BYU Law Review

Volume 1986 | Issue 2 Article 3

5-1-1986

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I. INTRODUCTION

The proper relationship between religion and government involves values accorded the highest priority by large numbers of our society. Most religious and non-religious people will agree that a tolerance by both groups for the views of the other is one of the surest signs of a civilized society. Despite this important recognition the perfection of the proper relationship between religion and government has encountered problems which have eluded sensible solutions.

The constitutional framework for dealing with these problems is contained in two clauses of the first amendment.[1] One of these, the assurance that Congress[2] shall not impair the free exercise of religion, fits comfortably with the non-religious guarantees of the first amendment. Freedom of religion, like freedom of speech, press, and assembly, is one of the basic means of human expression. The establishment clause, by contrast, deals with a structural issue: the proper relationships between two types of institutions, namely, governments and religious organizations. The closest living doctrinal relatives of the establishment clause are the separation of powers and federalism, not the other individual guarantees of the first amendment.

Presently there is a general dissatisfaction with constitu-

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* This paper, slightly modified, was presented as the introductory address at the "Perspectives on the Religion Clauses of the First Amendment" Symposium at the J. Reuben Clark Law School, Brigham Young University, January 10, 1986.

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. The word "Congress" has been interpreted to include the states as well. *See generally* Wallace v. Jaffree, 105 S. Ct. 2479, 2486 n.34 (1985); School Dist. v. Schempp, 374 U.S. 203, 215-17 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

tional doctrine dealing with the religion clauses, and particularly the establishment clause. This dissatisfaction goes beyond the level of complaining generally expected from academics—particularly when they turn their attention to the United States Supreme Court. Aside from a few polygamy cases,[3] the religion clauses have been the subject of Supreme Court attention for only about forty years,[4] or approximately one-fifth of the total time that the Court has been deciding cases and controversies. A decent argument can be made that the net contribution of the Court's precedents toward a cohesive body of law over these forty years has been zero. Indeed, some would say that it has been less than zero, and that we would be further ahead not only in terms of what we can work with, but in terms of what we can understand, if the Court had waited another half century before it began deciding religion clause cases.

Perhaps we should not be impatient that the Supreme Court has yet been unable to provide a consistent and comprehensive theory for first amendment religion issues. After all, the religion clauses involve matters that for large numbers of people represent values of prime importance, and in many instances, those values conflict with each other.

II. Tension Between the Clauses: Time for Judicial Refurbishing

One of the problems in perfecting a consistent and comprehensive religious decisional theory has been the potential tension between the two clauses themselves.[5] In some instances, governmental actions designed to minimize or eliminate the interrelationships between religious organizations and governments affect the ability of individuals to freely pursue their religiously-based objectives.[6] In other instances, governmental requirements,

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3. Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).

4. *See* Everson v. Board of Educ., 330 U.S. 1 (1947); *see generally Jaffree,* 105 S. Ct. at 2508 (Rehnquist, J., dissenting).

5. The religion clauses "are cast in absolute terms, and either. . ., if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970); *see generally* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. Pitt. L. Rev. 673 (1980).

6. *See* Widmar v. Vincent, 454 U.S. 263 (1981) (student religious group may not be denied use of university buildings made available to other groups); McDaniel v. Paty, 435 U.S. 618 (1978) (Tennessee statute unconstitutional which prohibited ministers from

which some members of the Supreme Court have held proscribed by the free exercise guarantee, are mandated by the establishment clause.[7] Thus, there is always the specter that in some areas the Constitution may be responsible for both a Scylla and a Charybdis with little, if any, room within which governments may permissibly navigate.

It is the establishment clause that is in greatest need of judicial refurbishing. Whatever problems attend the free exercise clause are shared with its other first amendment cousins. The basic rule is that governmental schemes inhibiting the free exercise of religion will only be permitted on a showing of a compelling state interest which cannot be achieved through means less burdensome to religious freedom.[8] The free exercise of religion is, in short, a preferred constitutional right entitled to a heightened degree of judicial scrutiny. I personally object to this two-tiered approach to constitutional guarantees, at least where the Constitution is devoid of any clue as to which rights should fit within the preferred category. But however enlightened my views are in this respect, there is little chance they will find their way into the law within the near future, and for present purposes, it is important only to note that the basic approach to free exercise cases is a venerable and familiar one.

Establishment clause doctrine, by contrast, fits into an ill-defined mold all its own. It purports to be built upon a three-part test[9] designed to assist the Court in ascertaining which arrangements between church and government are constitutionally prohibited establishments of religion. It is a test whose genesis can be traced back to the prayer decisions of a quarter-century ago,[10] but whose principal development (if such an orderly word

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being delegates to Constitutional Convention).

7. *See* Thomas v. Review Bd., 450 U.S. 707 (1981) (Jehovah's Witness who quit his job because he did not wish to help manufacture weapons was entitled to unemployment benefits); Sherbert v. Verner, 374 U.S. 398 (1963) (Seventh-Day Adventist who would not accept a job which required Saturday work was entitled to unemployment benefits).

8. *See Sherbert*, 374 U.S. at 407; *Walz*, 397 U.S. at 674-75; *see generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 851-55 (1978).

9. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

10. The origin of this tripartite test can ultimately be traced to Thomas Jefferson's "wall of separation" comments to the Danbury Baptist Association. *See* Reynolds v. United States, 98 U.S. 145, 161 (1879). In Everson v. Board of Educ., 330 U.S. 1, 16 (1947), the Supreme Court adopted the "wall of separation" metaphor in developing its theory of establishment clause review. However, the Court soon found that the process of determining the demarcation between church and state was not improved by its acceptance of this metaphor. In an effort to create a consistent analysis of the establishment

as "development" can conscientiously be used in this context) occurred in a series of parochial school aid cases beginning in the 1970s.[11]

In order to survive establishment clause scrutiny, a governmental practice must pass all three parts of the test;[12] failure to meet any of the three results in the practice's invalidity. The three parts of the test are: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "[13] An establishment clause test which includes inquiry into purpose and effect is understandable. Indeed, I would think that these two inquiries would have to be included in any serious effort to determine whether activities of churches and governments have become so intertwined as to amount to an unconstitutional establishment of religion. There are, however, two basic problems with the three-part test as it is presently employed. The first is that the number of parts should be diminished by one, and the second is that in all too many cases the test itself has become the ultimate inquiry. I will discuss each of these problems.

A. *Removal of the Entanglement Prong*

As noted, I have no quarrel with an approach which examines the purpose and effect of the practice at issue. But whatever sense the inquiry into "entanglement" ever made has certainly been outweighed—and, I think, lost—by its actual applications. Common sense teaches that the best way to assure against improper use of government funds is to have the government inspect to ensure that funds are not being used for religious purposes. But this obvious, harmless, and seemingly effective tactic

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clause, the Court interpreted the "wall of separation" metaphor to mean that a statute was unconstitutional if its purpose was religious and if it advanced or inhibited religion. Board of Educ. v. Allen, 392 U.S. 236, 243 (1968); School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (mandatory school prayer unconstitutional). The Court found these two prongs insufficient and in 1971 created the *Lemon* test by adding the entanglement prong to the two-prong analysis of *Schempp*. *Lemon*, 403 U.S. at 612-13.

11. *See Lemon*, 403 U.S. 602; Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Meek v. Pittenger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977); *see generally* Wallace v. Jaffree, 105 S. Ct. 2479, 2508-20 (1985)(Rehnquist, J., dissenting).

12. *See, e.g., Jaffree*, 105 S. Ct. 2479.

13. *Lemon*, 403 U.S. at 612-13 (citations omitted).

is unavailable. Why? Because, we are told, governmental efforts to make sure that government funds are spent for government purposes are unconstitutional entanglements of church and state.[14] This notion that automatic invalidation occurs whenever government takes steps to assure that its money is not being used for sectarian purposes seems so illogical that I am surprised anyone would take it seriously. A central rationale behind the entanglement prong is that the *church* needs to be protected from being compromised by government intermeddling.[15] Yet it is the church itself that wants money. If the church is willing to submit to inspections in order to receive funding, what business is that of anyone except the church?[16]

To be sure, the governmental strings that almost inevitably accompany governmental largesse can create significant obstacles to churches' ability to maintain their independence and in some cases, even their religious identity. For this reason, many churches decline governmental aid. But who determines such things as (1) what any given church's identity should be; (2) the impact on that identity from participating in governmental programs; and (3) whether the negative effect is more than offset by some other beneficial effects? To say that government should decide these things is, at best, a perversion of institutional roles, and at worst, hypocritical. I submit, therefore, that within our present doctrinal scheme there is an impermissible entanglement between church and state. It is not one which occurs when a church determines that it is willing to meet governmental conditions which everyone agrees are reasonable in order to get governmental money. Rather, it occurs when federal courts declare that a church cannot take money that it wants and is willing to accept on the government's conditions because the courts have concluded that for the church to take the money will unduly compromise the church's principles and objectives. I therefore

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14. *See* Aguilar v. Felton, 105 S. Ct. 3232, 3237 (1985); Meek v. Pittenger, 421 U.S. 349, 370 (1975); *Lemon*, 403 U.S. at 619; Public Funds for Pub. Schools v. Marburger, 358 F. Supp. 29, 40-41 (D.N.J. 1973), *aff'd*, 417 U.S. 961 (1974).

15. *See Aguilar*, 105 S. Ct. at 3237-39 ("When the state becomes enmeshed with a given denomination in matters of religious significance,. . .the freedom of. . .adherents of the denomination is limited by the governmental intrusion into sacred matters.").

16. Indeed, this raises the question of whether anyone but the affected church has standing to raise the establishment clause issue. *Cf.* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982); Flast v. Cohen, 392 U.S. 83 (1968).

think that whatever else happens to the three-part test, the entanglement prong should be dropped.

B. *The* Lemon *Test as the Ultimate Inquiry*

The most serious drawback of the three-part test is not one that derives from the inadequacies of one of its parts. Rather, the most serious drawback is that the test itself has become the ultimate inquiry, and not just an aid to ascertain whether a particular arrangement has so enmeshed religion and government that the establishment clause has been violated.[17] As a result, the approach in some establishment clause cases has not been a full-measured evaluation of what the first amendment requirements are, but a simple three-step checklist that may not progress beyond the first step. Two examples from the Court's 1985 Term reveal the problems of using the test itself as the ultimate inquiry.

1. *Wallace v. Jaffree*

The first example is the "moment of silence" case, *Wallace v. Jaffree*.[18] There appears to be a consensus among a majority of the Court in *Jaffree* that state statutes authorizing moments of silence in public schools are constitutional.[19] Nevertheless, the Alabama statute, at least for now, is unconstitutional. Why? Largely because of careless statements made by one legislator who supported the Alabama statute.[20] Whatever the wisdom of what he said—and however offensive those views may be to religious tolerance and freedom—why should his speeches preclude an entire state from a practice which other states are entitled to? The answer is that those statements disclosed a legislative purpose to further religion. Thus, the scheme was automatically

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17. Since its inception, the *Lemon* test has been applied in every Supreme Court review of the establishment clause, with the exception of Marsh v. Chambers, 463 U.S. 783 (1983), and Larson v. Valente, 456 U.S. 228 (1982). Although Lynch v. Donnelly, 465 U.S. 668 (1984) applied the *Lemon* test, its application was so loose that one could possibly include this opinion with *Marsh* and *Larson*. For an examination of the origins on constitutional formulae in general and their effect on American constitutional juries, see Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

18. 105 S. Ct. 2479 (1985).

19. *Id.* at 2497-500 (O'Connor, J., concurring).

20. *Id.* at 2490. The sponsor of the Alabama statute, Senator Donald Holmes, said that the legislation was an "effort to return voluntary prayer to the public schools." *Id.* at 2490 n.43. See also *id.* at 2483 for additional comments made by Senator Holmes.

invalidated for failure to pass the first hurdle of the three-part test.

Certainly there are instances when the purpose of a statute will be relevant to the existence or nonexistence of an establishment of religion. The inquiry into purpose in *Jaffree*, however, was not just the beginning of an examination into the universe of things to be considered. It was the universe itself, and there was no further inquiry.[21]

The facts, holding, and rationale in *Jaffree* suggest the need for a reassessment of the purpose portion of the three-part test. In *Jaffree*, the Court found an improper intent, and held that improper intent alone made the entire scheme unconstitutional.[22] I question whether, in a case like *Jaffree*, intent should even be relevant, much less dispositive. It is not that intent should be eliminated from the relevant inquiries in determining the existence or nonexistence of an establishment of religion. But the examination into intent—if it is to be helpful at all—must be objective rather than subjective.

It is fairly apparent, at least from *Jaffree*, that a majority of the Court would sustain the constitutional right of a state to provide for a moment of silence in public schools absent the expression of purpose which invalidated the Alabama statute.[23] It makes no sense to permit moments of silence in all states that want to adopt them except those states unlucky enough to have legislators who said the wrong things when the statute was debated.[24] Whatever the legitimate constitutional and societal arguments about the comparative benefits or drawbacks of "moments of silence," I fail to see how those are affected in the least by the actual, subjective mind set of the legislators who pass such statutes, or the fortuity of whether they happen to express those thoughts.

The only inquiry into intent or purpose, therefore, should be whether there is some proper objective which the legislature might have chosen. Otherwise, constitutional adjudication in this area is reduced to a process under which judges give legislators passing or failing grades in constitutional law. Those who are smart enough, and sufficiently well informed, to say the right

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21. *Id.* at 2490.

22. *Id.* at 2492-93.

23. *Id.* at 2501 (O'Connor, J., concurring).

24. See *id.* at 2497-98 (O'Connor, J., concurring) for a list of various states which allow "moments of silence" in their classrooms.

things get a passing grade, and their legislation is constitutional. But the courts will flunk those who are not. That appears to be our current approach. On June 4, 1985, the Supreme Court gave a failing grade to the Alabama Legislature, thanks to the performance of only one of its members. As a result, the first amendment means one thing in Alabama and something else in the other forty-nine states. I submit that it is time to change the grading system.

2. *Aguilar v. Felton*

My second example comes from *Meek v. Pittenger*[25] and *Aguilar v. Felton.*[26] Both cases indulge an irrebuttable, conclusive presumption that *any* presence of state-employed remedial school teachers on church-owned premises renders the entire remedial instruction scheme unconstitutional regardless of what actually happened.

Just what is the perversion in church-state relationships that can occur—even as a theoretical matter—when secular teachers enter parochial premises? Surely it cannot be fear that these public employees—who are not employed by a church—will somehow inculcate religious beliefs into a school that is already religious. Perhaps it is that public teachers who come onto parochial premises might themselves be the object of attempted religious proselyting. But this notion is surely at odds not only with common experience but also with the Court's own observations that it is the susceptibility of children, not adults, to religious indoctrination that raises establishment clause concerns.[27]

Another possibility is that the presence of nonchurch personnel on church premises might add an additional element of credibility to the parochial program, and thereby enhance the effectiveness of the church's efforts to instill orthodoxy through its educational efforts. But this concern cannot be addressed without infringing the free exercise guarantees of the first amendment. I accept as correct the proposition that high-quality remedial programs, such as those in *Aguilar*, enhance the pres-

25. 421 U.S. 349 (1975).

26. 105 S. Ct. 3232 (1985).

27. *See* Marsh v. Chambers, 463 U.S. 783, 792 (1983); Tilton v. Richardson, 403 U.S. 672, 686 (1971); School Dist. v. Schempp, 374 U.S. 203, 290 (1962) (Brennan, J., concurring) (distinguishing between adults' and children's susceptibility to "religious indoctrination" and "peer pressure").

tige and credibility of the participating school. But using that reality as the premise from which analysis begins, the real freedom of religion problem is the one that results when government confers that benefit on some students, those who attend nonreligious schools, and withholds it from others, those who attend religious schools. The anomaly is enhanced by noting that this distinction is based solely on the exercise by the disadvantaged group of a constitutional right to attend religious schools.

The facts of *Aguilar* drive this point home with painful clarity. At issue was the constitutionality of Title I of the Elementary and Secondary Education Act of 1965.[28] Title I is the largest and most successful endeavor by the federal government to improve the quality of education in this country. Its basic objective is to break the poverty cycle at its most vulnerable point by providing remedial, supplemental services to school children who (1) live in economically deprived areas and (2) have performed below designated academic standards. Congress specified, however, that the obvious benefits of this educational headstart program were to be available to *all* needy children, including those who attended nonpublic schools.[29]

Title I is, very simply, a program that works. Across a broad geographic spectrum, its remedial math, reading, and other programs (administered by local educators who adapt the program to the needs of the particular area) have helped thousands of educationally and financially deprived students improve the quality of their schooling, and presumably, of their life. Judge Friendly's opinion for the Court of Appeals for the Second Circuit, even though it held Title I unconstitutional, referred to Title I as a program which "has done so much good and little, if any, detectable harm."[30]

What, then, was the problem? The problem was *Meek v. Pittenger*, and the assumption on which it rested. *Meek* involved a Pennsylvania state student aid program which, inter alia, provided for remedial services at schools (including parochial schools) attended by students needing such assistance. The Pennsylvania statute was attacked on its face, so there was no factual record, but the Supreme Court assumed that any in-

28. 20 U.S.C. §§ 2701-3386 (1982).

29. 20 U.S.C. §§ 2740(a), 3806(a) (1982). *See Aguilar*, 105 S. Ct. at 3234-35; Wheeler v. Barrera, 417 U.S. 402 (1974).

30. Felton v. Secretary of Educ., 739 F.2d 48, 72 (2d Cir. 1984).

struction on the premises of church schools would inevitably involve unconstitutional entanglement of church and state.[31]

In *Aguilar* this irrebuttable presumption prevailed over a record which showed about as clearly as possible that the intermixing of church and state had not occurred, and that the only effects of Title I services being offered on parochial school premises were educational effects, all of which were salutary.[32] Before offering these services on the nonpublic school premises, the public school administrators responsible for the Title I program had exhausted all three of the other possibilities: (1) transporting parochial students to the public schools for instruction during regular school hours; (2) offering the remedial services on public premises after school hours; and (3) offering the services on parochial premises after school hours.[33] It was only after each of these alternatives proved unsatisfactory that the responsible persons turned to the only approach that was educationally acceptable.[34] And this approach, unlike the others, was a success. Even the plaintiffs did not contend otherwise.[35] They simply relied on *Meek's* per se rule. And they won.

Aguilar is the ideal example demonstrating why categorical application of the three-part test is wrong. The Court in *Aguilar* did not consider whether the factual assumption on which the per se rule is based was factually correct. Neither did it attempt to determine what first amendment values were possibly threatened by helping to educate deprived children without regard to their religious beliefs or practices. It simply made a wooden application of one prong of a three-part test. Since this highly successful program that has helped so many and has hurt

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31. *Meek*, 421 U.S. at 367-73 (ruling that a state statute which provided for "auxiliary services" such as remedial and accelerated instruction was unconstitutional).

32. New York has been providing Title I services in nonpublic schools for fourteen years . . . . The evidence establishes that the result feared in other cases has not materialized in the City's Title I program. The presumption—that the "religious mission" will be advanced by providing educational services on parochial school premises—is not supported by the facts of this case.

National Coalition for Pub. Educ. and Religious Liberty v. Harris, 489 F. Supp. 1248, 1265 (S.D.N.Y. 1980); *see also Aguilar*, 105 S. Ct. at 3243-46 (O'Connor, J., dissenting).

33. For a history of Title I in New York City, see *Harris*, 489 F. Supp. at 1255-57.

34. *Id.*

35. *See Aguilar*, 105 S. Ct. at 3243-48 (O'Connor, J., dissenting); *Harris*, 489 F. Supp. at 1255-57; *see also* Felton v. Secretary of Educ., 739 F.2d 48, 49 (2d Cir. 1984) ("[T]he City could reasonably have regarded [on-campus instruction] as the most effective way to carry out the purposes of the Act.").

no one failed that wooden application, the whole program was automatically unconstitutional.

III. Conclusion

A fundamental defect in the Court's establishment clause jurisprudence is that the three-part test—or any one of its three parts—has become the ultimate inquiry. That is wrong. The inquiry should not be whether there is entanglement; the inquiry should be whether there is an establishment of religion.[36] *Jaffree* and *Aguilar* powerfully illustrate the perversions that can occur when the three-part test becomes not just a guide to interpretation, but the ultimate question. There is, I submit, something wrong with a constitutional jurisprudence under which, in the name of one of the religion clauses, educationally deprived children are denied benefits which are central to a successful life solely because of a choice—attending a parochial school— that is itself constitutionally protected.

36. *See* Chief Justice Burger's dissent in *Aguilar*, 105 S. Ct. at 3242-43. "[T]he Court's obsession with the criteria identified in Lemon v. Kurtzman . . .has led to results that are 'contrary to the long-range interests of the country . . . . [O]ur responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion.' " *Id.* at 3242 (citations omitted) (emphasis added).