal of providing [or ensuring] an economic alternative to a wholly public system be likewise realized.147 Put differently, Maryland's goal of reducing the burden on public colleges and universities by encouraging private ones would be almost totally meaningless without the aid.

Again, as in *Hunt*, substantial, additional Establishment Clause concerns were warranted because Maryland took steps to insure that the funds were used for secular purposes.148 Given that the Supreme Court had more difficulty in *Roemer* with the entanglement prong of *Lemon* than in *Hunt*,149 it is clearly the time to slay that particular "dragon," and with it the *Catch-22* paradox.150 If government monitoring of the manner in which public funds are spent by private schools with a religious affiliation is to satisfy *O'Brien-Turner* — that substantially no more Establishment Clause concerns were implicated than were necessary to effectively achieve the governments purpose — then such monitoring is *ipso facto* not a problem, unless the educational institution in question finds it to be one. In that instance, the school can sever that particular aid program, or perhaps shift its focus to something which requires less monitoring by the government.151 The *O'Brien* "incidental impact" test would thus be satisfied.

The final higher education case, *Witters v. Washington Department of Services for the Blind*,152 forms, in a way, a transition between higher education and secondary and elementary schools. In *Witters*, a blind individual received assistance from the State of Washington under a disability-based statute.153 The statute provided public funding for the specialized education of disabled individuals to enable these persons to "obtain the maximum degree of self-support and self-care."154 The blind individual in *Witters* attended a private Christian college to become a pastor, missionary or youth director.155

The Court noted the statute had a secular purpose and the entanglement between State and religion was minimal since the State

146. See *supra* text following note 119. Of course, here, as in *Hunt*, seminaries and divinity schools were excluded from the State aid. See *Hunt*, 413 U.S. at 736-737; see also *Roemer*, 426 U.S. at 740.

147. See *supra* text accompanying note 143.

148. See *supra* notes 123-25 and accompanying text.

149. See *supra* notes 134-35 and accompanying text.

150. See *supra* notes 23, 32-33 and accompanying text.

151. Our feeling on this point can be summed up by Chief Justice Rehnquist's comment that "[t]his type of self-defeating result is certainly not required to ensure that [governments] do not establish religions." *Lemon*, 472 U.S. at 110.

152. 474 U.S. 481 (1986).

153. See *id.* at 483.

154. *Id.*

155. See *id.*

paid the individual, who in turn paid the institution.¹⁵⁶ The main issue of the case surrounded the primary effect of the statute on establishment of religion. The Court held that “[a]ny aid provided under Washington’s program that ultimately flows to religious institutions does so only as a result of a genuinely independent and private choice of aid recipients. Washington’s program is ‘made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted.’”¹⁵⁷ The analysis shows that since the State provided the aid directly to the individual and his personal choice decided the use, the primary effect was not the establishment of religion. Thus, the statute did not violate the Establishment Clause.

Once again the “neutrality” and indirect impact tests would arrive at the same conclusion through a more direct analysis. As the Court stated in *Witters*, the statute had a secular purpose and was available generally, without distinction as to which institution the individual directed the compensation.¹⁵⁸ In *Witters* the plaintiff, under the statutory scheme, decided the best type of study for his particular needs. This alone would satisfy our Establishment Clause version of the *Smith* “neutrality” test since, under it, a law of general secular applicability simply does not implicate the Establishment Clause at all merely because it has some incidental impact upon some of its concerns.¹⁵⁹

The application of the *O’Brien-Turner* test is, of course, more complicated than the *Smith* evaluation.¹⁶⁰ The question for the *O’Brien-Turner* “incidental impact” test is by now familiar: was the law based upon some valid purpose unrelated to religion, thus rendering any impact on Establishment Clause concerns merely incidental? The purpose of the law was to publicly assist disabled persons to “obtain the maximum degree of self-support and self-care.”¹⁶¹ Any brush with Establishment Clause concerns would thus be merely incidental. *Witters* himself chose the vocation he wished to follow and the education required to do so. The important or substantial nature of the government’s purpose should be beyond debate. The purpose of maximizing potential self-sufficiency would obviously lose some of its effectiveness¹⁶² if persons, otherwise qualified, were denied the aid necessary to achieve the vocation of their

156. *See id.* at 485.

157. *Id.* at 487 (quoting *Committee for Public Education and Religion v. Nyquist*, 413 U.S. at 782-83, n.38). *See infra* notes 333-53 and accompanying text for further discussion of *Nyquist*.

158. 477 U.S. at 487.

159. *See generally* notes 71-77 and accompanying text.

160. *See generally* notes 79-85 and accompanying text.

161. *See supra* text accompanying note 154.

162. *See supra* text accompanying note 70.

choice simply because that vocation involved attending a seminary or divinity school.

The next question in the *O'Brien-Turner* incidental impact test is whether the aid to Witters substantially implicated more Establishment Clause concerns than were necessary to achieve the government's purpose.¹⁶³ The answer is no. Witters, being otherwise qualified for the aid because of his handicap, had chosen a vocation requiring attendance at a seminary or divinity school. Nothing less would suffice, so clearly Establishment Clause concerns were not implicated substantially beyond that which was necessary.

As the university-level cases reveal, under the three elements of the *Lemon* test the Court needed to establish that the legislation did not violate any of the three elements. Among the university-level cases presented, not one was seriously questioned under the first test, secular purpose. The problems for the Court arose, if at all, on the second and third prongs, primary effect and entanglement. The same type of analytical conclusion regarding *Lemon* will generally hold true for the secondary and elementary school cases.

B. Secondary and Elementary Schools

1. The Pre-*Lemon* Cases: School Busing & Textbooks

The earliest — and perhaps the easiest — of the secondary and elementary cases to analyze under the “neutrality” and “incidental impact” tests are those concerning school busing¹⁶⁴ and textbooks.¹⁶⁵ These are pre-*Lemon* cases, but provide some background for the eventual development of that test.

*Everson v. Board of Education of the Township of Ewing*¹⁶⁶ dealt with a New Jersey statute which required the Board of Education to reimburse students of public and private not-for profit schools, including those with a religious affiliation, the cost of transportation aboard public transportation to and from school.¹⁶⁷ The State's statute thus applied generally to all secondary and elementary schools except private for-profit schools.¹⁶⁸ The Board of Education reimbursed the students out of generally-collected taxes, which the State used for general public welfare.¹⁶⁹ The Court held that the statute did not violate the

163. See *supra* note 69 and accompanying text.

164. See *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947).

165. See *Bd. of Educ. of Central Sch. Dist., No. 1 v. Allen*, 392 U.S. 236 (1968).

166. 330 U.S. 1 (1947).

167. See *id.* at 2-3.

168. See *id.* at 2, n.1.

169. See *id.* at 6.

Establishment Clause because the legislation was simply a general program to help parents get their children to school.¹⁷⁰

Since *Everson* was pre-*Lemon* the Court created an analysis based upon the history of governmental entanglement with religion in the American colonies and in Britain.¹⁷¹ The Court's main concern was the difficulty of drawing the line between "tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion."¹⁷² The Court concluded that it could not prohibit the State from extending general State benefits to all its citizens as long as the benefits were not based upon the recipient's religious beliefs.¹⁷³ Thus, the Court held the statute did not violate the Establishment Clause.¹⁷⁴

Under the "neutrality" test the Court's analysis would have taken on more form and substance.¹⁷⁵ Our "neutrality" test inquiry of whether the statute applies equally to all is easily established in *Everson*. The Court even stated that the statute applied equally to religious believers and non-believers.¹⁷⁶ The statute therefore passed our version of the *Smith* "neutrality" test, and the Establishment Clause is simply not applicable.

The *O'Brien's-Turner* "incidental impact" test is also satisfied. The Court acknowledged that governmental payment for bus transportation may allow additional individuals to attend religious schools, but the Court analogized this effect to giving police and fire protection to

170. See *id.* at 18. The Court went on further to state the statute applied "regardless of their [the children or parents] religion." *Everson*, 330 U.S. at 18.

171. See *Everson*, 330 U.S. at 8-14. The Court reviewed the effect government entanglement had upon religion, and the power a religion gained from governmental support. See *id.* at 9. The government's support or establishment of one religion over another lead to the majority religious group persecuting the minority or non-supported religious groups. See *id.* Virginia created the first separation of church and state doctrine in the "Virginia Bill for Religious Liberty" written by Thomas Jefferson. See *id.* at 12-13. The Court further interpreted the First Amendment's free exercise of religion and establishment clauses to mean:

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 tax in any amount . . . 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. . . . 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.'

Id. at 15-16.

172. *Id.* at 14.

173. See *id.* at 16.

174. See *id.* at 18.

175. See *supra* notes 71-77 and accompanying text.

176. See *Everson*, 330 U.S. at 18.

religious institutions.¹⁷⁷ Thus, the Court in its own analysis satisfied the incidental-impact requirement because the statute was directed at a goal other than assisting religion and had no more than an "incidental" effect on religion. Once this point is established, the now-familiar¹⁷⁸ questions must be asked: was the government's purpose substantial or important? This is easily answered in the text of the applicable New Jersey statute.

"Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part." New Jersey Laws 1941, c. 191, p. 581; N.J.R.S. Cum. Supp., tit. 18, c. 14, §8.¹⁷⁹

It is obvious that the goal of assisting children to get to school would be achieved less effectively, if at all, if the government could not provide that assistance.

Finally, we must inquire as to whether the transportation program substantially implicated more Establishment Clause concerns than were necessary to achieve its admittedly legitimate and important purposes of educating the State's youth and assisting in transporting them to and from school. Assuming that at least all not-for-profit private schools¹⁸⁰ formed an integral part of the State's education system, then merely assisting children attending schools with a religious affiliation did not clash with Establishment Clause concerns not substantially more than was necessary. How could the transportation program have been less and still gotten the job done? With the "neutrality" or "incidental impact" tests, the Court could easily have given a direct and easily understandable analysis for future cases.

177. *See id.* at 17-18.

178. *See supra* note 69.

179. *Everson*, 330 U.S. at 3, and n.1.

180. *See supra* text at note 168.

The next pre-*Lemon* Establishment clause case, *Board of Education of Central School District, No. 1 v. Allen*,¹⁸¹ concerns the distribution/loan of textbooks to students attending private elementary and secondary schools, some of which were religiously affiliated.¹⁸² *Allen* involved a New York State law which authorized the school districts of New York to lend books free of charge to all students grades seven through twelve.¹⁸³ The Board of Education of Central School District brought the suit to stop using school funds to purchase books which the law required the Board to loan to parochial school students.¹⁸⁴ The Board contended that the use of school funds to purchase and then lend books to religious school students violated the Establishment Clause.¹⁸⁵

The Court rested its decision upon the *Everson*¹⁸⁶ analysis, holding that the statute did not violate the Establishment Clause.¹⁸⁷ Again the Court concluded since the textbooks were not loaned based upon religion, and the religious schools were not using the books for sectarian teaching, the statute did not violate the Establishment clause. If the Court applied the "neutrality" test to the *Allen* facts, the analysis would be somewhat less subjective. The New York statute clearly met the neutrality requirement since books were to be provided to all students between the seventh and twelfth grade.¹⁸⁸ Not only was the law neutral in regard to Establishment Clause concerns, but the impact was *ipso facto* neutral even without recognizing that the religiously affiliated schools did not use the loaned books for sectarian teaching.¹⁸⁹ Under the approach utilized by Justice Scalia in *Smith*¹⁹⁰ the "neutrality" of the law alone would be enough to indicate that the loan of textbooks to students is not subject to First Amendment Scrutiny at all.¹⁹¹

The *O'Brien-Turner* analysis¹⁹² would track our application of that test to the *Everson* facts.¹⁹³ The text book law is directed at a purpose

181. 392 U.S. 236 (1968).

182. *See id.* at 236-39.

183. *See id.* at 238.

184. *See id.* at 240.

185. *See id.* at 240-41. The New York Court of Appeals stated the laws purpose was to benefit all students regardless of what school they attended. *Id.* at 241. The court considered the law "completely neutral with respect to religion, merely making available secular textbooks at the request of the individual students and asking no questions about what school he attends." *Id.* (quoting *Board of Education of Central School District v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791 (1967)).

186. *See supra* notes 166-74 and accompanying text.

187. *See Allen*, 392 U.S. at 248-49.

188. *See id.* at 238.

189. *See id.* at 248.

190. *See supra* notes 71-78 and accompanying text.

191. *See supra* text at note 84.

192. *See supra* notes 52-70 and accompanying text.

193. *See supra* notes 177-80 and accompanying text.

having nothing to do with establishing religion. Providing secular textbooks to children attending private school enhances their educations, and is as important as providing those same books to students attending the public schools. It would be difficult to describe placing secular text books in the hands of students as unimportant or unsubstantial. There is another purpose, alluded to earlier,¹⁹⁴ which would apply with equal force in this instance. By providing secular aid such as textbooks to students attending private schools, the State helps to ensure that private schools continue to function, and thus a large number of students do not have to be educated in the public schools; clearly, an important fiscal benefit thus flows to the State. The textbook program also easily meets the narrow tailoring requirement. It is easy to see that the State purpose of enhancing education by providing textbooks would be less effective if the text books had not been provided.¹⁹⁵ As to aiding private schools in this way in order to reduce the number of children in public schools, there are presumably many other things which could have been done, but probably none equally or more effective, considering the cost involved and the absolute neutrality of textbooks as compared to other alternatives. It is this neutrality that establishes that substantially no more Establishment Clause concerns than necessary were involved. Thus, the "neutrality" and "incidental impact" tests give a simple, concise analysis to the *Allen* facts.

2. The Federal Statute Cases

Federal statute Establishment clause cases are the next major elementary and secondary school area this article will analyze: *Bowen, Secretary of Health and Human Services v. Kendrick*,¹⁹⁶ *Zobrest v. Catalina Foothills School District*,¹⁹⁷ *Wheeler v. Barrera*,¹⁹⁸ *Aguilar v. Felton*¹⁹⁹ and *Tilton v. Richardson*.²⁰⁰ As stated, the cases deal with federal statutes: the Adolescent Family Life Act (AFLA),²⁰¹ the

194. See *supra* text following note 147.

195. See *supra* note 69.

196. 487 U.S. 589 (1988).

197. 509 U.S. 1 (1993).

198. 417 U.S. 402 (1973).

199. 473 U.S. 402 (1985), overruled in *Agostini v. Felton*, ___ U.S. ___, 117 S. Ct. 1997 (1997). See *infra* notes 491-496 and accompanying text.

200. 403 U.S. 672 (1971).

201. 42 U.S.C. § 300 (1991). Congress created the AFLA to authorize federal grants to public, private and religious organizations to provide "services and research in the area of premarital adolescent sexual relations and pregnancy." *Kendrick*, 487 U.S. at 589. The AFLA lists the following:

'[N]ecessary services' that may be funded[:] pregnancy testing and maternity

Individuals with Disabilities Education Act (IDEA),²⁰² the Elementary and Secondary Education Act of 1965²⁰³ and the Higher Education Facilities Act of 1963.²⁰⁴

In *Bowen v. Kendrick*, the Court noted that Congress established AFLA to correct what Congress perceived as a social problem.²⁰⁵ AFLA established grants to certain organizations; grant money recipients included religious hospitals, community centers and charitable organizations.²⁰⁶ Taxpayers and clergymen filed suit, stating AFLA violated the Establishment Clause.²⁰⁷ The group asserted that AFLA

counseling, adoption counseling and referral services, prenatal and postnatal health care, nutritional information, counseling, child care, mental health services, and perhaps most importantly for present purposes, 'educational services relating to family life and problems associated with adolescent premarital sexual relations.

Id. at 594.

202. 20 U.S.C. § 1400-1402 (1991) Congress created the IDEA to benefit disabled individuals who needed additional assistance while attending schools. *Zobrest*, 509 U.S. at 5. Congress stated:

[P]urpose of this chapter [was] to assure that all handicapped children have available to them, . . . , a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

20 U.S.C. § 1400(c) (emphasis added).

203. 20 U.S.C. § 6301 (1991). Congress' stated "purpose of this chapter is to enable schools to provide opportunities for children served to acquire the knowledge and skills contained in the challenging State content standards and to meet the challenging State performance standards developed for all children." 20 U.S.C. § 6301(d) (1991).

204. 20 U.S.C. §§ 711-721, 751(a)(2) (1964). Congress' purpose in passing the act was to satisfy a "strong nationwide demand for the expansion of college and university facilities to meet the sharply rising number of young people demanding higher education." *Tilton*, 403 U.S. at 675.

205. *Kendrick*, 487 U.S. at 593.

206. *See id.* at 597. In addition, state and local governmental agencies, private hospitals and non-aligned charitable organizations also received grants under the AFLA. *See id.*

207. *See id.* at 597-58. The district court held that AFLA violated the Establishment clause because it failed the second and third test of *Lemon*. *See id.* at 598-600. The Supreme Court also considered an argument that even if the law was not facially invalid under *Lemon*, the Establishment Clause was violated in the manner in which it was "applied" by the Secretary of Health and Human Services. On this point, the Supreme Court remanded the case to the trial court:

[T]he court should consider on remand whether particular AFLA grants have had the primary effect of advancing religion. Should the court conclude that the Secretary's current practice does allow such grants, it should devise a remedy to insure that grants awarded by the Secretary comply with the Constitution and the statute. The judgment of the District Court is accordingly reversed.

Id. at 622.

Under our proposed tests, the question in addition to whether the Secretary's actions complied

violated the Establishment Clause because government funds were going directly to religious organizations, and the religious organizations were allowed to solve the perceived social problem, adolescent sexual activity.²⁰⁸

The Court reviewed the case under the *Lemon* test.²⁰⁹ The first element, the law's promotion of a secular purpose, was easily found by the Court since the reduction of teenage pregnancy and parenthood is a general social problem.²¹⁰ The second element, primary effect of the legislation as advancing religion, was harder for the Court to analyze. The Court overturned the lower court's presumption that religiously affiliated institutions cannot provide services in a purely secular manner.²¹¹ The Court stated that the judiciary cannot strike down statutes because of an anticipated breach of the Establishment clause.²¹² The Court went on to hold that neither AFLA's recognition that "religious organizations have a role to play" in trying to solve the problem of teen sexuality,²¹³ nor the fact that the law allows religiously affiliated organizations to participate as grantees or subgrantees in AFLA programs²¹⁴ caused the law's primary effect to be that of advancing religion.²¹⁵ Thus, AFLA passed the second element of *Lemon*.

Excessive entanglement is the third element of the *Lemon* test. The *Kendrick* Court recognized the *Catch-22* quandary that the supervision necessary to assure the grants are not used for religious purposes necessarily entangles the government in the religion's operations.²¹⁶ The Court then created a fiction in order to enable AFLA to withstand the third element of the *Lemon* test by differentiating religious organizations from religious parochial schools.²¹⁷ However, the Court did not state why counseling and education of teenagers by religious counselors is any different from parochial school teachers.²¹⁸ Additionally, the Court stated that less intrusive monitoring (even though the Court did not enlighten

with AFLA would be whether they complied with whichever of our proposed tests is used.

208. *Id.* at 597-99.

209. *See supra* note 10.

210. *See Kendrick*, 487 U.S. at 602. The Court refused to question Congress' stated purpose. *Id.* at 604.

211. *See id.* at 612.

212. *See id.*

213. *Id.* at 605-606.

214. *Id.* at 606.

215. *Id.* at 604-615.

216. *See id.* at 615-16.

217. *See id.*

218. The district court in its opinion noted that under the *Lemon* test the AFLA programs "provide[d] a crucial symbolic link between government and religion, thereby enlisting, at least in the eyes of those youngsters, the power of government to the support of religion denominations." *Kendrick v. Bowen*, 657 F. Supp. 1547, 1561 (1987), *rev'd* 487 U.S. 589 (1988).

the reader regarding what the monitoring was) did not violate the Entanglement element of the *Lemon* test.²¹⁹ Thus, AFLA did not violate the Establishment clause.

Even though *Kendrick* was not a true elementary and secondary school case, the type of education and counseling provided by AFLA was arguably very similar to parochial school teachings. AFLA provided counseling and education to teenagers regarding sexual relationships and pregnancy.²²⁰ If the Court had used the “neutrality” or the “incidental impact” test instead of *Lemon*, the Court would not have needed to create the fiction that counselors are not equal to teachers. The Court’s finding that the statute was facially neutral and provided for a secular purpose²²¹ would have guaranteed that AFLA passed the “neutrality” test of *Smith*.²²²

Under our vision of the “incidental impact” test, the Court first would need to find that the law is based on a valid secular purpose, and the impact upon Establishment Clause concerns is by definition indirect. Thus, AFLA only had an incidental effect on those concerns. Put differently, the simple recognition that the government’s purpose was to provide counseling to children to help alleviate a clearly recognized grave problem of teen pregnancy²²³ made any benefit to religion merely incidental.

This established, it remains to be determined whether the means which included religious organizations among those groups tapped to provide the counseling was narrowly tailored.²²⁴ By now, it should be fairly clear that in this context narrow tailoring consists of two interrelated concepts. The first is that the government purpose would be less effectively achieved if required to be carried out some other way.²²⁵

Since Congress found that “[such] problems are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored

219. See *Kendrick*, 487 U.S. at 615-16.

220. See *id.* at 594.

221. See *id.* at 602.

222. See *supra* notes 71-77 and accompanying text. Simply put, the law was based upon a valid purpose unrelated to religion and applied equally to all. Thus, the Establishment Clause simply would not apply.

223. *Kendrick*, 487 U.S. at 593.

224. See *supra* note 69.

225. It is this point that is the principle distinction between the use of the phrase “narrowly tailored” in other contexts as a synonym for “necessary” with its requirement of inquiring about the existence of less drastic means. The concept of less drastic means cannot be part of a balancing test that asks would the purpose be less effectively achieved by different means.

initiatives,²²⁶ the purpose obviously would be achieved less effectively absent the involvement of religious organizations.

However, in order to insure that this recognition of the importance of efficacy in carrying out the governmental purpose does not unduly intrude into constitutional limitations, the Court has required that the government's foray into constitutionally protected interests not be substantially greater than what is needed to achieve the government's goal.²²⁷ Since the government considered it important to involve many groups perceived to have the necessary expertise and since the involvement of religious organizations was hedged about with safeguards,²²⁸ this requirement is clearly satisfied.

*Zobrest v. Catalina Foothills School District*²²⁹ concerned a deaf individual attending a religiously-affiliated secondary school, the State supplying the school with an interpreter under IDEA.²³⁰ The Act required States to provide special services for disabled individuals for educational purposes.²³¹ Arizona declined to give Zobrest an interpreter because the State viewed the funding of the interpreter as a violation of the Establishment Clause.²³² The State's argument was based upon the interpreter acting as a conduit for religious indoctrination, and since the interpreter was paid with government funds, a violation of the Establishment Clause would have occurred.²³³

226. *Kendrick*, 487 U.S. at 595 (citation omitted).

227. See generally *supra* note 69

228. The Court summarized the safeguards as follows:

We note that the AFLA requires each grantee to undergo evaluations of the services it provides, § 300z-5(b)(1), and also requires grantees to "make such reports concerning its use of Federal funds as the Secretary may require," § 300z-5(c). The application requirements of the Act, as well, require potential grantees to disclose in detail exactly what services they intend to provide and how they will be provided. § 300z-5(a). These provisions, taken together, create a mechanism whereby the Secretary can police the grants that are given out under the Act to ensure that federal funds are not used for impermissible purposes. Unlike some other grant programs, in which aid might be given out in one-time grants without ongoing supervision by the Government, the programs established under the authority of the AFLA can be monitored to determine whether the funds are, in effect, being used by the grantees in such a way as to advance religion. Given this statutory scheme, we do not think that the absence of an express limitation on the use of federal funds for religious purposes means that the statute, on its face, has the primary effect of advancing religion.

Kendrick, 487 U.S. at 615.

229. 509 U.S. 1 (1992).

230. *Id.* at 4.

231. *Id.* at 3.

232. *Id.*

233. *Id.* at 5.

Although the Court of Appeals reviewed the Act and its effect under *Lemon*, it is not clear that the Supreme Court did likewise. If it did so, it focused on the "Primary Effect" element.²³⁴ The Court first reiterated that it had "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."²³⁵ Providing this explanation, the Court continued:

The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "disabled" under the IDEA, without regard to the "secretarian-nonsecretarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a secretarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking.²³⁶

Faced with an argument that physical placement of the interpreter on the campus of the religiously-affiliated private school violated the Establishment Clause the Court found that

[T]he task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor. [T]he Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school. Such a flat rule, smacking of antiquated notions of "taint," would indeed exalt form over substance. Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to "transmit everything that is said in exactly the same way it was intended." James' parents have chosen of their own free will to place him in a pervasively sectarian environment. The sign-language interpreter they have requested will neither add to nor subtract from that

234. *See id.* at 10-14.

235. *Id.* at 8.

236. *Id.* at 10.

environment, and hence the provision of such assistance is not barred by the Establishment Clause.²³⁷

The initial inquiry in the "neutrality" and "incidental impact" tests would operate in a very similar fashion in the *Zobrest* case. First, the Act is neutrally applied because any disabled student can gain the benefits of the act whether attending public or private elementary or secondary schools, and whether religiously affiliated or not.²³⁸ As should now be apparent, the *Smith* test²³⁹ would be easily satisfied by the *Zobrest* facts. IDEA was a neutral law that applied to all schools whether religiously-affiliated or not. Therefore, the Establishment Clause was simply not implicated.

IDEA had no more than an incidental effect on the establishment of religion, because the purpose of the law had nothing to do with religion. The interpreter is a conduit, and the disabled individual is simply obtaining information in a different form than would a normal child. "Nothing in the record suggests that a sign-language interpreter would do more than accurately interpret. . . ." ²⁴⁰ The balancing-of-interests aspect of *O'Brien-Turner*²⁴¹ test is easily satisfied. Providing the services needed to assist disabled persons in obtaining an education is clearly important or substantial. Both prongs of the narrow tailoring component of the test are also easily met. Clearly, the federal goal of educational aid to the handicapped would be less broadly, and thus less effectively, achieved were schools with a religious affiliation excluded. And, for the same reason, substantially no more Establishment Clause concerns are implicated than need be. Therefore, under either test IDEA is constitutional.

The federal statute cases *Wheeler v. Barrera*²⁴² and *Aguilar v. Felton*.²⁴³ both dealt with the Elementary and Secondary Education Act of 1965.²⁴⁴ *Wheeler* is not, strictly speaking, an Establishment Clause case under the Court's analysis but shows the fiction the Court created to uphold a statute. The Elementary and Secondary Education Act of 1965 provided State governments with federal funds to educate deprived children in public and private schools including those with a religious

237. *Id.* at 13 (footnotes omitted).

238. *See id.* at 10.

239. *See supra* notes 71-78 and accompanying text.

240. 509 U.S. at 13.

241. *See supra* notes 52-70 and accompanying text.

242. 417 U.S. 402 (1973).

243. 473 U.S. 402 (1985), *overruled in* *Agostini v. Belton*, ___ U.S. ___, 117 S.Ct. 1997 (1997).

244. *See Wheeler*, 417 U.S. at 405; *See also Aguilar*, 473 U.S. at 404.

affiliation.²⁴⁵ The case arose when the Missouri State Commissioner of Education refused to provide federal funds under the Elementary and Secondary Education Act of 1965 to private and parochial schools but did provide the funds to public schools.²⁴⁶ The State defended its actions stating the funding of parochial schools was against Missouri law and the Establishment Clause of the First Amendment.²⁴⁷

The Court analyzed the case not under *Lemon* but under a neutrality type test.²⁴⁸ Since the State did not provide for equal "comparable" services to private and parochial schools, the State violated the statutes requirements.²⁴⁹ The Court reviewed the statute and noted the word "comparable" services did not mean identical services.²⁵⁰ Instead of explaining what would satisfy a "comparable" service under Elementary and Secondary Education Act of 1965, the Court left the issue up to the State, and noted the possibility of an Establishment Clause problem, but refused to elaborate further—thus the fiction.²⁵¹ The State might effect the Establishment Clause under *Lemon* by using federal funds in parochial schools to fulfil the statute's requirements. Had the Court used either the "neutrality" or "incidental impact" test, the States would have had the guidance necessary to comply with the federal statute.

Under the "neutrality" test the State would merely have to supply the funds to programs on a neutral basis. The State should distribute the federal funds to public schools and to private schools, regardless of any existence of religious affiliation, on the basis of need to comply with the purpose of Elementary and Secondary Education Act of 1965. The neutrality of our adaptation of the *Smith* test²⁵² —a law that is generally applicable, and not directed at Establishment Clause concerns — is clearly established by the Court of Appeals' description of the purpose of the federal law. It "require[d] a program for educationally deprived non-public school children that is comparable in quality, scope and opportunity, which may or may not necessarily be equal in dollar expenditures to that provided in the public schools."²⁵³ The law is thus

245. See *Wheeler*, 417 U.S. at 405.

246. 417 U.S. at 408.

247. See *id.*

248. See *Wheeler*, 417 U.S. at 420-21.

249. See *id.* at 420. The State did provide federal funding to private schools in compliance with the statute after the district court's decision. See *id.* However, the parochial schools required that the State supply public school teachers to teach the deprived children within the parochial schools. See *id.* at 409-10. The conflict arose because the State would not provide public school teachers to the parochial schools. *Id.*

250. See *id.* at 420-23.

251. See *id.* at 423-26.

252. See *supra* notes 71-78 and accompanying text.

253. *Wheeler*, 417 U.S. at 411 (citing *Wheeler*, 475 F.2d, at 1344).

universally applicable to all educationally deprived children. That it may brush up against Establishment Clause concerns is of no consequence, and the Establishment Clause of the First Amendment is simply inapplicable.

The "incidental impact" test would also be satisfied since the funds were used directly for the benefit of handicapped and disabled children. The parents of the affected children had the choice of where to send their children for education: either a private, a public, or a parochial school. Since the services in all schools were equally suitable for the disabled and handicapped children, the parents had no ulterior motive in choosing one school over another. The "important" or "substantial purpose" component of the *O'Brien-Turner* incidental-impact test²⁵⁴ is easily met. It would be difficult to reasonably dispute that ensuring a basic equality of treatment of educationally deprived students, whether in public or private school, is not an important governmental goal. The first of the "means" components — that the goal or purpose would be achieved less effectively some other way²⁵⁵ — appears clearly to be satisfied. Indeed, here, it is difficult to even think of "another way" that might work, even less effectively. The federal law provided the broadest scope of alternatives to the States.²⁵⁶ The second Means Component — that there is not substantially more intrusion into Establishment Clause concerns than needed — is also apparently satisfied, considering the broad discretion that the State apparently had to implement the federal program.²⁵⁷ Thus, the "neutrality" and "incidental impact" tests could guide a State, and thereby help the State legislatures comply with the Elementary and Secondary Education Act of 1965.

Aguilar v. Felton,²⁵⁸ is also based on the Elementary and Secondary Education Act of 1965.²⁵⁹ The major difference between the two cases is that in *Aguilar* the State attempted to comply with the Court's requirement for comparable services by placing public teachers and other professionals into parochial schools to teach the deprived children.²⁶⁰ The State of New York thus created the comparable system to comply with the Act.²⁶¹ The public funds supplied all the teachers, books, and supplies, thus insuring that the teaching was strictly secular.²⁶² In

254. See *supra* notes 52-70 and accompanying text.

255. *Id.*

256. See *supra* text at note 245.

257. See *supra* note 52-70 and accompanying text.

258. 473 U.S. 402, overruled in *Agostini*, 117 S.Ct. 1997.

259. See *Wheeler*, 417 U.S. 402.

260. See *Aguilar*, 473 U.S. at 406.

261. See *id.* at 407.

262. See *Aguilar*, 473 U.S. at 407. In addition, the classes were taught at the parochial schools, but the school was required to remove all religious symbols from the room before the

addition, the State of New York implemented a review program whereby an individual would make monthly surprise visits to the classrooms to assess whether religious teachings were being taught.²⁶³

The Court in *Aguilar* used the *Lemon* analysis to decide the constitutionality of New York's attempt to comply with the Elementary and Secondary Education Act of 1965.²⁶⁴ In *Aguilar* the Court bypassed the *Lemon* test's first two prongs, Secular Purpose and the Effect, and instead based its reasoning on the third prong, Entanglement.²⁶⁵ The Court stated the State's monitoring technics were pervasive.²⁶⁶ In interpreting the Establishment Clause, the Court's noted, "the objective [is] . . . to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other."²⁶⁷ Therefore, the Court without describing at what point the New York's interpretation of the Act violated the Establishment Clause simply stated New York's actions under the Act violated the Establishment Clause.²⁶⁸

Either of our proposed substitutes for *Lemon* is preferable as a way for the Court to analyze an Establishment Clause case. The *Aguilar* case is a prime example of where the "neutrality" test could better guide a State and its actions than the frequently unworkable *Lemon* test. As the Court noted in *Wheeler* and *Aguilar*, the Act's goals are purely secular, *i.e.*, to help deprived children, and the program was neutrally applied to all deprived children, *e.g.* not based upon where the child went to school.²⁶⁹ Thus, the Act passed the "neutrality" test and the first prong of the "incidental impact" test, neutral application for a secular purpose.

Since the federal law in question in *Aguilar* is identical to that of *Wheeler*, nothing more is needed than to refer to our discussion of the impact of our adaptation of the *Smith* test of the latter case.²⁷⁰ Particular emphasis is placed on our statement that "[t]he law is thus generally applicable to the universe of educationally deprived children. The fact that it may brush up against Establishment Clause concerns is of no consequence and the First Amendment simply does not apply."²⁷¹

classes began. *See id.*

263. *See id.* at 409.

264. *See id.* at 410.

265. *See id.* at 409-13.

266. *See id.*

267. *See id.* at 413 (citing *Lemon*, 403 U.S. at 614).

268. *See id.* at 414. Because the Court in *Wheeler* did not define separate but equal, comparable services, and how a State should comply or could comply with the Act, States were left to experiment and fight against such lawsuits as *Aguilar*.

269. *See Wheeler*, 417 U.S. at 420; *See also Aguilar*, 473 U.S. at 409-10.

270. *See supra* notes 251-53 and accompanying text.

271. *Id.*

As with our adaptation of the *Smith* test, much of what we concluded regarding the applicability of our adaptation of the *O'Brien-Turner* test to *Wheeler*²⁷² applies to *Aguilar*. Since the Court in *Aguilar* chose to invalidate the State's implementation of the federal law based on one aspect of the entanglement prong of *Lemon*,²⁷³ reference needs to be made to what we said earlier on that point.²⁷⁴

The "incidental impact" test's second prong, Effect on Religion, is a much more direct method to determine constitutionality of the Act than the *Lemon* test. Under *Aguilar*, New York's so-called "pervasive monitoring techniques" consisted of using professional teachers and counselors to lower the risk of subliminal religious indoctrination, a surprise monthly visit by a field officer of the State, and requiring the school to remove all religious symbols from rooms where the teachers would be teaching.²⁷⁵ The State implemented the review and personal procedures to reduce the risk of the students being taught sectarian values while under the Act's teaching requirements.²⁷⁶ In *Kendrick*, the Court stated that courts should not act based upon anticipatory breach of the Establishment Clause.²⁷⁷ A monthly visit by a field officer and requiring a removal of religious symbols from a classroom can hardly be considered pervasive, especially when the Court has allowed a State to collect rent and regulate how a school can utilize a building.²⁷⁸ Therefore, New York's monitoring system should have no more than an incidental effect on religion, thus, setting up the balancing aspect of the *O'Brien-Turner* test. Little time needs to be spent on the Gravity of Purpose portion of the *O'Brien-Turner* test. Few would quibble with the idea that providing this kind of assistance to children is important. As far as the two components of "narrowly tailored means", we repeat the earlier statement in *Wheeler*:

The first of the means components — that the goal or purpose would be achieved less effectively some other way — appears clearly to be satisfied. Indeed, here, it is difficult to even think of "another way" that might work, even less effectively. The federal law provided the broadest scope of alternatives to the States. The second means component that there is not substantially more intrusion into Establishment Clause concerns than needed appears also to be satisfied given the

272. See *supra* notes 254-77 and accompanying text.

273. *Aguilar*, 473 U.S. at 409-14.

274. See *supra* notes 149-151 and accompanying text.

275. See *Aguilar*, 473 U.S. at 409.

276. See *id.*

277. See *Kendrick*, 487 U.S. at 612.

278. See *supra* notes 103-107 and accompanying text.

broad discretion that the State apparently had to implement the federal program.²⁷⁹

There remains the argument that "entanglement" will cause substantially more intrusion into Establishment Clause concerns than is really necessary. Again, we reiterate our aforesaid conclusion:

[N]ow is the time to slay . . . [the entanglement] dragon and with it the *Catch-22* paradox. If government monitoring of how public funds are spent by private schools with a religious affiliation in order to satisfy the *O'Brien-Turner* requirement that substantially no more Establishment Clause concerns were implicated that were necessary to effectively achieve the government's purpose, then such monitoring is *ipso facto* not a problem unless the educational institution in question finds it to be one. In that case the school can serve that particular aid program or [perhaps] shift its focus to something that requires less monitoring by the government. Thus, the *O'Brien* "incidental impact" test would be satisfied.²⁸⁰

The final case in the area of federal statute cases is *Tilton v. Richardson*.²⁸¹ In *Tilton* the Court reviewed the constitutionality of the Higher Education Facilities Act of 1963.²⁸² The case was very similar to *Roemer*²⁸³ but concerned federal, rather than state, funding. *Tilton* involved the federal government offering of grants to public, private and religious institutions of higher learning for university facilities.²⁸⁴ The universities could only use the facility for secular purposes, but after twenty years the facility would revert to university control.²⁸⁵ If the university violated the Act by using the facility for religious activities the university would be required to reimburse the government for the proportion of the present value the grant bore to the original cost.²⁸⁶

The Court reviewed the case under *Lemon*.²⁸⁷ Within the Act itself Congress stated the purpose was to advance higher education at all institutions, which the Court concluded was a legitimate secular purpose.²⁸⁸ The Act passed the first prong of the *Lemon* test. The Court

279. See *supra*, text accompanying notes 255-57.

280. See *supra* text accompanying notes 150-52.

281. 403 U.S. 672 (1971).

282. See *id.* at 675.

283. See *supra* notes 121-134 and accompanying text.

284. See *Tilton*, 403 U.S. at 675.

285. See *id.* at 683-84. The fact that the school could use the building after the passage of twenty years for sectarian purposes caused the court to invalidate this part of the law. *Id.*

286. See *id.* at 675.

287. See *id.* at 678.

288. See *id.* at 678-79.

then reviewed the primary effect of the Act on the establishment of religion.²⁸⁹ The Court found that since the grants were for secular facilities, the primary effect of the Act was not to advance religion.²⁹⁰ The Court additionally held that universities are not as pervasive with religious doctrine as are religiously-affiliated secondary and elementary schools.²⁹¹ The Court also did not have a problem with entanglement since the grants were one-time payments.²⁹² The Court concluded that the entanglement was minimal since cursory inspections were all that were necessary to confirm the building was being used for purely secular activities.²⁹³

The "neutrality" and "incidental impact" tests would arrive at the same conclusion, but in a more straightforward fashion. The Court stated that the statute had a purely secular purpose.²⁹⁴ Thus, its impact on religion was incidental. It also was similarly neutral in that the law was unrelated to the religious affiliation of a particular university. Thus the "neutrality" test and the first portion of the "incidental impact" test are satisfied.

Stated differently, insofar as our adaptation of *Smith*²⁹⁵ is pertinent, it suffices to say that the aid involved in *Tilton* was generally applicable to all higher education institutions. As such, the merely incidental and very minimal brush with Establishment Clause concerns does not change the rule that the First Amendment is simply inapplicable. The application of our *O'Brien-Turner* analysis²⁹⁶ would follow that applied to *Hunt*.²⁹⁷

One factual difference between *Hunt* and *Tilton* provides an opportunity to highlight the operation of the part of our *O'Brien-Turner* analysis which requires that the means selected by government must not encroach on substantially more Establishment Clause concerns than are needed to ensure the effective accomplishment to the government's goal.²⁹⁸ In *Tilton*, the government had limited the ban on religious use of the building constructed with government funds to 20 years.²⁹⁹ In the language of the *O'Brien-Turner* test, this provision is substantially more encroachment on Establishment Clause concerns than is needed for effective accomplishment of the government's goal. The Court severed

289. See *Tilton*, 403 U.S. at 679.

290. See *id.* at 681-82.

291. See *id.* at 682-83.

292. See *id.* at 687-88.

293. See *id.*

294. See *id.* at 679.

295. See *supra* notes 71-78 and accompanying text.

296. See *supra* notes 52-70 and accompanying text.

297. See *supra* notes 114-20 and accompanying text.

298. See *supra* note 69.

299. *Tilton*, 403 U.S. at 683.

the 20 year provision and let the remainder of the law stand.³⁰⁰ This holding is precisely what would occur under our adaptation of the *O'Brien-Turner* test. Additionally, since the facilities were merely for secular activities for twenty years, the effect on religion would be minimal. Thus, the "incidental impact" test would also be satisfied because the grants affected the religious teaching minimally, by giving the building to the university in 20 years. Therefore, the federal statute cases arrive at the same outcome under both *Lemon* and, under the "neutrality" and "incidental impact" tests, but with the later tests giving a better guiding light for courts and legislatures to follow.

C. Direct Funding to Elementary and Secondary Schools

The greatest area of confusion and misuse of the *Lemon* test happens in the area of state funding provided to elementary and secondary schools with a religious affiliation. Among the primary cases within this subgroup are *Lemon v. Kurtzman*,³⁰¹ *Committee for Public Education & Religious Liberty v. Nyquist*,³⁰² *Levitt v. Committee for Public Education & Religious Liberty*,³⁰³ *Wolman v. Walter*,³⁰⁴ and *Meek v. Pittenger*.³⁰⁵ In the *Lemon* case, the Supreme Court assembled the three part Establishment Clause conflict test (the *Lemon* test).³⁰⁶ This article will analyze each of these cases under the "neutrality" and "incidental impact" tests.³⁰⁷

As stated previously, *Lemon* dealt with two state statutes, one from Rhode Island and the other from Pennsylvania.³⁰⁸ The statutes provided state funding for religious and private schools for purely secular teachings.³⁰⁹ Both statutes provided funding, either directly to the private school (whether or not it had a religious affiliation) or directly to the teacher, to solve an important state purpose, education.³¹⁰ Both States sought to solve the decline in quality secular teaching at private and religious schools.³¹¹ Rhode Island's statute³¹² used equalization to solve the problem by equalizing the salaries of private school teachers,

300. *Id.* at 683-84.

301. 403 U.S. 602 (1971).

302. 413 U.S. 756 (1973).

303. 413 U.S. 472 (1973).

304. 433 U.S. 229 (1977).

305. 421 U.S. 349 (1975).

306. *See Lemon*, 403 U.S. at 612-13. The *Lemon* test consisted of three prongs: neutrality, legislative outcome, and entanglement between government and religion. *See id.*

307. *See supra* notes 52-78 and accompanying text.

308. *See Lemon*, 403 U.S. at 606-09.

309. *See id.*

310. *See id.*

311. *See id.*

312. R. I. GEN. LAWS. § 16-51-1 (Supp. 1970).

including those who taught secular subjects in a school with a religious affiliation, with the salaries of those who taught in public schools.³¹³ In Pennsylvania,³¹⁴ the State reimbursed the non-public school for "secular education services."³¹⁵ Both statutes contained procedures to protect the funds from going to sectarian teachings, such as audits of funds spent and examination of records in order to compute reimbursements.³¹⁶

As noted in *Lemon*, the Supreme Court reviewed the statutes based upon the newly developed *Lemon* test.³¹⁷ The first prong of the "incidental impact" test and the only prong of the "neutrality" test require the state statute or law be equally applied. In *Lemon*, both the Rhode Island and Pennsylvania statutes applied equally to all private schools whether or not they had a religious affiliation.³¹⁸ Rhode Island sought to bring qualified teachers to all schools.³¹⁹ To accomplish the goal, the State used an equalization funding program to subsidize all secular teaching within Rhode Island schools.³²⁰ In Pennsylvania, the State's goal was much the same.³²¹ However, in Pennsylvania the State sought to purchase secular teaching from all schools.³²² Both States had a substantial governmental purpose, education of the State's children, and applied the means to accomplish the purpose neutrally. Therefore, the statutes passed the "neutrality" test and the first prong of the "incidental impact" test. Thus under the neutrality test, the Establishment Clause simply would not apply. Having an incidental impact (The purpose was to improve secular education in private schools including those with a religious affiliation; therefore, the brush with Establishment Clause concerns is merely incidental.), we now need to turn to the other elements of that test.

The main purposes behind the Pennsylvania and Rhode Island laws were to bring the private school's secular teachings up to par with the public school system.³²³ Surely, a state government seeking to equalize the secular education within their state is an important governmental purpose. The next major step is to decide if the method both states used

313. See *Lemon*, 403 U.S. at 607-09. The Rhode Island plan allowed the State to supplement non-public school teachers who taught secular subjects up to 15%, but not over, the salary of public teachers. See *id.* at 607.

314. PA. STAT. ANN. tit. 24, §§ 5601-5609 (Supp. 1971).

315. See *Lemon*, 403 U.S. at 609-10. The statute gave the State the right to purchase secular teachings from non-public schools. See *id.* at 609.

316. See *id.* at 606-10.

317. See *id.* at 602.

318. See *id.* at 607-10.

319. See *id.* at 607-08.

320. See *id.*

321. See *id.* at 609-10.

322. See *id.*

323. See *id.* 606-09.

was narrowly tailored.³²⁴ Based upon the *O'Brien-Turner* tests, the government's purpose would have to be less effective if carried out by other means and those means must not intrude on Establishment Clause concerns in a substantially greater manner than needed to accomplish the purpose.³²⁵

In *Lemon*, the State governments sought to accomplish their goal through direct funding of the secular education at private schools, including those with a religious affiliation.³²⁶ Without direct funding the States would have to hire, train and supervise additional teachers to teach secular subjects to the private school students. This method would accomplish the same goals, but far less effectively.

The second portion of the equation requires that the means must not interfere with Establishment Clause concerns substantially more than is necessary to accomplish the purpose.³²⁷ The brush against the Establishment Clause was not substantially greater than necessary simply because the States were supporting secular education in schools with religious affiliation. Monitoring of state funding would reduce the proximity of the State aid to the Establishment Clause even further. This, of course, brings up the entanglement concern (the third prong of the *Lemon* Test). The answer is as we have stated it twice already. State monitoring of the teacher's actions is a problem only if the private school finds it to be so.³²⁸ The incidental impact test would thus find no violation of the Establishment Clause.

*Nyquist*³²⁹ dealt with New York's attempt to raise non-public schools quality of education to a level equivalent to public schools through the Health and Safety Grants for Non-public School Children Program and the Elementary and Secondary Education Opportunity Program.³³⁰ The Health and Safety Grant program consisted of funds for maintenance and repair of school facilities.³³¹ New York limited the grants to \$30 per

324. See *supra* note 69.

325. See *id.*

326. See *Lemon*, 403 U.S. at 606-09. Even though each state accomplished the direct funding mechanism in a different manner, the effect was the same: direct funding for secular studies. See *id.*

327. See *supra* notes 69-70.

328. See *supra* notes 150-151 and accompanying text. See also *supra* note 280 and accompanying text.

329. 413 U.S. 756 (1973).

330. See *Nyquist*, 413 U.S. at 762, 764.

331. See *id.* at 763. The statute defined maintenance and repair as "the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled students." *Id.*

student or \$40 per student if the facility was over twenty-five years old.³³² The Elementary and Secondary Education Opportunity program offered subsidies to lower income families for reimbursement of school expenses (\$50 for grade school or \$100 for high school—not to exceed 50% of tuition).³³³ The program also gave tax savings to high income taxpayers, but the tax savings decreased as the income became higher.³³⁴

The Court used the recently developed *Lemon* test to decide the constitutionality of the programs.³³⁵ It concluded that since the programs did not state a particular non-public school objective and were for an important governmental purpose, the programs passed the *Lemon* test's secular purpose element.³³⁶ The Court did not need to tangle (so to speak) with the third *Lemon* element, entanglement, since the State was not involved except in the distribution of funds.³³⁷

Therefore, in *Nyquist* the Court's primary concern was the effect the funds had on the advancement of religion.³³⁸ The Court stated that the Health and Safety Grants "inevitably . . . subsidize and advance the religious mission of sectarian schools."³³⁹ The Court applied the same reasoning to the Elementary and Secondary Education Opportunity program.³⁴⁰ The Court struggled with the problem of direct aid to the parents, contrasted with direct aid to the schools, but held the purpose of the aid was to directly support sectarian schools.³⁴¹ Therefore, both programs failed the *Lemon* test's second element, primary effect, and the Court held both programs unconstitutional.

Applying the "neutrality" test and the "*O'Brien-Turner*" incidental impact test (since New York sought to equalize health and safety measures of public and private schools and create diversity by modestly assisting parents to enroll their children in private schools—perhaps reducing the number of children in the public school systems), the programs were both neutral respecting Establishment Clause concerns and had only an incidental effect on those concerns. Thus the programs passed the "neutrality" test and the first portion of the "incidental impact" test. Under the *Smith* neutrality test, the Establishment Clause would not even apply. In further support of the indirect nature of the impact, the Health and Safety Grants merely provided funds to non-public schools for

332. *See id.* at 763.

333. *See id.* at 764.

334. *See id.* at 765-66.

335. *See id.* at 771.

336. *See id.* at 773.

337. *See id.* at 780.

338. *See id.* at 774-80.

339. *Id.* at 779-80

340. *See id.* at 780.

341. *See id.* at 783.

repairs and maintenance.³⁴² The schools used the funds for upkeep and maintenance of buildings, not the teaching of religion or purchasing religious materials. Under the *O'Brien-Turner* test the Court's *Lemon* reasoning (which suggested that the schools could use the funds to pay an employee to clean the school chapel or renovate a room where religion is taught³⁴³) is simply of no moment. Put somewhat differently, the State set out to improve health and safety at schools, some of which had a religious affiliation. This purpose is equivalent to the expressed neutral purpose in *O'Brien* of having a draft card. The fact that someone might want to burn the card was only incidentally affected by the law. Here the relationship of health and safety purposes to Establishment Clause concerns is the same. The same analysis would apply to the modest subsidies provided to parents. Offering them some choice as to where to send their children to school (and reducing the pressure on the public schools) is totally unrelated to advancing religion and has only an incidental impact on such advancement, if any.

Under the remainder of the *O'Brien-Turner* test, the proposed New York statutes must be important. New York's purpose was to make sure the buildings that school children used were kept at a minimum standard of repair and cleanliness.³⁴⁴ In addition, the State did not want a great influx of private and religious school students into the public system which could not handle the additional students without great expense to the State.³⁴⁵ Therefore, New York's programs addressed important governmental purposes: the safety and well being of the students, the protection of the public school system and a choice provided to the parents.

The next issue under the *O'Brien-Turner* test is whether the means New York used were narrowly tailored to accomplish the governmental purpose of each law.³⁴⁶ As stated previously, New York sought to provide safe and clean schools for all school children and protect its public school systems viability.³⁴⁷ A per student allocation of funds allowed the State to disburse funds on the needs of the schools based upon student population. The means accomplished the State's purpose efficiently because the schools with more students would require greater maintenance and repair. Employees of the school system could have been sent to effectuate the health and safety purposes. However, this would clearly be less effective

342. See *id.* at 762-63. See *supra* note 331 for description of maintenance and repairs.

343. *Nyquist*, 413 U.S. at 774.

344. See *id.* at 763-64.

345. See *id.* at 765.

346. See *supra* notes 52-70 and accompanying text.

347. See *Nyquist*, 413 U.S. at 763-65.

than the simple payment of funds for repair and safety. For one thing, the State would not have been required to employ additional personnel with fringe benefits and other problems that might involve. Thus there can be little doubt that the direct payment of funds was more effective than having school system personnel do the work. If one assumes that the primary purpose of the Education Opportunity Program was to ease the burden on the public school system by making private school education somewhat more affordable, then it is almost axiomatic that the greater number of students enrolled in private schools the more protection offered the public school system. Thus, an influx of students into the public school system is clearly less effective from a fiscal point of view than providing a financial boost to private schools.

The next issue under the *O'Brien-Turner* narrowly tailored test is whether the means infringe on Establishment Clause concerns substantially more than necessary.³⁴⁸ The statute gave money to private and religious schools based upon the number of school children.³⁴⁹ It is difficult to see how the proximity of this program to Establishment Clause concerns (which doesn't appear to be all that great anyway) could have been reduced without simply scrapping the program or monitoring what was done with the money. Obviously, scrapping the program to reduce the proximity is not required by the narrow tailoring requirement. Monitoring is a possibility. Our views on monitoring and entanglement have been repeatedly stated.

If the Education Opportunity program was to have a chance to work, then it should be recognized that some way had to be devised to increase private school enrollment. The grants and tax credits to the children's parents would be much further removed from Establishment Clause concerns than direct grants of money to the schools themselves. Thus it is easy to state that the grants and tax credits did not brush against Establishment Clause concerns substantially more than was necessary.

A case which the Court decided at the same time as *Nyquist* was *Levitt v. Committee for Public Education & Religious Liberty*.³⁵⁰ In *Levitt* the State of New York sought to reimburse non-public schools for services rendered in order to comply with the State's mandatory testing requirements. The funding was to reimburse for the Pupil Evaluation Progress Test and other teacher prepared tests on subjects required to be

348. See *supra* note 70.

349. See *Nyquist*, 413 U.S. at 763-65.

350. 413 U.S. 472 (1973).

taught under State law.³⁵¹ The Chapter contained language prohibiting the school from using the funds for religious work or instruction.³⁵²

The Court reviewed the case under the *Lemon* test with emphasis on the Court's analysis in *Nyquist*.³⁵³ Under the first *Lemon* test element, secular purpose, the Court had no problem deciding that the statute was for a secular purpose, reimbursement to the school for mandatory testing.³⁵⁴ However, the Court got hung-up on the primary effect the funds had upon the establishment of religion.³⁵⁵ The reasoning the Court used was similar to *Nyquist* in that the school might use the funds for religious purposes.³⁵⁶ The Court thus held any direct aid to be a violation of the Establishment Clause because it would have the primary effect of advancing religion.³⁵⁷

Similar to *Nyquist*, New York was merely supplementing certain projects for a secular purpose.³⁵⁸ The Chapter's purpose was secular, and the Chapter was applied neutrally to non-public schools whether religiously affiliated or not. The law was also neutral in the sense that it had the effect of the State paying for all those categories of tests whether administered in public or private school. Thus, the law passed the "neutrality" test. As to the first portion of the "incidental impact" test, the state's purpose was clearly secular; whatever marginal advancement of religion took place was clearly incidental to that purpose. It is probably fair to say that the impact of this law on the advancement of religion was far less than the impact the draft card law had on O'Brien's expressive activity in burning the card. In addition, unlike *Nyquist*, New York was directly reimbursing the non-public school for mandatory testing required by the State.³⁵⁹ The funds should have only an incidental effect on religion since the tests are mandated whether the State reimbursed the non-public schools or not. Therefore, the New York law would pass constitutional muster under the "neutrality" test and pass the first part of the *O'Brien-Turner* or "incidental impact" test.

In addition, based upon the *O'Brien-Turner's* requirement that the means accomplish an important governmental purpose and be narrowly tailored, New York's reimbursement for mandatory testing passes for similar reasons as *Nyquist*. The purpose was to bring all schools to a

351. *See id.* at 474-75.

352. *See id.* at 477.

353. *See id.* at 478-79.

354. *See id.* at 479, note 7.

355. *See id.*

356. *See id.*

357. *See id.* at 481-82.

358. *See id.* at 474-75.

359. *See id.*

minimum level of secular education excellence,³⁶⁰ surely an important governmental purpose. Second, the means were narrowly tailored because it would have been less effective for New York to handle the tests using public school personnel. Exactly as in our analysis of *Nyquist*, the New York law does not intrude substantially more than necessary into Establishment Clause concerns.³⁶¹

The last major case within the funding of elementary and secondary non-public schools is *Meek v. Pittenger*.³⁶² The case dealt with public funding of non-public schools for various select programs.³⁶³ The State's purpose was to provide equal benefits to all children within the State.³⁶⁴ The Supreme Court reviewed the statute under the *Lemon* three pronged test.

Based upon the wording of the statute, the Supreme Court agreed the statute passed the first prong of the *Lemon* test; it had a secular purpose.³⁶⁵ That purpose was to provide all children within the State services equal to those received at public institutions.³⁶⁶ Under our "neutrality" test, the Supreme Court would have stopped its analysis at this point.

Since the purpose was clearly secular, any advancement of religion would be clearly incidental. There can be little doubt of the importance of insuring that all school children benefit from the various programs at issue. The law was clearly narrowly tailored because the benefits of these programs would have been greatly reduced, if indeed they would have existed at all without the State aid. Given the nature of the programs,³⁶⁷ it

360. *See id.*

361. *See supra* note 349 and accompanying and subsequent text.

362. 421 U.S. 349 (1975).

363. *See id.* at 353-57. Pennsylvania set up various programs depending upon the Act. *See id.* at 353-57. Under Act 194, the legislature authorized the State to supply "auxiliary services" to students of non-public schools. *Id.* The services varied from counseling and testing to services for exception and disadvantaged students. *See id.* at 352-53. Act 195 provided text books to students and also provided the State the ability to loan other "instructional materials and equipment, useful to the education of non-public school children." *Id.* at 354. The Court held that text book loan programs did not violate the Establishment Clause based upon its reasoning in *Board of Education v. Allen*, 392 U.S. 236 (1968). *See Meek*, 421 U.S. at 360. *See supra* pp. 17-19. The Acts required the non-public institution to use the services and equipment for purely secular purposes and mandated the institution comply with the State's compulsory attendance requirement. *See id.*

364. *See Meek*, 421 U.S. at 351-52.

365. *See id.* at 363.

366. *See id.* *See supra* note 363 for list of services.

367. Act 194 authorizes the Commonwealth to provide "auxiliary services" to all children enrolled in nonpublic elementary and secondary schools meeting Pennsylvania's compulsory-attendance requirements. "Auxiliary services" include counseling, testing, and psychological services, speech and hearing therapy, teaching and related services for exceptional children, for remedial students, and for the educationally disadvantaged, "and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth." Act 194 specifies that the teaching and

should be clear that New York Law does not intrude substantially more than necessary upon Establishment Clause concerns.

D. Acts of Government that Arguably Aid Religion
in Ways Other Than Financial

That some cases might satisfy one test but not the other is illustrated by *Stone v. Graham*.³⁶⁸ By law, Kentucky required "the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public classroom in the State."³⁶⁹ The Supreme Court, brushing aside the State's proffered purpose,³⁷⁰ found that "the pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature."³⁷¹ Thus the first element of the

services are to be provided in the non-public schools themselves by personnel drawn from the appropriate "intermediate unit," part of the public school system of the Commonwealth established to provide special services to local school districts. *See* PA. STAT. ANN., tit. 24 §§ 9-951 to 9-971 (West 1972).

Act 195 authorizes the State Secretary of Education, either directly or through the intermediate units, to lend textbooks without charge to children attending nonpublic elementary and secondary schools that meet the Commonwealth's compulsory-attendance requirements. The books that may be lent are limited to those "which are acceptable for use in any public, elementary, or secondary school of the Commonwealth." *Id.*

Act 195 also authorizes the Secretary of Education, pursuant to requests from the appropriate nonpublic school officials, to lend directly to the nonpublic schools "instructional materials and equipment, useful to the education" of nonpublic school children. "Instructional materials" are defined to include periodicals, photographs, maps, charts, sound recordings, films, "or any other printed and published materials of a similar nature." Instructional equipment," as defined by the Act, includes projection equipment, recording equipment, and laboratory equipment. *See* PA. STAT. ANN., tit. 24 §§ 9-951 to 9-971 (West 1972); *See also Meek*, 421 U.S. at 352-355.

368. 449 U.S. 39 (1980).

369. *Id.*

370. The Commonwealth insists that the statute in question serves a secular legislative purpose, observing that the legislature required the following notation in small print at the bottom of each display of the Ten Commandments: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." 1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), KY. REV. STAT. ANN. § 158.178 (Banks-Baldwin 1980). 449 U.S. at 41.

371. *Id.* at 41. This was so, said the Court, because "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Id.* The almost total malability of the *Lemon* test to suit the Court's whims is illustrated by the following comment by then-Justice Rehnquist in dissent.

With no support beyond its own *ipse dixit*, the Court concludes that the Kentucky statute involved in this case "has no secular legislative purpose," *ante*, at 193 (emphasis supplied), and that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature," *ante*, at 41. This even though, as the trial court found, "[t]he General Assembly thought the statute had a secular legislative purpose and specifically said so." App. to Pet. for Cert. 37. The Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence. *Stone*, 449 U.S. at 43 (Rehnquist, J., dissenting).

The Chief Justice (Burger) and Justices Blackman and Stewart dissented from the Courts "summary reversal" to which Justice Rehnquist refers in the portion of his dissent quoted above. *Id.*

Lemon test (no secular purpose) was found to be violated and the law was a violation of the Establishment Clause.³⁷²

Since this law cannot be said to be in a religiously neutral posture because of the nature of the Ten Commandments, it apparently would not fit the *Smith* neutrality test.³⁷³ However, the *O'Brien-Turner* test is a different matter. The posting of the Ten Commandments for the purpose Kentucky put forward has nothing to do with religion. As illustrated by the statement of purpose required to be affixed to the posted copies, "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."³⁷⁴ Even making allowances for the "sellers puff" contained in the statement of purpose, this is a secular purpose. However, it is a secular purpose achieved by means (the posting) that has an incidental effect on Establishment Clause concerns. As the Court pointed out, the Commandments are found in the Torah or Old Testament and contain injunction, concerning the worship of God. So, one must first ask if the purpose is important and would that purpose as stated by Kentucky be achieved less effectively by not posting them.³⁷⁵ The answer is obvious. However, does the law involve substantially more Establishment Clause concerns than are necessary to achieve the purpose?³⁷⁶ The answer is "no" because the Ten Commandments are a unit. Divide them up and their force is diminished.

*Engle v. Vitale*³⁷⁷ involved a prayer to be said in public schools. Under *Smith*, the prayer is certainly not "a general law regarding conduct" that is "not specifically directed at" the practice of religion.³⁷⁸ Under the *O'Brien-Turner* test, we need do no more than examine the purpose to see that the Regent's prayer would violate the Establishment Clause. To paraphrase what the Court said in *O'Brien*, "the government interest [purpose] is" not "unrelated to" the practice of religion.³⁷⁹ Therefore, the law in *Engel* would pass neither the *Smith* nor the

372. *Id.* at 42-43.

373. The *Smith* test appears, based on the only two examples available, to envision a law of almost total neutrality. *O'Brien*, on the other hand lends itself to the situation where, although perhaps not totally neutral, the act of government advancement of religion is, in truth, merely incidental to the purpose the law sets out to achieve.

374. *Stone*, 449 U.S. at 41.

375. *See supra* notes 52-70 and accompanying text.

376. *See id.*

377. 370 U.S. 421 (1962). The New York State Board of Regents drafted the prayer involved in this case and the Board of Education of Union Free School District Number 9 directed that the prayer be recited at the beginning of each school day. *Id.* at 422-423. Arrangements were made so that those who did not wish to participate would be "safeguard[ed]" against "embarrassments and pressures." *Id.* at note 2.

378. *See supra* notes 84-85 and accompanying text.

379. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

O'Brien-Turner incidental impact text. The law thus violates the Establishment Clause.

The year after *Engle* the Court decided *School District of Abington Township v. Schempp* and *Murray v. Curlett* together.³⁸⁰ At issue in *Schempp* was a Pennsylvania Statute³⁸¹ which "require[d] 'At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day.'"³⁸² The law also required that "[a]ny child . . . be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."³⁸³ At issue in *Murray* was a 1905 rule of the City of Baltimore³⁸⁴ which "provided for the holding of opening exercises in the schools of the city, consisting primarily of the 'reading, without comment, of a chapter of the Holy Bible and/or the use of the Lord's Prayer.'"³⁸⁵ As with *Engle*³⁸⁶ under *Smith*, the *Bible* reading is certainly not "a general law regulating conduct" that is "not specifically directed at" the practice of religion.³⁸⁷ And, it would be impossible to say that "the governmental interest [purpose] is unrelated to "the practice of religion."³⁸⁸ Exactly the same observations may be made regarding the *Bible* reading and/or Lord's Prayer recitation which was involved in *Murray*.

*Wallace v. Jaffree*³⁸⁹ presents a public school prayer issue that is much more difficult to resolve. In 1978 Alabama enacted a statute "which authorized a 1-minute period of silence in all public schools 'for meditation.'"³⁹⁰ In 1981 a similar second statute "authorized a period of silence 'for meditation or voluntary prayer.'"³⁹¹ The constitutional validity of the "for meditation" period of silence was upheld.³⁹² The meditation and prayer statute was found to be unconstitutional primarily based on the testimony of two people. State Senator Donald G. Holmes

380. 374 U.S. 203 (1963).

381. 24 PA. CONS. STAT. §15-1516, *as amended*, Pub. Law 1928 (Supp. 1960). *Id.* at 205.

382. *Id.*

383. *Id.*

384. *Id.* at 211. The rule was adopted "pursuant to Art. 77, Sec. 202 of the Annotated Code of Maryland." *Id.*

385. *Id.*

386. *See supra* note 377.

387. *See supra* text at note 378.

388. *Id.*

389. 472 U.S. 38 (1985).

390. *Id.* at 40. The statute was ALA. CODE §16-1-20 (1978). *Id.*

391. *Id.* The statute was ALA. CODE §16-1-20.1 (1978).

392. *Id.* at 41. A third Alabama statute, ALA. CODE §16-1-20.2 (1978) which, "authorized teachers to lead 'willing students' in a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the World", *Id.* at 40, was held to violate the Establishment Clause. *Id.* at 41. This statute and its being ruled unconstitutional plays no part in this article.

testified that he was the "prime sponsor" of . . . Sec. 16-1-20.1. He explained that the bill was an effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction."³⁹³ Then the governor of Alabama "express[ly] admitt[ed] . . . that the enactment of Sec. 16-1-20.1 was intended to "clarify [the State's] intent to have prayer as part of the daily classroom activity . . ." and that the "expressed legislative purpose in enacting Section 16-1-20.1 . . . " was to "return voluntary prayer to the public schools."³⁹⁴

In the view of the majority of the Court, the first element of the *Lemon* test was "dispositive." The State's purpose was totally sectarian.³⁹⁵

One must study the dissent of Chief Justice Burger to understand how the *O'Brien-Turner* neutrality test would lead to a totally different view of Sec. 16-1-20.1. Although his critique of the Court's use of statements of a single legislator's [Holmes] motive to establish the collective motivation of the Legislature is correct,³⁹⁶ what is absolutely damning is that the majority opinion ignored another of Mr. Holmes' statements. "[T]he sponsor (Holmes) also testified that one of his purposes [motives?] in drafting and sponsoring [16-1-20.1] was to clear up a widespread misunderstanding that a schoolchild is legally *prohibited* from engaging in silent, individual prayer once he steps inside a public school building."³⁹⁷

Two can obviously play the game of substituting individual motive for collective legislative purpose; thus, Chief Justice Burger pointed out that "[t]hat testimony is at least as important as the statements the Court relies upon, and surely that testimony manifests a permissible purpose."³⁹⁸

Put in the simple terms of the *O'Brien-Turner* neutrality test, is there a legislative purpose unrelated to a government sponsored religious exercise where the means selected to achieve it creates merely an incidental government involvement with religion? The answer, we believe, is yes. In the words of Chief Justice Burger,

[Sec. 16-1-20.1] accommodates a purely private, voluntary religious choices of individual pupils who wish to pray while at the same time creating a time for nonreligious reflection for

393. *Id.* at 43.

394. *Id.* at 57 n.44.

395. *Id.* at 53.

396. The use of individual motive to determine the purpose of a legislative action is rife with confusion. See the cases collected at West key number, STATUTES 216 in the various digests.

397. *Wallace*, 472 U.S. at 87.

398. *Id.*

those who do not choose to pray. The statute also provides a meaningful opportunity for schoolchildren to appreciate the absolute constitutional right of each individual to worship or believe as the individual wishes.³⁹⁹

Admittedly, there is not here the total absence of relationship between purpose and the incidental impact of means that one finds in *O'Brien*,⁴⁰⁰ *Glen Theatres*⁴⁰¹ or *Smith*.⁴⁰² To be sure, part of the purpose has religious overtones and therefore the impact of the means on religion is not totally incidental. Therefore we would not suggest that the *Smith* approach of total First Amendment inapplicability is appropriate here. However, the purposes appear to go sufficiently beyond the simple endorsement of a religious practice to warrant the scrutiny under the *O'Brien-Turner* test rather than the "ridiculous" (or bordering thereupon)⁴⁰³ voiding of the statute under the secular purpose prong of the *Lemon* test. It would, however, be difficult to find the requisite *Smith* neutrality.

To apply the remainder of the *O'Brien-Turner* test, one first asks whether the purpose of the law is important. We do not believe it is beyond reason to suggest that clarifying any misunderstanding as to whether the statute's moment of silence could be used for prayer,⁴⁰⁴ together with Chief Justice Burger's observation regarding the appreciation of the constitutional lesson of religious toleration,⁴⁰⁵ is sufficiently important. Under *O'Brien-Turner*, the relationship of means to purpose must be such that the purpose would be achieved less effectively some other way. Certainly, since this efficacy of means test does not require a search for less drastic alternatives, it is fair to say that there is no other way to insure in the minds of children that a moment of silence includes the right to pray as well as meditate other than to say so. That is what the statute does, that and no more. Therefore it does not intrude substantially more than is necessary into Establishment Clause concerns. As to the lesson about religious toleration, actual practice is worth more than all the words in the world. We believe that the statute should not have been struck down under *Lemon* but upheld under *O'Brien-Turner*. That is the true neutrality toward religion to which the majority opinion merely pays lip service.

399. *Id.* at 89.

400. *See supra* notes 52-70 and accompanying text.

401. *See supra* notes 80-84 and accompanying text.

402. *See supra* notes 71-78 and accompanying text.

403. *Wallace*, 472 U.S. at 89.

404. *Id.* at 87.

405. *Id.* at 89.

Edwards v. Aguillard,⁴⁰⁶ which involved a law that required that the theory of evolution and the theory of creation science be taught in tandem or not at all, appears at first blush to be a very clear example of a legislative purpose that has everything to do with the promotion of religion in the public schools and nothing to do with neutrality. Viewed that way, it could never survive either the *O'Brien-Turner* test or the *Smith* test. However once it is realized, as pointed out by the dissent of Justice Scalia, that a powerful secular purpose did exist and that its affect on any Establishment Clause concerns were merely incidental, *O'Brien-Turner* can easily be applied.

The crux of the case for the law being directed at something other than religion and merely having an incidental effect upon religion is found in the following summation by Justice Scalia of the testimony of the bill's sponsor, Senator Bill Keith, and those whom the Senator called to testify. We have edited it for the purpose of this article.

There are only two scientific explanations for the beginning of life — evolution and creation science. Both posit a theory of the origin of life and subject that theory to empirical testing. The body of scientific evidence supporting creation science is as strong as that supporting evolution. Creation science is educationally valuable because students exposed to it better understand the current state of scientific evidence about the origin of life. Creation science can and should be presented to children without any religious content. The censorship of creation science has at least two harmful effects. First, it deprives students of one of the two scientific explanations for the origin of life and leads them to believe that evolution is proven fact; thus their education suffers and they are wrongly taught that science has proved their religious beliefs false.⁴⁰⁷

As Justice Scalia noted, it is not necessary to “endorse the accuracy” of the testimony which we have set out above. That, he correctly felt, was beside the point:

Our task is not to judge the debate about teaching the origins of life, but to ascertain what the members of the Louisiana Legislature believed. The vast majority of them voted to approve a bill which explicitly stated a secular purpose; what is crucial is not their *wisdom* in believing that purpose would

406. 482 U.S. 578 (1987).

407. *Id.* at 619-29 (Scalia, J., dissenting)(citations omitted).

be achieved by the bill, but their *sincerity* in believing it would be.⁴⁰⁸

If one assumes that a balanced teaching of the two theories of creation does not focus on religion, then the effect of the law in ensuring that the flaws in the teaching of evolution alone (the fact that a child is not taught that his or her religious beliefs have been disproven by science) is merely an incidental treatment of religion.

The application of the *O'Brien-Turner* balancing test appears to be easily satisfied. It is clearly an important purpose for both scientific theories to be taught in the interest of "academic freedom" as that phrase was understood by the Louisiana Legislature. The means, teaching both theories, is clearly "narrowly tailored" in the sense of the purpose being achieved less effectively by some other means. There are no other means. And for that reason substantially no more Establishment Clause concerns are involved than are necessary.

*Marsh v. Chambers*⁴⁰⁹ presents a situation that must be treated apart from the simple application of the two tests we have been applying.⁴¹⁰ At issue was the practice of a State legislature employing a chaplain and opening each legislative session with a prayer.⁴¹¹ Just as such a practice could not survive even a reasonable application⁴¹² of the *Lemon* test, neither can it survive either of our proposed tests. It is not a neutral practice that merely has religious implications as in our version of *Smith*,⁴¹³ nor is it a non-religious purpose whose achievement has an indirect and unintended effect on Establishment Clause concerns as in our version of *O'Brien-Turner*.⁴¹⁴ This is simply a form of religious endorsement, thus it is not neutral in regard to Establishment Clause concerns. However, in *Marsh* the Court refused to apply *Lemon* and upheld the practice as one rooted in history⁴¹⁵ and not posing any real threat to Establishment Clause concerns.⁴¹⁶ The same must be done here with the two neutrality tests.

408. *Id.* at 621 (Scalia, J., dissenting).

409. 463 U.S. 783 (1983).

410. See *supra* notes 53-68, 71-78 and accompanying text.

411. 463 U.S. at 785-86.

412. See *supra* note 10.

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415. 463 U.S. at 786-91. Although "standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees.... (*Id.* at 790) the Court found that "the unique history leads us to accept the interpretations of the First Amendment drafts men who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged." *Id.* at 791.

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416. *Id.* at 791-92.

The next area deals with public displays of religiously affiliated holiday decorations. The two cases which deal with this activity are *Lynch v. Donnelly*⁴¹⁷ and *County of Allegheny v. A.C.L.U.*⁴¹⁸ In both cases, the Court again showed the inconsistencies and varied results the *Lemon* test can create with similar facts. The Court struggled with both the intent and primary effect of allowing a government to display religiously affiliated decorations during a holiday period.

In *Lynch*, the City of Pawtucket, Rhode Island erected a Christmas display every holiday season.⁴¹⁹ The display was located in a park, owned by a non-profit organization, in the heart of Pawtucket.⁴²⁰ Pawtucket's city government, along with the downtown merchants erected the display, which consisted of various Christmas type items⁴²¹ and a crèche.⁴²² The Court also noted the crèche originally cost the city \$1,365 but was currently worth only \$200, and the city spent about \$20 per year erecting and dismantling the crèche.⁴²³ The respondents brought this action because they believed the crèche display violated the Establishment Clause.⁴²⁴

The Court began its analysis under the *Lemon* test but noted within the first paragraph of the analysis that "total separation [of church and state] is not possible in an absolute sense."⁴²⁵ Some relationship between government and religious organizations is inevitable."⁴²⁶ Additionally, the Court started to tear down the "wall" of separation.⁴²⁷ Then the Court went through a litany (so to speak) of examples where the government and religion act together or the separation of church and state doctrine is blurred.⁴²⁸

417. 465 U.S. 668 (1984).

418. 492 U.S. 573 (1989).

419. See *Lynch*, 465 U.S. at 671.

420. See *id.*

421. The items included "[a] Santa Claus house, reindeer pulling Santa's sleigh, candy-stripped poles, a Christmas tree, carolers, . . . , a large banner that reads 'Seasons Greetings.'" *Id.*

422. See *id.* A crèche is the Christian representation of the birth of Christ which normally consists of Christ, a manger, Mother Mary, Joseph, three wise men, and various villagers and farm animals.

423. See *Lynch*, 465 U.S. at 671.

424. *Id.*

425. *Id.* at 672.

426. See *id.*

427. See *id.* The Court notes that "the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." *Id.*

428. The Court noted the history of religion within the United States and its influence on government. *Lynch*, 465 U.S. at 675-76. Some of the examples the Court gave were Washington's Thanksgiving proclamation based upon religious overtones and the "Executive Orders and other official announcements of Presidents and of Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. See *id.*

In the Court's review of the current problem, the *Lemon* test elements of secular purpose and primary effect were of the greatest concern.⁴²⁹ Pawtucket's stated purpose was based upon the whole display, not just the crèche, and was simply to have a Christmas display.⁴³⁰ The Court stated that a city sponsoring a display to celebrate a holiday was a legitimate secular purpose.⁴³¹ Thus, the display passed the first element of the *Lemon* test.

Second, the district court had held that the crèche had the primary effect of benefitting the Christian religion in particular.⁴³² The Court noted that there might be some incidental benefit, but the benefit was surely less than previously allowed benefits, as in *Board of Education v. Allen*⁴³³ and *Roemer v. Board of Public Works*.⁴³⁴ For the final element, entanglement, the Court merely used a kind and degree analysis.⁴³⁵ The Court stated the value of the crèche and the maintenance and set-up costs were de minimis.⁴³⁶ Therefore, the Court held that the crèche display did not violate any of the *Lemon* test elements and did not violate the Establishment Clause.

The two tests established within this article are closely related to the analysis the Court used in *Lynch*. First, the *Smith* "neutrality" test would simply look to see if the display was neutrally established.⁴³⁷ Pawtucket merely wished to celebrate the holiday, a legitimate legislative purpose.⁴³⁸ In addition, the display had no more than an incidental impact on religion, as the Court stated previously.⁴³⁹ Thus, the display passed the *Smith* test and the first portion of the *O'Brien-Turner* test.

The *O'Brien-Turner* test's first balancing of interests element requires that the legislative purpose be important which can hardly be disputed. The second element, narrowly tailored, is somewhat harder to explain. However, the two basic underpinnings of narrowly tailored, would lead to the inclusion of the crèche in the overall holiday display being upheld. A Christmas display is simply less effective without the crèche. As secular as many aspects of the holiday have become, it still is

429. *See id.* at 680.

430. *See id.* at 681.

431. *See id.*

432. *See id.*

433. 392 U.S. 236 (1968). *See supra* notes 185-99 and accompanying text at that point for our discussion of *Allen*.

434. 426 U.S. 736 (1976). *See Lynch*, 465 U.S. at 681. *See also supra* notes 126-55 for our discussion of *Roemer*.

435. *See Lynch*, 465 U.S. at 684.

436. *See id.*

437. *See supra* notes 71-78 for an explanation of the "neutrality" test.

438. *See Lynch*, 465 U.S. at 681.

439. *See id.* at 685.

related to the birth of Christ. Second, since the crèche is but one part of a display containing a number of secular symbols of the holiday, the crèche does not conflict with First Amendment concerns substantially more than necessary. Even the Court noted that any benefit or infringement on a constitutional area was incidental.⁴⁴⁰ Therefore, the display would pass both the *Smith* and *O'Brien-Turner* tests.

The next display case, *County of Allegheny v. A.C.L.U.*,⁴⁴¹ dealt with a crèche display placed within the County Courthouse and a menorah placed outside the City-County building.⁴⁴² The Court began its review with a history of both the crèche and the menorah.⁴⁴³ Both symbols relate to religious holidays, Christmas and Chanukah, but the Court went one step further with the menorah and stated the Israeli Jews do not place as much emphasis on the menorah as the American Jews do.⁴⁴⁴

Based upon the historic, cultural and present meaning of the symbols, the Court initiated its analysis under the *Lemon* test elements. First the Court reviewed the crèche⁴⁴⁵ under both the secular purpose and primary effect elements of *Lemon*. The Court differentiated the crèche from the *Lynch* crèche because of its prominence in the display area. In addition, the Court noted this crèche had a sign stating "Glory to God in the Highest."⁴⁴⁶ As in *Lynch*, the Court observed that having a Christmas display is a legitimate legislative secular activity.⁴⁴⁷ But, the Court held that the display's primary effect was the advancement of religion, mainly the Christian faith.⁴⁴⁸ Therefore, the crèche violated the Establishment Clause.

Achieving a different result under the *Smith* and *O'Brien-Turner* tests may not be possible, certainly not under *Smith* anyway. The display of the crèche is simply not the neutral application of a law that is equally applicable to all. Therefore, application of our version of the *Smith* neutrality test would lead to the same result that the Court reached under *Lemon*.

The *O'Brien-Turner* test presents greater possibilities, but only if the existence of a purpose unrelated to religion can be identified. It is admittedly a stretch, but that purpose might be simply the celebration of what is, after all, a national holiday. If this definition of the government's

440. *See id.* at 681-83.

441. 492 U.S. 573 (1989).

442. *See id.* at 578.

443. *See id.* at 578-87.

444. *See id.* at 586-87. The cultural celebration differences between the crèche and the menorah become important later in the Court's analysis. 492 U.S. 573 (1989).

445. *See County of Allegheny*, 492 U.S. at 594.

446. *See id.* at 598.

447. *See generally Lynch*, 465 U.S. 668. *See County of Allegheny*, 492 U.S. at 598-602.

448. *See* 492 U.S. at 598-602.

purpose can be sustained, then it is possible to argue that the effect of the crèche on Establishment Clause concerns is merely indirect or incidental. Then, if the above analysis holds up, the placement of the crèche could probably be upheld. Celebrating a national holiday is obviously an important purpose. The first element of narrow tailoring is met for the same reason as *Lynch*.⁴⁴⁹ When one arrives at the second element, however, problems arise. Arguably there is substantially more intrusion into interests protected by the Establishment Clause than is necessary because of the availability of a *Lynch* type holiday display. On the other hand, this appears to be simply a search for a less drastic means which is emphatically not part of this test. Therefore it is possible to argue, even if not with great confidence, that the nature of the holiday being what it is, the crèche is not substantially a greater intrusion than necessary into Establishment Clause concerns.

The Court created the fiction that the menorah is more than strictly a religious symbol, being also secular in nature and then used the elements of the *Lemon* test to prove a menorah does not violate the Establishment Clause.⁴⁵⁰ This fiction could also have been carried to the crèche because manger scenes were used often in the pre-Christian days. However, the Court also noted that the menorah was beside a Christmas tree and a Statue of Liberty.⁴⁵¹ Thus the display did not portray a singly religious message.⁴⁵² Based upon the same reasoning as *Lynch*, the Court held that the menorah did not violate the Establishment Clause.

The *Smith* and *O'Brien-Turner* tests would go through the same type of analysis with the menorah as with the crèche in *Lynch*.

The next major area of non-financial cases surround the Federal Civil Rights legislation and its effect on religious institutions. One of the current and major cases dealing with Title VII of the Civil Rights Act of 1964 is *Church of Jesus Christ of Latter Day Saints v. Amos*.⁴⁵³ The case involved an employee who was discharged from his duties at a non-profit facility run by the Church of Jesus Christ of Latter-Day Saints (otherwise known as "Mormons").⁴⁵⁴ The Church discharged the employee because of a requirement that the employee must be a member of the Church in good standing.⁴⁵⁵ The employee brought suit under the Civil Rights Act stating that the §702 religious exemption to the Civil Rights Act was

449. See *supra* text at the second and third sentence before note 435.

450. See *County of Allegheny*, 492 U.S. at 613-15.

451. See *id.* at 613-16.

452. See *id.*

453. 483 U.S. 327 (1987).

454. See *id.*

455. See *id.* at 330-31.

unconstitutional because the section violated the Establishment Clause.⁴⁵⁶ The Church countered stating that §702 did not violate the Establishment Clause.

The Court reviewed the statute using the *Lemon* test's three elements: intent, primary effect and entanglement.⁴⁵⁷ The first element, intent, the Court discounted by reasoning that the legislature was trying "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."⁴⁵⁸ Thus, the Court found the legislative intent was secular, and the first *Lemon* test element was met.

The second element, primary effect, was slightly harder for the Court to analyze. The Court dropped back to a defensive position stating that some laws benefit religion,⁴⁵⁹ and the Court noted that these laws will have the effect of benefitting religion, but the benefit is incidental.⁴⁶⁰ In addition, since the nonprofit facility was a gymnasium, the Court could not fathom how a gymnasium could promote religion.⁴⁶¹ Therefore, the religious exemption under the 1964 Civil Rights Act did not have the primary effect of advancing or establishing religion. The Court did not analyze the entanglement element because §702 did not involve any government interference with religion. The statute was written to prevent this from happening.⁴⁶² Thus, the Court held the exemption for the 1964 Civil Rights Act did not violate the Establishment Clause.

The *Smith* and *O'Brien-Turner* tests would arrive at the same conclusion but through a more logical analysis. First, the *Smith* test requires the law to be neutrally applied to all.⁴⁶³ In the current case, the exemption, §702, applies equally to all religious institutions' secular activities. In addition, the effect of the statute must not have more than an incidental effect on religion. In the current case, the Court even stated §702 does not have more than an incidental effect on religion because the purpose was to keep government out of religion.⁴⁶⁴ Therefore, the exemption passed both the *Smith* test and the first portion of the *O'Brien-Turner* test.

456. See *id.* at 331.

457. See *Church of Jesus Christ Latter-Day Saints*, 483 U.S. at 334-35.

458. See *id.* at 335.

459. The Court specifically notes the property tax exemptions of *Waltz v. Tax Commissioner* and the school book loans upheld in *Board of Education v. Allen*. See *Church of Jesus Christ of Latter-Day Saints*, 483 U.S. at 336-37 (citations omitted).

460. See *id.*

461. See *id.*

462. See generally *Church of Jesus Christ of Latter-Day Saints*, 483 U.S. at 339.

463. See *supra* notes 71-78 and accompanying text.

464. See *Amos*, 483 U.S. at 336-38.

The *O'Brien-Turner* test also requires that the means used to accomplish the legislative purpose be narrowly tailored. The Court gave the reasons the legislation was necessary: to prevent government interference in a religious organization's practices, which is clearly an important purpose.⁴⁶⁵ The government could not separate itself from interfering with religion if the 1964 Civil Rights Act applied equally to all employers. The government would be forced to interfere in the religions hiring practices and thereby get the government entangled with religion.⁴⁶⁶ This resembles the "Catch 22" argument.⁴⁶⁷ Therefore, the 1964 Civil Rights Act might not have passed the *Lemon* test without the exemption supplied through §702.

The means was narrowly tailored because without the exemption the legislative purpose could not have been met. In addition, the exemption had no more than incidental effect on any constitutionally protected area. The exemption did benefit religion, but as the Court pointed out, §702 did not have any greater benefit on religion than what the Court had previously held did not violate the Establishment Clause.⁴⁶⁸ Therefore, the religious organization's exemption from the 1964 Civil Rights Act passed both the *Smith*, *O'Brien-Turner*, and *Lemon* tests with the first two supplying a superior analysis of why the exemption did not violate the Establishment Clause.

The question of government's delegation of power to an individual or group has also entered into the Establishment Clause arena. In *Larkin v. Grendel's Den*, the State of Massachusetts created a statute which gave churches and schools the right to veto a liquor sales license if the establishment was within 500 feet of the church or school.⁴⁶⁹ The suit started when the Holy Cross Church objected/vetoed a liquor license application by Grendel's Den.⁴⁷⁰ The church's only reason for vetoing the application was because there were already so many liquor establishments within the area.⁴⁷¹ The Court reviewed the statute's constitutionality under the previously mentioned *Lemon* test's three elements: secular purpose, effect on religion and entanglement.⁴⁷²

465. See *infra* text at note 471.

466. *Id.*

467. See *supra* note 23.

468. See *Amos*, 483 U.S. at 336-337.

469. See *id.* at 117. The statute was MASS. GEN. LAWS ch.138 §16C (1974).

470. See *id.* at 118.

471. See *id.*

472. See *id.* at 123.

The Court acknowledged that protecting churches and educational institutions from the clientele of liquor establishments is a secular purpose.⁴⁷³ Thus, the statute passed the first element of the *Lemon* test.

The second element of the *Lemon* test, effect on religion, caused the Court to analyze the effect the veto power had on the establishment of religion. The Court found the statute allowed a church to veto a liquor license without reason or cause.⁴⁷⁴ The Court then went through an analysis of how a church may misuse the veto power.⁴⁷⁵ The Court states that "the potential for conflict inheres in the situation."⁴⁷⁶ After the analysis, the Court noted the benefit a church would gain from the veto power, an appearance of a joint government/church legislative power.⁴⁷⁷ The Court noted that the church and government were also entangled because of the joint process in the liquor application process—government application and church veto power.⁴⁷⁸ Therefore, the Court held that the statute violated the second element and third element, beneficial primary effect on religion, and entanglement.

The *Smith* "neutrality" test and the *O'Brien-Turner* "incidental impact" test would arrive at the same conclusion the court did, violation of the Establishment Clause. The first step in the "neutrality" test is that the statute must be applied equally to all. In *Larkin*, the churches and schools had an unlimited right to veto any liquor license within 500 feet of the institution.⁴⁷⁹ The statute did not allow others, such as museums or day care centers, to veto the liquor license even though these type institutions would also fall under the Court's stated purpose of the statute. Therefore, the statute does not neutrally apply to all and would fail the *Smith* test. The statute would also have more than an incidental effect on religion. As the Court noted, the veto power gives the church a legislative power. The statute was not neutral; it had more than an incidental effect on religion because the church was performing a governmental task. Therefore, the statute failed the *Smith* test and violated the Establishment Clause.

The statute also violates the first portion of the *O'Brien-Turner* test. In addition, the *O'Brien-Turner* test would require the method selected to accomplish the purpose be the least intrusive on a constitutionally

473. See *id.* at 123-24. In the Court's words the reasons for MASS. GEN. LAWS ch.138 §16C was to "protect spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets." *Larkin*, 459 U.S. at 123.

474. See *Larkin*, 459 U.S. at 125-26.

475. See *id.* at 126-27.

476. *Id.* at 125.

477. See *id.* at 125-27.

478. See *id.* at 126-27.

479. *Id.* at 117.

protected area. In *Larkin*, the legislature sought to keep liquor establishments away from schools and churches and accomplished this goal by allowing churches or schools to veto liquor license applications.⁴⁸⁰ However, the legislature could have simply required liquor establishments to be at least 500 feet from schools or churches. There was a method which would infringe even less on a constitutionally protected area than the method chosen, the veto power. The statute fails both portions of the *O'Brien-Turner* test also. Thus, the *Lemon* and the proposed *Smith* and *O'Brien-Turner* tests would all arrive at the same conclusion in *Larkin*.

The Establishment Clause also involves the actual usage of a public building for religious activities. In *Board of Education of the Westside Community Schools v. Mergens*,⁴⁸¹ the Court reviewed a case involving a student Christian club's right to hold meetings on school property. The School Board created an Act which provided a limited open forum for the students to associate after school on certain activities.⁴⁸² The school thought that since the Christian club⁴⁸³ was affiliated with religion, to allow the students to hold meetings on the school property would violate the Establishment Clause.⁴⁸⁴ The Court then had to decide whether the school clubs at Westside High School were protected by the limited open forum rule of the Equal Access Act, which was designed to extend the Court decision of *Widmar v. Vincent* to public secondary schools⁴⁸⁵. It held that they were, and thus the Christian Club could not be denied access available to other clubs at the School.⁴⁸⁶ The Court again reviewed the Act under the *Lemon* test.⁴⁸⁷

The Court noted that the Act's purpose was secular.⁴⁸⁸ In addition, the Court compared this Act with the "equal access" policies in *Widmar*⁴⁸⁹ where the Court had stated these types of Acts or policies do not violate the Establishment Clause.⁴⁹⁰

480. *See id.* at 118.

481. 496 U.S. 226 (1990).

482. *See id.* at 226-27. The group activities were such things as, scuba, chess and "clubs and organizations shall not be sponsored by any political or religious organization, or by any organization which denies membership on the basis of race, color, creed, sex or political belief." *Id.* at 232.

483. *See id.* at 232.

484. *See id.* at 232-33.

485. *Widmar v. Vincent*, 454 U.S. 263.

486. *See Mergens*, 496 U.S. at 234-47.

487. *See id.* at 234.

488. *See id.* at 235.

489. 454 U.S. at 271-74.

490. *Mergens*, 496 U.S. at 247-53 (opinion by O'Connor, J., joined by Rehnquist, C.J., White and Blackmun, Jj.).

Under the *Smith* and *O'Brien-Turner* tests the results would have been the same. Under *Smith*, the Act must be neutrally applied with no more than an incidental effect on religion. First, in *Mergens*, the Act was applied equally to all students. Second, the Act did not affect religion because the Act specifically excluded religion. Therefore, under the *Smith* test the Establishment Clause would not even apply.

In the *O'Brien-Turner* test, the first portion passed because the Act was directed at equal access to limited open forums and any impact of that on Establishment Clause concerns is indeed incidental. The draft card law in *O'Brien* is equivalent to the Equal Access Act here. The incidental impact of the draft card law on *O'Brien's* expressive act of burning his draft card equals the Equal Access Act's opening up public school property to a religious club. The second portion of the *O'Brien-Turner* test requires that the purpose be important. It would be difficult to argue that it wasn't. The two components of narrowly tailored means are also satisfied. The purpose of Equal Access would be achieved less effectively if access was unequally based upon religious grounds. It is that very point that satisfies the second element of narrow tailoring—not substantially greater intrusion into Establishment Clause interests than necessary to effectuate the purpose of the Act. Thus, under the *O'Brien-Turner* test, the Equal Access Law does not violate the Establishment Clause.

CONCLUSION

This conclusion will consist of three parts. The first is the simplest. We did not cover every Supreme Court Establishment Clause case because it would have generally been redundant and could have made a long manuscript even longer.

Second, we must recognize *Agostini v. Felton*⁴⁹¹ which overruled *Aguilar v. Felton*,⁴⁹² one of the cases discussed in this manuscript.⁴⁹³ *Agostini* was decided by the Supreme Court after the discussion of those cases herein had already been written. Since *Agostini* would not change our approach to *Aguilar* and, indeed, to some modest extent takes the Court in the direction of our approach, it was decided to deal with *Agostini* in the conclusion. Initially, however, it is important to note that the Court rejected the idea that, in *Agostini*, it had greatly modified its Establishment Clause analysis:

491. ___ U.S. ___ (1997), 117 S.Ct. 1997 (1997).

492. 473 U.S. 402 (1982). See *supra* notes 258-74 and accompanying text. *Agostini* also overruled part of the Courts earlier holding in *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1982). See *Agostini* ___ U.S. ___ at ____, 117 S. Ct. at 2010.

493. See *supra* notes 258-76 and accompanying text.

Our more recent cases have undermined the assumptions upon which *Ball* and *Aguilar* relied. To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided. For example, we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. See *Witters*, 474 U.S., at 485-486; *Bowen v. Kendrick*, 487 U.S. 589, 602-604 (1988) (concluding that Adolescent Family Life Act had a secular purpose); *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 248-249 (1990) (concluding that Equal Access [*37] Act has a secular purpose); cf. *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down Louisiana law that required creationism to be discussed with evolution in public schools because the law lacked a legitimate secular purpose). Likewise, we continue to explore whether the aid has the "effect" of advancing or inhibiting religion. What has changed since we decided *Ball* and *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect.⁴⁹⁴

The changes in the Court's outlook that lead it to overrule *Aguilar* and modify *Ball* were set out by the Court.

First, the Court has "abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."⁴⁹⁵

Second, the Court

departed from the rule relied on in *Ball* that all government aid that directly aids the educational function of religious schools is invalid. In *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986), we held that the Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wishes to use the grant to attend a Christian college and become a pastor, missionary, or youth director. Even though the grant recipient clearly would use the money to obtain religious education, we observed that the

494. 117 S. Ct. at 2010.

495. *Id.* at 2010. *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, is cited by the Court for this proposition and can clearly be so read. See *supra* text at notes 229-41 for discussion of the Supreme Court's opinion in *Zobrest*.

tuition grants were "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." *Id.*, at 487 (quoting *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 782-783, n.38 (1973)). The grants were disbursed directly to students, who then used the money to pay for tuition at the educational institution of their choice. In our view, this transaction was no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution. In both situations, any money that ultimately went to religious institutions did so "only as a result of the genuinely independent and private choices of" individuals. *Ibid.* The same logic applied in *Zobrest*, where we allowed the State to provide an interpreter, even though she would be a mouthpiece for religious instruction, because the IDEA's neutral eligibility criteria ensured that the interpreter's presence in a sectarian school was a "result of the private decision of individual parents" and "[could] not be attributed to state decisionmaking." 509 U.S., at 10 (emphasis added). Because the private school would not have provided an interpreter on its own, we also concluded that the aid in *Zobrest* did not directly finance religious education by "reliev[ing] the sectarian school[] of costs [it] otherwise would have borne in educating [its] students."⁴⁹⁶

Third, although as the *Agostino* Court admitted that case is not anything like a full retreat from *Lemon*,⁴⁹⁷ it is a beginning. We believe that either of our proposed alternatives to *Lemon* would continue to improve the process.⁴⁹⁸ To select the *Smith* neutrality approach is tempting not in the least because of its simplicity. A law that serves a neutral purpose, having nothing directly to do with advancing religion, simply does not involve an establishment of religion. Perhaps those who wrote the Establishment Clause of the First Amendment and those who voted for its ratification would have felt that the *Smith* test would have prevented such an establishment as they understood it. However, much has happened since then to complicate matters. The Establishment Clause now applies to the States, having been "selectively" incorporated into the Due Process Clause of the Fourteenth Amendment. More important than that, perhaps, the interpretation of the Clause fell into the hands of a

496. 117 S.Ct at 2011-12.

497. See *supra* text at note 495.

498. See *supra* notes 52-70 and 71-78 and accompanying text.

transcendent Supreme Court majority whose determination to guard Jeffersons "wall of separation" can, it seems to us, be described as zealous if not fanatical. The needs of little children in schools with a religious affiliation were sacrificed in the name of Jefferson's wall. Regrettably then, the work of the zealots requires an approach that can remove the offending bricks in that wall in a more careful way than the rather broad brush approach of the *Smith* test.

Thus we think the Establishment Clause version of the *O'Brien-Turner* incidental impact test, with its recognition that there are interests that should prevail over what can be described as marginal Establishment Clause concerns, can do. Consider again the precision it employs. First, government must not set out with the goal of simply advancing religion, one belief or all. It must have its sights set on achieving some other goal so that if in the advancement of that goal, religion is also advanced, it is truly incidental. Then, even to justify that incidental advancement, government's non-religious purpose must be an important one. Beyond that, the means used to achieve it (and that have the incidental effect on religion) must be narrowly tailored. This requires that the non religious purpose would be achieved less effectively using other means (means that presumably would not have the incidental effect on religion). Even that is not enough, however, because the incidental effect on religion must not be substantially more than necessary to achieve the non-religious purpose.

As we believe has been demonstrated in this article, while the application of this approach probably won't take us back to original intent, it presents a way to achieve a much more realistic application of the Establishment Clause.