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The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation

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THE STATE, THE STORK, AND THE WALL: THE ESTABLISHMENT CLAUSE AND STATUTORY ABORTION REGULATION

The first amendment prohibits the enactment of laws respecting the establishment of religion.[1] The United States Supreme Court has held that the rights guaranteed by the establishment clause are fundamental and are applicable to the states through the fourteenth amendment.[2] The Framers of the Constitution drafted the establishment clause based on their fear that religious denominations that receive the benefits of state law pose a threat to individual liberties.[3] From its inception, the focus of the establishment clause has been neutrality,[4] neutrality not only among sects, but also among believers and nonbelievers.[5] Some members of the Court have asserted that this neutrality should take the form of "a wall of separation between church and State."[6] Other members of the Court reject this approach because it places religion in a vacuum.[7] Regardless of the approach, the Court consistently holds that the establishment clause protects fundamental rights that "no government official in this Nation may violate."[8]

In an attempt to avoid biased and inconsistent decisions, the Court has sought to develop a rational test for establishment clause challenges. The Supreme Court's decision in *Lemon v. Kurtzman*[9] compiled and clarified existing establishment clause doctrine into a test designed to preserve a statute that appears to violate the establishment clause. In order to preserve

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. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

3. *See generally* J. MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1795) (outlining Madison's objections to the establishment of religion), *reprinted in part in* Everson v. Board of Educ., 330 U.S. 1, 63-72 (1947) (Rutledge, J., dissenting).

4. *See, e.g., Cantwell,* 310 U.S. at 303.

5. *Everson,* 330 U.S. at 18.

6. Marsh v. Chambers, 463 U.S. 783, 802 (1983) (Brennan, J., dissenting); *Everson,* 330 U.S. at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

7. *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

8. County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086, 3099 (1989).

9. 403 U.S. 602 (1971).

such a statute, the state must demonstrate: a secular purpose for the statute, a primary effect of the statute which neither advances nor inhibits religion, and freedom from excessive entanglement between the state and religion.[10] In defining the parameters of this test, the Court has held that even the smallest step toward the advancement of religion violates the test.[11] Further, the Court has held that a statute that implicates the establishment clause must have a "clearly" legislative purpose,[12] and that, when founded on a denominational basis, the Court will apply strict scrutiny to the statute in question.[13] Independent of the *Lemon* criteria, a statute may be invalid if it aligns the government on one side of a political issue divided along religious lines.[14] Additionally, the Court allows an exception to these general principles where a certain practice, while appearing to violate the establishment clause, has a long history of noninterference with secular affairs and institutions.[15]

Today, American society faces few issues as volatile as abortion. Despite the obvious role of religion in the abortion debate, the Court, with the exception of Justice Stevens' dissent in one of the Court's recent pronouncements on abortion,[16] has rejected claims that antiabortion statutes violate the establishment clause.[17] Instead, the Court continues to involve itself in the un-

10. *Id.* at 612-13.

11. *Id.* at 612.

12. Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973).

13. Larson v. Valente, 456 U.S. 228, 246 (1982).

14. *Nyquist*, 413 U.S. at 795-98.

15. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961) (holding that religious blue laws, requiring the closing of stores on Sundays, do not violate the establishment clause).

16. Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3082-85 (1989) (Stevens, J., concurring in part and dissenting in part).

> Indeed, I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution. This conclusion . . . rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause.
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> . . . .
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> Bolstering my conclusion that the preamble violates the First Amendment is the fact that the intensely divisive character of much of the national debate over the abortion issue reflects the deeply held religious convictions of many participants in the debate. The Missouri Legislature may not inject its endorsement of a particular religious tradition into this debate, for "[t]he Establishment Clause does not allow public bodies to foment such disagreement."

Id. (quoting County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086, 3132 (1989)) (footnotes omitted).

17. Harris v. McRae, 448 U.S. 297 (1980); *see infra* notes 242-50 and accompanying text (critiquing the Court's cursory treatment of claimed establishment clause violations).

ending debate regarding *Roe v. Wade*.[18] Decided in 1973, *Roe* protects the right of a woman to have an abortion.[19] *Roe*, however, relied not on textual arguments, but on certain "zones of privacy" that emanated from the Bill of Rights and the fourteenth amendment.[20]

This Comment suggests that the abortion debate should move away from the present quagmire involving privacy rights, and back to the textual constitutional analysis found in establishment clause cases. This Comment argues that establishment clause analysis is grounded firmly in legal precedent, making it an ideal tool to analyze an issue involving a great deal of personal emotion.[21]

After outlining the history and development of establishment clause tests, this Comment analyzes antiabortion statutes in terms of the establishment clause. This Comment concludes that such statutes lack a secular purpose, benefit specific religious organizations, unnecessarily entangle church and state, and place the state on one side of a political issue which is divided along religious lines, thus violating the establishment clause.[22] This Comment advocates that the Supreme Court adopt the use of the establishment clause in analyzing antiabortion statutes because such an approach provides judges with sound constitutional precedent which relates to the fundamental issue underlying the abortion debate—religion.

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18. 410 U.S. 113 (1973).

19. *Id.* at 154.

20. *Roe* protects the right of a woman to choose to abort a pregnancy through the second trimester. After the second trimester, the fetus becomes viable and the state has a compelling interest in protecting the potential life of the fetus. The legal grounds for the Court's decision rested on the fourteenth amendment concept of personal liberty, implying a right of privacy. There is no textual guarantee of privacy in the Constitution, leading to the perceived weakness of decisions based on privacy rights. The reasoning underlying *Roe* is that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (citing Poe v. Ullman, 367 U.S. 497, 516-22 (1961) (Douglas, J., dissenting)). Such emanations were perceived as creating zones of privacy; in *Roe*, the zone surrounded the woman's choice to terminate her pregnancy.

21. As the lower court's finding in *McRae v. Califano* indicates, a successful challenge to an antiabortion statute could be brought using the free exercise clause. Although the establishment clause and free exercise clause are closely tied to each other, this Comment does not consider the free exercise clause in the context of abortion. 491 F. Supp. 630 (E.D.N.Y. 1980), *rev'd sub. nom.* Harris v. McRae, 448 U.S. 297 (1980).

22. This Comment, however, will point out that such a determination, while allowing some abortions, offers certain guarantees to members of the antiabortion movement.

I. THE HISTORY AND DEVELOPMENT OF THE ESTABLISHMENT CLAUSE

A. Building a Wall: Madison, Jefferson, and the Creation of the Establishment Clause

The development of the establishment clause began five years before its ratification, when James Madison fought the Virginia Assessment Bill.[23] This bill proposed to authorize the Commonwealth to use tax revenues to support Christian churches and organizations.[24] Before the Virginia legislature could pass the bill, Madison organized and wrote his *Memorial and Remonstrance Against Religious Assessments,*[25] which outlined his objections to the Assessment Bill. He focused both on the freedom to exercise religion and freedom from the establishment of religion. Madison appealed to common sense, and asked, "[w]ho does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?"[26] Madison continued and explained that ecclesiastical establishments historically have had a significant impact on civil society. In particular, Madison noted that ecclesiastical establishments "have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people."[27]

The need to accommodate the religious diversity of immigrants in America also motivated Madison. Indeed, Madison saw America as an "asylum to the persecuted and oppressed of every Nation and Religion."[28] Madison, therefore, cautioned against political involvement in divisive religious issues

> [b]ecause, it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions.[29]

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23. Walz v. Tax Comm'n of New York, 397 U.S. 664, 704-05 (1970) (Douglas, J., dissenting).

24. *Id.* at 717 (Appendix I).

25. *See* Everson v. Board of Educ., 330 U.S. 1, 37 (1947).

26. *Walz,* 397 U.S. at 721.

27. *Id.* at 724 (Appendix II).

28. *Id.*

29. *Id.* at 725. Avoidance of government mingling in religious disputes is effectuated in the political divisiveness test. *See infra* notes 156-76 and accompanying text.

Madison was victorious in Virginia,[30] and succeeded in convincing the Framers of the Constitution to include protection of religious freedoms in the Bill of Rights.[31]

Madison's victory in Virginia led to passage of the Virginia Statute of Religious Liberty,[32] written by Thomas Jefferson. Jefferson felt so strongly about the separation of church and state that he had the passage of the Virginia Statute of Religious Liberty listed on his tombstone as one of his greatest accomplishments.[33] Understandably, considering Jefferson's concern with religious freedom, hearing that the draft of the United States Constitution lacked a religious clause dismayed Jefferson.[34]

Because of Madison's continued efforts, however, when the first Congress convened, the first amendment to the Constitution included the protection of religious freedoms.[35] Although he was in France when the amendment was drafted and ratified,[36] Jefferson's vision of the first amendment still persists today: "[A] wall of separation between church and State."[37] While Jefferson and Madison seemed unambiguous in their support for a separation of church and state, the Court has since struggled to apply this principle in a consistent manner.[38]

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30. *Walz*, 397 U.S. at 704-05.

31. *Id.* at 705-06.

32. "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . . ." *Everson*, 330 U.S. at 12-13 (quoting Virginia Statute of Religious Liberty).

33. R. CORD, SEPARATION OF CHURCH AND STATE 36 (1982). To put the importance of the Virginia Bill in perspective, it is worth noting that there are two other accomplishments Jefferson listed on his tombstone: founding the University of Virginia and authoring the Declaration of American Independence. *Id.*

34. Reynolds v. United States, 98 U.S. 145, 163 (1878).

35. *Walz*, 397 U.S. 664, 705-06.

36. *Reynolds*, 98 U.S. at 163 (1878).

37. *Id.* at 164

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

Id. (quoting U.S. CONST. amend. I) (emphasis added).

38. *Compare* Zorach v. Clauson, 343 U.S. 306 (1952) (release program held constitutional) *with* McCollum v. Board of Educ., 333 U.S. 203 (1948) (release program held unconstitutional) (although both programs involved nearly identical release programs, the Court reached completely contrary results within five years of one another).

B. Sitting on the Wall: The Court's Struggle to Develop a Coherent Test for Establishment Clause Challenges

The United States Supreme Court failed to reach establishment clause issues in several early challenges;[39] the Court waited until 1947 to offer its first conclusive interpretations of the establishment clause.[40] Since that time, the Court has continued to uphold the underlying values enunciated by Madison and Jefferson,[41] but debate still exists as to how solid Jefferson's wall should be.[42]

In 1947, the Supreme Court decided the case of *Everson v. Board of Education.*[43] In *Everson,* a local taxpayer challenged a New Jersey statute that allowed parents reimbursement for the cost of transporting their children to parochial schools on public school buses. The Court, after reviewing colonial America's fear of state endorsed religion, identified the minimum standards of establishment clause protection.[44] At a minimum, the Court stated, the establishment clause prohibited a state from setting up a religion, passing any law that aided one or all religions, and expressing a preference for one religion over another.[45]

The Court also advocated the continued use of Jefferson's wall of separation.[46] The Court then considered the issue of whether, in an attempt to maintain this wall, the establishment clause required members of religious groups to surrender public benefits which they had earned as citizens. The Court ruled that New Jersey "cannot exclude individual[s] . . . because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[47] Although the Court stated that "[t]he First Amendment . . . erected a wall between church and state [which] must be kept high and impregnable,"[48] the Court ruled that the New Jersey Statute could stand under a

39. *See* Quick Bear v. Leupp, 210 U.S. 50 (1908); Bradfield v. Roberts, 175 U.S. 291 (1899).

40. *See* Everson v. Board of Educ., 330 U.S. 1 (1947).

41. Note, *The Separation of Church and State—A Debate,* 1987 UTAH L. REV. 895, 896.

42. *See id.* (outlining traditional battle lines regarding the establishment clause).

43. 330 U.S. 1 (1947).

44. *Id.* at 15-16.

45. *Id.* Specifically, the Court asserted that:

> 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 . . . . 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. (quoting Reynolds v. United States, 98 U.S. 145, 165 (1878)).

46. *Id.*

47. *Id.* at 16 (emphasis omitted).

48. *Id.* at 18.

theory of social benefit.[49] In a vigorous dissent, Justice Jackson criticized the majority for failing to apply its legal reasoning to its ultimate ruling in the case.[50] While the Court painstakingly enumerated the criteria to use when analyzing the establishment clause, it seemingly ignored these criteria in making its decision.[51]

Perhaps as a result of the Court's ultimate ruling in *Everson,* which seemed at odds with the criteria it had set forth, the *Everson* criteria were challenged within the year. In *Illinois ex rel. McCollum v. Board of Education,*[52] the Court held unconstitutional an Illinois School Board practice which permitted students to attend sectarian classes, taught by parochial school teachers, within public schools.[53] In its decision, the Court expressly upheld the *Everson* ruling that the establishment clause protected more than avoiding the preference of one religion over another.[54] In addition, the Court offered a glimpse into the future development of the entanglement

49. *Id.* at 17. Under this theory, any benefit to which a citizen was entitled could not be denied because it went to a religious group, for the denial would be hostile to religion and equally violative of the establishment clause. See *infra* note 51 for a discussion of the dilemma this created.

50. Justice Jackson equated the majority's stance with Byron's Julia, who, "whispering 'I will ne'er consent,'- consented." *Everson,* 330 U.S. at 19 (Jackson, J., dissenting) (taken from Lord Byron's *Don Juan*).

51. The Court's failure to use the criteria was, however, justifiable. In *Everson,* the legislators' goal in passing the bussing statute was not to benefit religion, but to benefit its citizens. *Everson,* 330 U.S. at 18. For the legislators to have not provided the bussing would have inferred a hostile attitude toward religion—also a violation of the first amendment. *Id.* at 16. The dilemma of whether providing general benefits to religious groups violates the establishment clause arises not only from the Court's decision in *Everson,* but also from the dual protections of the first amendment itself, assuring both freedom of religion and prevention of establishment. These two goals often leave government in the middle of a tug of war. As one commentator explained:

> Problems of complexity, formality, and ambiguity have plagued Establishment Clause doctrine since [*Everson*]. . . . *Everson* created a dilemma when it simultaneously adopted two different and incompatible conceptions of Establishment Clause neutrality—a separationist conception prohibiting aid to religion and an accommodationist conception allowing religious participation in secular governmental programs of general social benefit. This placed the Court in an impossible doctrinal situation. The contrary demands of these two conceptions of neutrality applied to the facts of the case doomed the Court's decision to unavoidable conflict with one or the other of its professed standards.

Valauri, *The Concept of Neutrality in Establishment Clause Doctrine,* 48 U. PITT. L. REV. 83, 86 (1986) (footnotes omitted).

52. 333 U.S. 203 (1948).

53. *Id.* at 205.

54. *Id.* at 211. Respondents argued that the establishment clause was intended only to avoid preference of one religion over another; and, that the ruling in *Everson,* applying the establishment clause to the states through the fourteenth amendment, should be limited or overruled. The Court replied, "we are unable to accept either of these contentions." *Id.*

test.[55] The Court announced that the "First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[56] The broad language of *Everson* had survived its first challenge.

While the Court's support of *Everson* seemed firm in *McCollum,* the Court did an abrupt about-face in regard to the extent of separation between church and state just four years later in *Zorach v. Clauson.*[57] *Zorach* involved a New York City program which allowed students to leave public schools in order to attend sectarian classes at parochial schools. The Court stated that "[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated [and,] within the scope of its coverage permits no exception; the prohibition is absolute."[58] Yet despite this unequivocal language, the Court qualified its statement in the next sentence: "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State."[59]

In light of these inconsistent statements, the Court found that the release program did not violate the establishment clause.[60] This inconsistency may, however, have had little practical effect on its decision, for it appears that the Court focused more on historical precedent than legal precedent in reaching its decision in *Zorach.* Specifically, the Court stated: "We are a religious people whose institutions presuppose a Supreme Being."[61]

Justice Jackson dissented in *Zorach,* explaining that the New York City release plan used the power of the state, in the form of truant officers, to enforce attendance at sectarian classes, thereby violating the establishment clause.[62] Amazed by the majority's reasoning, Justice Jackson commented: "The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's

55. *Id.* at 212. The entanglement test forms the third prong of the three part test later developed in *Lemon. See infra* notes 147-56 and accompanying text. The entanglement test examines whether a particular law creates a relationship between secular and sectarian institutions—a relationship which could result in the undue influence of one upon the other. *See infra* notes 153-55 and accompanying text.

56. *McCollum,* 333 U.S. at 212.

57. 343 U.S. 306 (1952).

58. *Id.* at 312.

59. *Id.*

60. *Id.* at 315.

61. *Id.* at 313. The use of such historical arguments has become an important factor in establishment clause analysis, often used to uphold statutes that appear to be clear violations of the establishment clause. *See, e.g.,* Marsh v. Chambers, 463 U.S. 783 (1983) (permitting state to pay for preacher to open legislative sessions).

62. *Zorach,* 343 U.S. at 323-24 (Jackson, J., dissenting).

judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law."[63] While Justice Jackson's criticism of the Court's application of factual patterns to its own test was particularly potent, it was not to be the last.

In *Torcaso v. Watkins,*[64] the Court ruled that a Maryland law requiring public officials to declare their belief in God violated the establishment clause. Maryland argued that the Court's decision in *Zorach* overruled the broad language found in *Everson,*[65] thus "open[ing] up the way for government . . . to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths."[66] The Court expressly denied such a ruling, pointing to an express statement in *Zorach* reaffirming the Court's decision in *Everson.*[67] Moreover, the *Torcaso* court underscored its own commitment to the broad interpretation of *Everson.*[68] The Court specifically stated: "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' "[69]

Although *Torcaso, Zorach,* and *McCollum* differ substantively, these cases highlight a major problem in establishment clause adjudication: the underlying principles are continuously endorsed, but inconsistently applied.

When the Court decided *Engel v. Vitale,*[70] it determined that its views on the establishment clause were clear and did not need citation.[71] In overturning a New York law that required teachers to open classes with the Regent's prayer,[72] the Court made it clear that government involvement with religion

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63. *Id.* at 325.

64. 367 U.S. 488 (1961).

65. *Id.* at 494; *see infra* note 67.

66. *Id.* at 494.

67. *Id.*

> The Maryland Court of Appeals thought, and it is argued here, that this Court's later holding and opinion in [*Zorach*], had in part repudiated the statement in the *Everson* opinion quoted above and previously reaffirmed in *McCollum*. But the Court's opinion in *Zorach* specifically stated: "We follow the McCollum case." Nothing decided or written in *Zorach* lends support to the idea that the Court there intended to [decrease the protections of the establishment clause].

Id. (citations omitted).

68. *Id.* at 495.

69. *Id.*

70. 370 U.S. 421 (1962).

71. *See* School Dist. of Abington v. Schempp, 374 U.S. 203, 220-21 (1963), stating that "in *Engel v. Vitale,* only last year, these principles were so universally recognized that the Court, without the citation of a single case and over the sole dissent of Mr. Justice Stewart, reaffirmed them." *Id.* (citations omitted).

72. "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." Engel v. Vitale, 10 N.Y.2d 174, 177, 176 N.E.2d 579, 580, 218 N.Y.S.2d 659, 660 (1961), *rev'd,* 370 U.S. 421 (1962).

amounted to coercion of those with other beliefs.[73] The Court indicated that states should avoid such combinations between church and state because, when government became involved with religion, it resulted in "the hatred, disrespect and even contempt of those who held contrary beliefs."[74] As the *Engel* decision indicated, the broad interpretations of *Everson* were intact; thus, the *Engel* Court exposed the *Zorach* decision as an anomaly, an awkward decision tossed into the broad language of *Everson.*

Justice Jackson was not alone in his belief that the Court had created a "warped and twisted" wall of separation.[75] Facing mounting criticism, the Supreme Court made its first attempt to articulate a clear and coherent establishment clause test in *School District of Abington v. Schempp.*[76] In *Schempp,* the Court examined Pennsylvania and Maryland laws requiring teachers to open classes each day with a reading from the Bible.[77] In its analysis, the Court carefully outlined the history of its establishment clause decisions.[78] The Court emphasized that the fourteenth amendment made the establishment clause applicable to the states,[79] that the establishment clause was not limited to avoiding the preference of one religion over another,[80] and that the goal of the establishment clause "was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[81]

The *Schempp* Court also articulated its objective in establishment clause cases as the maintenance of "wholesome 'neutrality.' "[82] In addition, the

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73. "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel,* 370 U.S. at 431.

74. *Id.* (footnote omitted).

75. *See, e.g., Recent Decisions,* 21 U. CINN. L. REV. 481, 483 (1952) (indicating the irreconcilability of *Zorach* and *McCollum*).

76. 374 U.S. 203 (1963).

77. *Id.* at 205-12.

78. *Id.* at 213-22.

79. *Id.* at 215.

80. *Id.* at 216.

81. *Id.* at 217 (quoting Everson v. Board of Educ., 330 U.S. 1, 31-32 (1947) (Rutledge, J., dissenting)). The reiteration of these principles was not a direct result of issues raised by the parties. Writing for the Court, Justice Clark appeared to indicate that the Court had become sensitive to criticisms regarding its establishment clause decisions:

> While none of the parties to either of these cases has questioned these basic conclusions of the Court, both of which have been long established, recognized and consistently reaffirmed, others continue to question their history, logic and efficacy. Such contentions, in light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises.

Id.

82. *Id.* at 222.

Court noted that history has demonstrated that "powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State . . . would be placed behind the tenets of one or of all orthodoxies."[83] While the Court did not include this reasoning in the test later proposed in *Schempp*,[84] the Court's language indicated the continuing development of the entanglement test.[85]

While it failed to fully develop and incorporate the entanglement test, the *Schempp* Court, relying on a restatement of its prior decisions, created a long-awaited test for establishment clause challenges.[86] Attempting to consolidate existing doctrine, the Court announced its establishment clause test: "What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."[87] Under this test, in order to withstand a challenge under the establishment clause, a statute must have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[88] The Court's use of secular purpose appeared to include two elements of its previous decisions interpreting the establishment clause. First, it implied a certain element of improper legislative motive. Second, the Court's emphasis on secular purpose integrated the concept of the benefit approach.[89]

The Court, applying its new test, found that reading the Bible and reciting the King's prayer in public schools violated the establishment clause.[90] The Court noted that the reading of these prayers had no secular purpose,[91] and impermissibly aided religion by advancing the tenets of Christianity.[92]

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83. *Id.*

84. *Id.*

85. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) (citing *Schempp* in a subsequent expansion of the entanglement test).

86. School Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963).

87. *Id.*

88. *Id.*

89. The rationale of the benefit approach is that while government may not pass laws specifically to benefit religious groups, it similarly may not deny religious groups the benefits to which all citizens of a state are entitled. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947). The busing scheme at issue in *Everson* could easily have been settled under the new test because the state had an interest in safely transporting its citizens to their schools. *Id.* at 17-18. Although such a plan aids parochial schools, the state had a secular interest in safeguarding the students' transportation to and from school, which is within the scope of legitimate state interests. *Id.; see also* CORD, *supra* note 33, at 196-98.

90. *Schempp*, 374 U.S. at 223-24.

91. *Id.* at 224.

92. *Id.*

Justice Brennan, concurring with the majority decision in *Schempp,* reiterated and expanded the concept of government neutrality towards religion. Specifically, Justice Brennan stated that the government "may not officially involve religion in such a way as to prefer, discriminate against, or oppress a particular sect or religion."[93] In addition to the general concept of neutrality, Justice Brennan extracted three principles underlying all establishment clause cases.

The first and most important principle was that government should not become involved in ecclesiastical disputes.[94] In support of this proposition, Justice Brennan focused on *United States v. Ballard,*[95] holding that a defendant accused of fraudulent use of the mails could not introduce evidence that he distributed truthful religious documents.[96] Justice Brennan stated that the *Ballard* ruling indicated that "the First Amendment foreclosed any judicial inquiry into the truth or falsity of . . . religious beliefs."[97] Moreover, Justice Brennan did not confine this limitation to the courts; he stated that it is essential to "give effect to the First Amendment's purpose of requiring on the part of all organs of government a strict neutrality toward theological questions."[98] Justice Brennan's conclusion that government may not become involved in debates divided along religious lines provided the groundwork for the subsequent development of the political divisiveness test in establishment clause challenges.[99]

Second, Justice Brennan indicated that, although the free exercise and establishment clauses were closely related, the Court should treat each clause independently.[100] Third, Justice Brennan asserted that the Court should consider relevant free exercise doctrines when the establishment clause is the basis of a challenge.[101] Realizing the complexity of the issue, Justice Brennan warned, "[W]e must not confuse the issue of governmental power to regulate or prohibit conduct *motivated by religious beliefs* with the quite different problem of governmental authority to compel behavior *offensive to religious principles.*"[102] Justice Brennan found the former permissible if the

93. *Id.* at 231 (Brennan, J., concurring).

94. *Id.* at 243-44.

95. 322 U.S. 78 (1944).

96. *Id.* at 88.

97. *Schempp,* 374 U.S. at 244 (Brennan, J., concurring).

98. *Id.* at 243.

99. *Id.* at 243, 246.

100. Justice Brennan noted that this approach had only recently developed, describing *Everson* as "the first of our decisions which treats a problem of asserted unconstitutional involvement as raising questions purely under the Establishment Clause." *Id.* at 246.

101. *Id.* at 249.

102. *Id.* at 250 (emphasis in original).

legislation in question was "for the punishment of acts inimical to the peace, good order and morals of society,"[103] and the latter permissible if there was a "strong state interest" behind the statute.[104] In short, Justice Brennan acknowledged that laws affecting religious beliefs and conduct must have a secular purpose.

The Court's next opportunity to apply its establishment clause test arose five years later in *Board of Education v. Allen.*[105] In *Allen,* the Court ruled that a New York City law, which required school districts to loan textbooks to parochial schools, did not violate the establishment clause.[106] The New York legislature's findings indicated that the state intended the statute to promote public welfare and safety.[107] The Court, first applying the *Everson* benefit approach,[108] suggested that the law was valid because the law was only part of a general program designed to benefit students.[109] The Court then invoked the *Schempp* test.[110]

From the outset, the Court appeared uncomfortable with the *Schempp* test, and noted that "[t]his test is not easy to apply."[111] The Court hesitantly applied the new test and found that the State had a legitimate interest in providing children with textbooks.[112] The Court based its judgment on the conclusion that "in addition to their sectarian function, [the parochial schools performed] the task of secular education."[113] While the Court easily articulated the secular purpose, it never fully evaluated the question of whether the primary effect of the statute was to advance religion.[114]

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103. *Id.* Brennan based his analysis on Hamilton v. Regents of University of California, 293 U.S. 245 (1934), where the court ruled that students could be compelled to participate in military drills even though such drills were against their religious convictions. The decision was, however, narrowly construed because attendance at the University was voluntary. *Id.*

104. *Id.* at 251. Any doubt that motive was part of purpose was dispelled in Wallace v. Jaffree, 472 U.S. 38 (1985), where the Court ruled that it is proper to examine motive when determining the presence of a secular purpose. *See infra* notes 186-88 and accompanying text.

105. 392 U.S. 236 (1968).

106. *Id.* at 238.

107. *Id.* at 239.

108. *See supra* notes 47-49 and accompanying text.

109. *Allen,* 392 U.S. at 243.

110. School Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963); *see supra* notes 86-88 and accompanying text.

111. *Allen,* 392 U.S. at 243.

112. *Id.* The Court, however, assumed that the school bureaucracy would ensure the transfer of secular textbooks only, an assumption strongly criticized by Justice Douglas. *See id.* at 254-56 (Douglas, J., dissenting).

113. *Id.* at 248.

114. *Id.*

Although Justice Harlan concurred in the opinion,[115] he did so by combining the secular purpose and excessive entanglement tests.[116] Justice Harlan proposed that a statute would pass constitutional muster if, in addition to a secular purpose, "the activity [did] not involve the State 'so significantly and directly in the realm of the sectarian as to give rise to [the] divisive influences and inhibitions of freedom.' "[117] While Justice Harlan's analysis stood as significant evidence of the continuing development of the entanglement clause, his analysis still subordinated entanglement as a corollary to the secular purpose test.[118]

Justice Black, in dissent, did not hesitate to criticize the majority's opinion; he described the statute as a "flat, flagrant, open violation of the First and Fourteenth Amendments which together forbid Congress or state legislatures to enact any law 'respecting an establishment of religion.' "[119] Justice Black reasoned that the law's primary effect relieved parochial schools from the cost of textbooks, and amounted to state aid for religion.[120] Accordingly, Justice Black urged the invalidation of the statute under the establishment clause as an impermissible aid to religion.[121]

The Court's decision in *Allen* failed to assuage complaints about the inconsistencies of the Court's establishment clause cases.[122] The fundamental problem remained the same: While the Court called for separation, it continued to allow aid to religious organizations.[123] In *Walz v. Tax Commission*

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115. *Id.* at 249 (Harlan, J., concurring).

116. *Id.*

117. *Id.* (quoting School Dist. of Abington v. Schempp, 374 U.S. 203, 307 (1963)).

118. It was not until the Court's decision in Walz v. Tax Commission of New York, 397 U.S. 664 (1970), that the Court recognized entanglement as an independent test. "[I]n *Walz v. Tax Commission* the Court supplemented this test with an independent measure of constitutionality. That is, does the program foster 'excessive government entanglement with religion . . . .' " Note, *Excessive Entanglement: A New Dimension to the Parochial Aid Controversy Under the First Amendment,* 3 LOY. U. CHI. L.J. 73, 77 (1972).

The independent excessive entanglement test offers an important additional barrier between church and state arising particularly with regard to legislation that while having a secular purpose and general benefit, creates the existence of a long-term relationship between church and state. The test's potency may lie in the ability of the excessive entanglement test to dismantle statutes that, while made to appear secular, have deeply ingrained religious objectives. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

119. *Allen,* 392 U.S. at 250 (Black, J., dissenting).

120. *Id.* at 253.

121. *Id.* at 252. "The First Amendment's bar to establishment of religion must preclude a State from using funds levied from all of its citizens to purchase books for use by sectarian schools, which, although 'secular,' realistically will in some way inevitably tend to propagate the religious views of the favored sect." *Id.*

122. Note, *Recent Decisions,* 35 BROOKLYN L. REV. 286, 291 (1969).

123. *See* Board of Educ. v. Allen, 392 U.S. 236 (1968); Zorach v. Clauson, 343 U.S. 306 (1952); Everson v. Board of Educ., 330 U.S. 1 (1947).

of New York,[124] the Court acknowledged that its previous holdings had created an amorphous series of tests which lead to unpredictable decisions.[125] Once again, the Court set out to create a new establishment clause test.

In *Walz*, the petitioner asked the Court to grant an injunction to prevent the tax commissioner from granting property tax exemptions to religious organizations. At the outset, the Court indicated that it intended to take a new direction in analyzing establishment clause challenges. The Court stated, "The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."[126] Even the long inviolate concept of neutrality was attacked: "[W]e will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[127] Such benevolence seems a far cry from "wholesome neutrality"[128] and "the wall of separation,"[129] the Court's previous touchstones. Having dismantled twenty years of precedent, the Court turned to a new test—intent.[130]

In focusing on the new test of intent, the Court did not completely abandon all precedent. Convinced that the legislature did not intend to establish religion, the Court applied an independent excessive entanglement test.[131] This marked the first time the Court used the entanglement test as more than a buttress for a secular purpose decision.[132] The Court's test examined "whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."[133] The Court did not strictly apply this test,

124. 397 U.S. 664 (1970).

125. *See supra* note 38 and accompanying text.

126. *Walz*, 397 U.S. at 668.

127. *Id.* at 669.

128. School Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963).

129. Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States 98 U.S. 145, 164 (1878)).

130. "Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question *are intended* to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz*, 397 U.S. at 669 (emphasis added).

131. "Determining [there is no intent to promote religion] does not end the inquiry, however. We must also be sure that the end result—the effect—*is not an excessive government entanglement with religion.*" *Id.* at 674 (emphasis added).

132. *See supra* note 118.

133. *Walz*, 397 U.S. at 675.

choosing instead to view the issue in an historical context.[134] The historical approach utilized in *Walz* offers the best example of an apparent exception for certain activities that, while clearly appearing to violate the establishment clause, have a history of peaceful coexistence with secular institutions and government. Under the Court's proposed entanglement test, it would be difficult to argue that tax exemptions, requiring constant state monitoring, do not entangle the Church and the State. The Court overlooked this fact and instead applied an historical exception because "two centuries of uninterrupted freedom from taxation has [not] given the remotest sign of leading to an established church or religion."[135]

While the Court managed to clarify and expand excessive entanglement and the historical exemption, its narrow view of neutrality and rejection of the *Schempp* test effectively eliminated what little progress had been made in constructing a coherent test for establishment clause challenges.[136] Although frustrated, the Court soon created a lasting test for such challenges.

C. Modern Establishment Clause Doctrine: Lemon v. Kurtzman *and* Committee for Public Education and Religious Liberty v. Nyquist

The greatest accomplishment of the *Walz* decision was the Court's realization that its decisions contained significant internal inconsistencies. While openly acknowledging the flaws in its prior decisions, the Court failed to resolve the confusion surrounding these decisions, and may have complicated the situation by disregarding the fairly coherent test articulated in *Schempp.* Fortunately, with the decision of *Lemon v. Kurtzman,*[137] the Court soon filled the void left by *Walz.*[138]

In *Lemon,* the Court focused on two statutory schemes. The first, the Rhode Island Supplement Act,[139] allowed state officials to "supplement the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to a teacher an amount not in excess of 15% of his current

134. *Id.* at 668; *see also infra* notes 203-09 and accompanying text.

135. *Id.* at 678.

136. "The majority opinion in *Walz* implicitly rejects th[e] theory [of the strict separation proposed in the *Schempp* test] . . . ." Note, *Recent Cases,* 39 U. CIN. L. REV. 569, 584 (1970).

137. 403 U.S. 602 (1971).

138. The significance of the Court's decision in *Lemon* cannot be overstated. In light of two decades of confusion surrounding the establishment clause, the *Lemon* decision is a masterpiece of condensation. More importantly, the tests outlined in the *Lemon* decision have, to this day, survived intact. *See* County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086 (1989).

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

annual salary."[140] The second scheme, the Pennsylvania Nonpublic Elementary and Secondary Education Act,[141] allowed reimbursements to nonpublic schools for "secular educational services."[142] These reimbursements included textbooks, salaries, and instructional materials.[143]

While acknowledging that it could "only dimly perceive the lines of demarcation,"[144] the Court created a clear establishment clause test in *Lemon.* Writing for the majority, Chief Justice Burger indicated that the Court's narrow view in *Walz* was an anomaly,[145] and stressed that the Court should broadly interpret the establishment clause to prevent even "a step that could lead to . . . establishment."[146] Under this broad interpretation, the Court's primary focus moved to the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' "[147] To ensure protection from these "primary evils,"[148] the Court reinstated the *Schempp* test.[149] The Court, however, went one step further and included excessive entanglement as the third prong to its test. As the *Lemon* Court stated: "Three . . . tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster 'an excessive government entanglement with

140. *Lemon,* 403 U.S. at 607.

141. PA. STAT. ANN. tit. 24, §§ 5601-5609 (Supp. 1971) (repealed 1977).

142. *Lemon,* 403 U.S. at 609.

143. *Id.*

144. *Id.* at 612.

145. *Id.* at 614.

146. *Id.* at 612.

> The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion . . . . Instead they commanded that there should be "no law *respecting* an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. . . . A given law might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

Id. (emphasis in original).

The emphasis of the terms "establishment" and "respecting" indicates the Court's desire that the establishment clause be broadly read. Initial colonial concerns revolved around a fear of state sponsored churches, which were "established" as the official church, thus receiving a virtual monopoly of religious power. Use of the term "respecting" intentionally moves beyond absolute sponsorship to include any action which might, no matter how unlikely, threaten a return of established churches. *Id.*

147. *Id.* (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 668 (1970)).

148. *Id.*

149. *Id.*

religion.' "[150] In evaluating the secular purpose of a statute, the Court inquired into the presence of any facts tending to undermine the stated legislative intent; absent such a showing, the Court deferred to the stated legislative intent.[151] In *Lemon,* the Court found nothing that undermined the stated legislative purposes of the two acts. It therefore proceeded to the question of entanglement.[152]

In addressing entanglement, the Court recognized that "[s]ome relationship between government and religious organizations is inevitable."[153] To determine which religious entanglements with government were excessive, the Court examined "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[154] The Court found that both the Pennsylvania and Rhode Island statutes violated the entanglement test because the state would have to monitor the schools consistently to make sure that schools did not use secular funds for sectarian purposes, thus creating a long term relationship between Church and State.[155]

In addition to the entanglement criteria it previously listed, the Court adopted a political divisiveness test[156] and integrated it into the entanglement test.[157] The Court viewed the political divisiveness test as crucial, saying that "[p]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[158] Government must avoid participation in such debates, the Court noted, because to do otherwise would divert resources away from the resolution of secular issues.[159] The Court ruled that the Rhode Island and Pennsylvania statutes violated the political divisiveness test because the funding bills for parochial schools would arise every year and that the "[p]olitical fragmentation and

150. *Id.* at 612-13 (quoting *Walz,* 397 U.S. at 674) (citations omitted).

151. *Id.* at 613.

152. *Id.*

153. *Id.* at 614.

154. *Id.* at 615.

155. *Id.* at 621-22.

156. The political divisiveness test examines whether the government has aligned itself on one side of a political debate divided along religious lines. *Id.* at 622.

157. "A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs." *Id.*

158. *Id.*

159. "It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad [of] issues and problems that confront every level of government." *Id.* at 623. This is precisely the situation which has been created by the current abortion debate.

divisiveness on religious lines are thus likely to be intensified."[160] Viewing the political divisiveness test as an adjunct to the entanglement test, the Court ruled that the statutes also violated the entanglement test because of political divisiveness caused by the need for constant monitoring to avoid politicization of religious issues.[161] Within two years, however, the political divisiveness test appeared severed from the entanglement test, perhaps making political divisiveness an independent test.[162]

In *Committee for Public Education and Liberty v. Nyquist,*[163] the Court held a New York statute, which provided maintenance and tuition reimbursement grants to parochial schools, invalid under the establishment clause.[164] Applying the *Lemon* test, the Court found the statutes unconstitutional as an impermissible advancement of religion.[165] The Court resolved the issue using the second prong of the *Lemon* test, but also discussed the political divisiveness test.[166] The Court distinguished two types of entanglement. "[A]part from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion."[167] The Court's use of the word "apart" appeared to create an independent test centered on political divisiveness. The Court's decision illustrated its concern regarding the history of religious groups that sought to impose their will on others by using the strength of government.[168] Applying the political divisiveness test, the Court ruled that the New York plan violated the establishment clause because the plan involved a deeply emotional church-state issue that created significant political division.[169] The

160. *Id.*

161. *Id.* at 623-24.

162. Indeed, some commentators believe that the political divisiveness test, while not explicitly stated, may have been the test underlying several decisions where statutes were found to violate the establishment clause. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1058-60 (1986).

163. 413 U.S. 756 (1973).

164. *Id.* at 798.

165. *Id.* at 794. The court appears to have heightened the scrutiny of the secular purpose test, requiring that the "law in question . . . must reflect a *clearly* . . . legislative purpose." *Id.* at 773 (emphasis added). The insertion of the word "clearly" may be interpreted as lowering the amount of deference required under *Lemon* when evaluating the legislature's stated intent.

166. *Id.* at 795-96.

167. *Id.* at 794.

168. "[C]ompetition among religious sects for political and religious supremacy has occasioned considerable civil strife, 'generated in a large part' by competing efforts to gain or maintain the support of government." *Id.* at 796 (quoting Everson v. Board of Educ., 330 U.S. 1, 8-9 (1947)).

169. *Id.* at 797. The Court's holding indicates its realization of how sensitive issues involve the establishment clause. While a spending bill may evoke passion, it seems illogical to assume

Court held that the political divisiveness of a statute did not, without more, violate the establishment clause; rather, political divisiveness raised a "warning signal."[170]

Without a clear majority, the status of the political divisiveness test remained unclear. The independence of the political divisiveness test, however, is not crucial. Even if political divisiveness is viewed only as a particular form of entanglement, and thus as subordinate to the entanglement test, the *Lemon* decision indicates that a violation of the political divisiveness test still triggers the protection of the establishment clause, albeit through the entanglement test.[171] Regardless, because the Court treated the political divisiveness test in *Lemon* as "entanglement of yet a different character,"[172] and in a subsequent case as an "addition,"[173] political divisiveness should be viewed as a separate test. As a separate test, its violation places a heavy burden on the state instead of the conclusory presumption created by a violation of any one of the three prongs of the *Lemon* test.[174]

The courts have yet to develop fully the political divisiveness test,[175] apparently because the Court is comfortable with the three-prong *Lemon* test.[176] The *Lemon* test has survived intact, and has subsequently been strengthened, thus rebuilding Jefferson's damaged wall.

D. The Present Test: The Expansion of Lemon *and the Continuing Use of the Historical Exemption*

Since the *Lemon* test's inception, the Supreme Court has continuously endorsed and upheld the test. The developments over the years since *Lemon*

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that it involves deep personal beliefs. Once associated with the measure, however, the infusion of religion moves the debate over a spending bill to a far more intense level.

170. "And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored." *Id.* at 797-98 (quoting Lemon v. Kurtzman, 403 U.S. 602, 625 (1971)).

171. If a statute, however, creates a political entanglement, but not an administrative entanglement, it may not violate the establishment clause. *See* Meek v. Pittenger, 421 U.S. 349, 372 (1975).

172. *Lemon*, 403 U.S. at 622.

173. *Meek*, 421 U.S. at 372.

174. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 141-42 (1986).

175. The Court did appear to use political divisiveness as an independent test in *Aguilar v. Felton*, 473 U.S. 402, 412-16 (1985).

176. *See, e.g.*, Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U.L. REV. 1113, 1126-27 (1988); Strossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333, 360-61.

have been limited to fine tuning the *Lemon* test, not challenging it. In general, the Court has aimed to strengthen the wall between church and state.

In *Meek v. Pittenger,*[177] the Court, in a plurality opinion, held that elements of a Pennsylvania statute, allowing the direct loan of instructional materials, equipment, and auxiliary service to parochial schools, violated the establishment clause.[178] Concurring in part, Justice Brennan, joined by Justices Douglas and Marshall, advocated the use of a heightened secular purpose test and the independent political divisiveness test of *Nyquist.*[179] In analyzing the secular purpose, Justice Brennan wrote, "[t]he law in question must, first, reflect a clearly secular legislative purpose."[180] More importantly, Justice Brennan's concurrence offered the strongest language yet in support of an independent political divisiveness test. Specifically, Justice Brennan stated that "the Court, albeit without express recognition of the fact, added a significant fourth factor to the [*Lemon*] test . . . divisive political potential."[181]

Seven years later, the Court, in *Larson v. Valente,*[182] found that a Minnesota solicitation law, allowing a reporting exemption for religious organizations that received more than 50% of contributions from their members, violated the establishment clause because the state designed the law to discriminate against the Unification Church.[183] The Court held that the strict scrutiny test applies whenever a state law demonstrates a denominational bias.[184] This was the first time the Court used strict scrutiny in an establishment clause challenge, an important expansion beyond the deference granted to legislators under the *Lemon* test.[185]

The Court examined legislative intent in *Wallace v. Jaffree.*[186] In *Wallace,* the Court ruled that an Alabama school prayer and meditation statute violated the establishment clause because the advancement of religion motivated the lawmakers.[187] The Court reasoned that when applying the *Lemon*

177. 421 U.S. 349 (1975).

178. Justices Stewart, Blackmun, and Powell held that a textbook loan program was constitutional. *But see* Bower v. Kendrick, 487 U.S. 589, 610-11 (1988) (holding that grants to religious institutions under a facially neutral statute do not violate the establishment clause).

179. *See supra* notes 165-75 and accompanying text.

180. 421 U.S. at 373.

181. *Id.* at 374 (quoting *Lemon,* 403 U.S. at 622).

182. 456 U.S. 228 (1982).

183. *Id.* at 244-47.

184. *Id.* at 246.

185. *Id.;* Note, *Another Brick in the Wall: Denominational Preferences and Strict Scrutiny Under Establishment Clause,* 62 NEB. L. REV. 359, 361 (1983); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

186. 472 U.S. 38 (1985).

187. *Id.* at 56, 59-60.

test, "it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.' "[188] Also, for the first time since *Nyquist,* five Justices accepted a "clear" secular purpose as the test for the first prong of the *Lemon* test.[189] The trend toward more separation, led by the *Lemon* test and its progeny, appeared to alarm advocates of a porous wall of separation. Justice Rehnquist, in a staunch dissent, called for the dismantling of the *Lemon* test, saying that "the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests."[190] The Court did not heed Justice Rehnquist's call.[191]

In *School District of Grand Rapids v. Ball,*[192] the Court analyzed the "effect" branch of the *Lemon* test.[193] The Michigan Community Education and Shared Time programs provided supplementary classes to students in private schools at public expense.[194] The Court found sectarian schools to be the primary beneficiaries of the program.[195] The Court noted that the purpose of the statute was laudable: providing additional education for the state's schoolchildren.[196] Despite the aim of the statute, the Court stated, "[o]ur cases have consistently recognized that even such a praiseworthy, secular purpose cannot validate government aid to parochial schools when the aid has the effect of promoting a single religion or religion generally or when the aid unduly entangles the government in matters religious."[197] The Court proceeded to outline the three criteria used to evaluate a statute's effect: 1) whether the statute encourages subtle or overt religious indoctrination; 2) whether the statute creates a symbolic union between Church and State; and, 3) whether the statute in effect subsidizes religious activity.[198] The Court applied these criteria and ruled that state funding of instructors in a sectarian environment might subtly or overtly indoctrinate students in particular religious tenets; that inherent in the state support of instruction in sectarian schools is the threat of conveying to the public a message of state support for religion; and, finally, that the program acted as a direct subsidy to parochial schools.[199]

188. *Id.* at 56 (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).
189. *Id.* at 56, 66.
190. *Id.* at 110 (Rehnquist, J., dissenting).
191. *Id.* at 55-56.
192. 473 U.S. 373 (1985).
193. *Id.* at 397.
194. *Id.* at 375.
195. *Id.*
196. *Id.* at 382.
197. *Id.*
198. *Id.* at 397.
199. *Id.*

The Court's final expansion of the *Lemon* criteria appeared in *Edwards v. Aguillard.*[200] In *Aguillard,* the Court held unconstitutional the Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public Schools Instruction Act. Although case law regarding the establishment clause generally discussed only broad concepts of religion, the *Aguillard* Court went a step further, saying, "[a] governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose. This intention may be evidenced by promotion of religion in general, or by advancement of a particular religious belief."[201]

Thus, the trend in establishment clause adjudication has been toward widening the separation between church and state. There have been only a few cases in which the Court rejected an establishment clause challenge.[202] The Court decided these cases under the historical exemption proposed in *Walz v. Tax Commission of New York.*[203] In *Lynch v. Donnelly,*[204] the Court addressed whether state funded crèches violated the establishment clause. While the Court admitted that a crèche is commonly associated with religion, it reasoned that because the crèche was part of a "celebration acknowledged in the Western World for 20 centuries,"[205] the City of Pawtucket, Rhode Island had not violated the establishment clause.[206]

Additionally, in *Marsh v. Chambers,*[207] the Court allowed the Nebraska state legislature, using state tax dollars, to pay for a chaplain to open the daily sessions with a prayer.[208] In both *Lynch* and *Marsh,* the Court pointed out that mixing religious and secular activities had been common in the United States for over two hundred years, but the mix had not evidenced any

200. 482 U.S. 578 (1987).

201. *Id.* at 585 (citations omitted). The particular religious belief that life begins at conception is the underlying rationale of the antiabortion movement. *Infra* note 346.

202. *See* Lynch v. Donnelly, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983).

203. 397 U.S. 664 (1970).

204. 465 U.S. 668 (1984).

205. *Id.* at 686.

206. *Id.* at 687. Justice O'Connor, in her concurring opinion, offered an alternative test to *Lemon* endorsement. Justice O'Connor stated:

> Our prior cases have used the three-part [*Lemon* test] as a guide to detecting . . . forms of unconstitutional government action. It has never been entirely clear, however, how the three parts of the test relate to the principles enshrined in the Establishment Clause. Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device.

Id. at 688-89 (O'Connor, J., concurring) (footnote and citation omitted).

207. 463 U.S. 783 (1983).

208. *Id.* at 795.

threat to secular institutions.[209] This history of coexistence, rather than strict legal precedent, appears to be the touchstone in these cases.

The Court recently reexamined the historical exemption in a religious display setting in *County of Allegheny v. American Civil Liberties Union.*[210] Writing for the majority, Justice Blackmun, joined by Justice O'Connor, ruled that a crèche with an angel wearing a banner stating "Glory to God in the Highest!"[211] violated the establishment clause.[212] The Court distinguished *Lynch* by explaining that "*Lynch* teaches that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line."[213] *Allegheny* thus indicates that there are strict limitations on the use of historical arguments in establishment clause adjudication.

The importance of the Court's opinion in *Allegheny* also lies in Justice O'Connor's decision to join the majority. Some commentators had viewed Justice O'Connor's concurrence in *Lynch*[214] as a repudiation of the *Lemon* test, rendering the *Lemon* test a minority stance.[215] Justice O'Connor, however, joined Justices Blackmun, Brennan, Marshall, and Stevens in Part III A of *Allegheny* to expressly uphold the three-pronged *Lemon* test.[216] Despite Justice O'Connor's apparent wavering and the problems posed by historical exemptions, the *Lemon* test has survived intact.

E. A Modern Day Test for Establishment Clause Adjudication

The modified *Lemon* test forms the crux of the present test for establishment clause challenges. The test requires that a statute have a clearly secular purpose[217] which does not discriminate against a sect,[218] and does not evidence a legislative intent to endorse religion or a particular religious belief.[219] In addition, the statute's primary effect must neither advance nor inhibit religion, including a tacit or implicit endorsement of religion,[220] and

209. *Id.; Lynch,* 465 U.S. at 686.
210. 109 S. Ct. 3086 (1989).
211. *Id.* at 3103.
212. *Id.* at 3105.
213. *Id.*
214. Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring); *see supra* note 206.
215. Note, Lynch v. Donnelly: *The Case for the Creche,* 29 ST. LOUIS U. L.J. 459, 488 (1984).
216. "This trilogy of tests has been applied regularly in the Court's . . . decisions." *Allegheny,* 109 S. Ct. at 3100.
217. Wallace v. Jaffree, 472 U.S. 38, 56 (1985).
218. Larson v. Valente, 456 U.S. 228, 246 (1982).
219. Edwards v. Aguillard, 482 U.S. 578, 585 (1987).
220. County of Allegheny v. American Civil Liberties Union, 109 S. Ct. at 3100-01 (1989).

the statute must not entangle the Church and the State, even to the extent of a small step in that direction.[221] Therefore, the Court can find unconstitutional a statute that entangles the state in a political issue divided along religious lines.[222] If a statute violates any of these rules, the Court will still allow the statute to stand where the particular religious practice in question has a long history of coexistence, without interference, with secular institutions.[223] It is against this test that all establishment clause challenges must be measured.

II. Does The Establishment Clause Prohibit The Outlawing Of Abortion?

A. Hear No Evil, See No Evil, Speak No Evil: The Court's Approach in Harris v. McRae

The Court addressed the relationship between antiabortion regulations and the establishment clause only once, in *Harris v. McRae.*[224] The debate in *McRae* focused on the Hyde amendment,[225] which restricted the use of federal funds for abortions.[226] The day Congress enacted the Hyde amendment, Cora McRae, a Medicaid recipient from New York in the first trimester of her pregnancy, sought to enjoin enforcement of the amendment in the District Court for the Eastern District of New York.[227] The New York City Health and Hospitals Corporation, which operated sixteen hospitals, twelve of which performed abortions, joined McRae in the suit.[228] Plaintiffs challenged the Hyde amendment, alleging violations of the first, fourth, fifth, and

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

222. Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973).

223. Marsh v. Chambers, 463 U.S. 783, 795 (1983).

224. 448 U.S. 297 (1980).

225. *Id.* at 300-01.

226. [N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.

Id. at 302 (quoting Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979)). Limiting Medicaid funding for abortions radically weakens women's access to abortion because prior to enactment of the Hyde amendment three hundred thousand abortions, a third of all abortions performed in the United States, were paid for by Medicaid. *See* Tribe, Abortion: The Clash of Absolutes 151 (1990) (discussing the ban on Medicaid funding for abortions).

227. *McRae,* 448 U.S. at 303.

228. *Id.*

ninth amendments.[229] The district court certified the case as a class action after granting the injunction.[230]

After a remand from the United States Supreme Court, which vacated the injunction, the district court conducted a lengthy trial.[231] The trial focused on three major issues: 1) whether a state participating in the Medicaid program was obligated to fund medically necessary abortions regardless of federal reimbursement; 2) whether the Hyde amendment violated the due process clause; and, 3) whether the Hyde amendment violated the religion clauses of the first amendment.[232] The district court rejected plaintiff's argument that the state was required to continue payments for medically necessary abortions because, in the court's view, the Hyde amendment had freed the state of that burden.[233] The district court also rejected plaintiff's establishment clause argument, claiming that the statute had a secular purpose, neither advanced nor inhibited religion, and that it did not cause excessive entanglement.[234] The district court did, however, accept plaintiff's due process and free exercise of religion claims.[235]

Noting probable jurisdiction, the Supreme Court granted certiorari.[236] The Court agreed with the lower court's determination that, under the Hyde amendment, New York was not required to pay for medically necessary abortions, but used a different rationale.[237] Having resolved the statutory issue, the Court proceeded to examine the relevant constitutional issues.

The Court began by examining the claim that the Hyde amendment impinged on the liberty interest protected by the due process clause as recognized in *Roe v. Wade*.[238] The Court rejected this argument. While acknowledging that *Roe* did entitle a woman to the right to have access to an abortion, the Court stated, "although government may not place obstacles in the path of . . . [a woman's choice to have an abortion,] it need not remove those [obstacles] not of its own creation."[239] Therefore, although indigent status was likely to hinder a woman's ability to receive an abortion, govern-

229. *Id.*

230. *Id.* at 304. The class represented was "all pregnant or potentially pregnant women in the State of New York eligible for Medicaid . . . who decide to have an abortion within the first 24 weeks of pregnancy, and . . . all authorized providers of abortion services to such women." *Id.*

231. For a full discussion of the prior history, see *id.* at 303-06.

232. *Id.* at 304-05.

233. *Id.* at 305.

234. *Id.* at 305 n.8.

235. *Id.* at 305-06.

236. 444 U.S. 1069 (1980).

237. 448 U.S. at 308-11.

238. *Id.* at 312.

239. *Id.* at 316.

ment had no obligation to assist her in procuring an abortion because government had not impoverished the woman.[240]

The Court then evaluated the argument that the Hyde amendment violated the first amendment's bar against establishing religion and impinging upon the freedom of religion.[241] The Court did not reach the merits of the free exercise clause challenge, and dismissed it for a lack of standing.[242]

As for the establishment clause challenge, the Court, in a cursory fashion, rejected a claim that the Hyde amendment, by incorporating doctrines of the Roman Catholic Church into law, violated the establishment clause.[243] Specifically, the Court stated that a statute does not "violate[] the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.' "[244] To illustrate its point, the Court reasoned "that [although] the Judaeo-Christian religions oppose stealing [that] does not mean that a State . . . may not, consistent with the Establishment Clause, enact laws prohibiting larceny."[245] This rationale, however, tended to indicate the weakness of the Court's approach to this particular establishment clause challenge.[246]

First, because the challenge alleged a denominational basis, under *Larson,* the Court should have utilized strict scrutiny.[247] At a minimum, using *Lemon,* the Court should have looked for a clearly secular purpose, asked who received the primary benefit of limiting abortion funds, and examined whether the Hyde amendment unnecessarily entangled church and state.[248] The Court, in attempting to justify its failure to apply the *Lemon* test, stated that "the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets does not, without more, contravene the

240. *Id.* at 316-17.

241. *Id.* at 318-19.

242. *Id.* at 320.

243. *Id.* at 319.

244. *Id.*

245. *Id.*

246. While the Court equates larceny statutes and the Hyde amendment, analysis under the *Lemon* test, Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), illustrates that these two types of law are distinguishable. Larceny statutes can clearly withstand establishment clause analysis. First, the state acts in accordance with a clearly secular purpose when it attempts to protect its citizens' property interests. The primary effect is beneficial to all citizens, not to particular religious groups. Also, such legislation does not involve the government in a political debate divided along religious lines. *Supra* notes 144-50 and accompanying text.

The Hyde amendment cannot withstand this same type of analysis. *See infra* notes 248-51 and accompanying text.

247. Larson v. Valente, 456 U.S. 228, 244-47 (1982); *see also supra* notes 182-85 and accompanying text.

248. *See* Comment, *The Establishment Clause and Religious Influences on Legislation,* 75 NW. U.L. REV. 944 (1980).

Establishment Clause."[249] The logical question to be asked was what "more" did the Court require. It appears from the Court's language that a successful establishment clause challenge would have to demonstrate that the statute did more than "coincide or harmonize" with religious tenets. Ironically, the district court in *McRae* found more:

> [T]he record indicates, only the Roman Catholic Church, among the institutional religions, has sought to secure the enactment of legislation that would forbid abortion, has organized educational and lobbying efforts to that end, and acted to mobilize popular support for its legislative goals. . . . [T]hat the efforts of the Roman Catholic clergy and laity have produced the [Hyde amendment is not a fact], but it is more likely than not that those efforts have been a factor that cannot be eliminated from the chain of causation.[250]

The Church's active role in the creation of the Hyde amendment indicates that the statute's similarity to the religious tenets of the Roman Catholic Church was more than mere coincidence.

B. Completing the Task of Harris v. McRae: *Why Present Antiabortion Statutes Cannot Survive a Thorough Establishment Clause Analysis*

1. States Do Not Have a Clearly Secular Purpose on Which to Base Antiabortion Statutes

Decisions such as *Edwards v. Aguillard* and *Wallace v. Jaffree* indicate the willingness of the Court to question the motives of state legislators. As the *Lemon* Court indicated, the Court will allow a statute to stand only if "we find nothing . . . that undermines the stated legislative intent."[251] According to the *Aguillard* Court, if the actual intention of the legislature is to promote religion, the claimed secular purpose is undermined and will be disregarded by the Court.[252] An intention to promote religion may be "evidenced by promotion of religion in general . . . or by advancement of a particular religious belief."[253] Even if there is some valid, secular purpose, under *Lynch,* the "requirement [of a secular purpose] is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes."[254]

249. *Harris,* 448 U.S. at 319-20.

250. McRae v. Califano, 491 F. Supp. 630, 727 (E.D.N.Y. 1980).

251. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

252. Edwards v. Aguillard, 482 U.S. 578, 593-94 (1987). In *Aguillard,* the state's claim that their plan for balanced treatment of creation and science protected academic freedom was undermined by the Court's determination that the actual purpose was to promote religion.

253. *Id.* at 585 (citations omitted).

254. Lynch v. Donnelly, 465 U.S. 668, 690-91 (1984).

As the *Aguillard* Court indicated, while "the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."[255] The secular purpose of antiabortion legislation must be measured against this framework.

In the context of abortion, the issue of secular purpose turns on one central issue: Whether a fetus is a human life.[256] Undoubtedly, if a fetus is a human life, a state would have a secular interest in protecting that life, and any action taken to protect that life would pass the first prong of the *Lemon* test. Often, however, the individual legislator's method of defining life can invoke the need for establishment clause analysis.[257] If the definition of life is motivated by religious beliefs, and incorporated into law, the resulting law cannot withstand establishment clause examination.[258]

Arguably, however, a state could pass such regulations based solely on a secular belief that life begins at conception. While some medical opinions appear contrary to this proposition,[259] the question of whether a state can pass antiabortion laws based on a purely secular belief merits examination. In enacting the regulation, the state would attempt to maximize the preservation of fetal life. Regulations based on secular beliefs would likely be evidenced by the existence of legal protections for state citizens in all substantive areas of state law from the moment of conception. Alternatively, if the view that life begins at conception is confined exclusively to abortion regulation, the absence of such a consistent legislative scheme would tend to undermine a claim that the legislature's intent in enacting an antiabortion regulation was clearly secular.

For example, four states have antiabortion regulations that tacitly or implicitly reflect a desire to protect life from the moment of conception: Kentucky,[260] Nebraska,[261] Pennsylvania[262] and Missouri.[263] If a state has based

255. *Aguillard,* 482 U.S. at 586-87.

256. "If it is not a human life, we have no fight, we have no argument. If it is a human life, then we do have a lot to argue about." 125 CONG. REC. 17,020 (1979) (comments of Rep. Henry Hyde on a proposal to revoke the Hyde amendment, which limited Medicaid funding for abortions).

257. "We cannot allow our government to become involved in this inhumane treatment of human life. It is God's creation and it is imperative that we do not destroy it." *Id.* (comments of Rep. Bouquard in support of Hyde amendment).

258. *See* Wallace v. Jaffree, 472 U.S. 38, 59-60 (1985); Edwards v. Aguillard, 482 U.S. 578, 585 (1987).

259. *See* Gardner, *Is An Embryo A Person,* THE NATION, Nov. 13, 1989, at 557.

260. "If, however, the United States Constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored." KY. REV. STAT. ANN. § 311.710 (Baldwin 1988).

261. The Legislature hereby finds and declares:

its laws on a secular belief that life begins at conception, then comparing the state antiabortion statutes to the state's homicide and wrongful death statutes should indicate the presence of an internal consistency indicative of a statutory scheme designed to protect a secularly based definition of life as beginning at conception. In such a system, the fetus, from the moment of conception, would be protected by state law. If the fetus were murdered, its killer could be prosecuted for homicide.[264] If the fetus died as the result of another's negligent act, the relatives of the fetus could sue the negligent party under the state's wrongful death statute.[265] Thus, this system, based on a secular belief that life begins at conception, would not only protect, within constitutional limits, the fetus from being aborted, but would also

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(1) That the following provisions were motivated by the legislative intrusion of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn. . . .

(2) That the members of the Legislature expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of the United States Supreme Court's decision on abortion of January 22, 1973 . . . .

NEB. REV. STAT. § 28-325 (1977).

262. (c) Construction.—In every relevant civil or criminal proceeding in which it is possible to do so without violating the Federal Constitution, the common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws and to further the public policy of this Commonwealth encouraging childbirth over abortion.

18 PA. CONS. STAT. § 3202 (1989). " 'Unborn child' and 'fetus.' Each term shall mean an individual organism of the species homo sapiens from fertilization until live birth." 18 PA. CONS. STAT. § 3203 (Supp. 1989).

263. 1. The general assembly of this state finds that:

(1) The life of each human being begins at conception;

. . . .

2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States. . . .

MO. ANN. STAT. § 1.205.1-2 (Vernon 1986).

264. Consider, for example, the case in Boston, Massachusetts, where Charles Stuart, with the assistance of his brother, allegedly shot and killed his wife who was seven months pregnant. The eight week premature infant was delivered alive, but died shortly thereafter. *A Murderous Hoax,* NEWSWEEK, Jan. 22, 1990 at 16.

Under the present laws of Kentucky, Pennsylvania, Nebraska, and Missouri, if the unborn fetus was not born alive, the state could not have prosecuted Charles Stuart's accomplices for the murder of Stuart's unborn son. In a state with a secular policy favoring life from the moment of conception, the state homicide statute would be drafted, or in the alternative, interpreted, to allow the killer of any fetus, from the moment of conception, to be prosecuted for homicide. *See infra* notes 321-24 and accompanying text.

265. A common factual situation in this area is the miscarriage of a nonviable or viable fetus as a result of the mother's involvement in a car accident. *See, e.g.,* Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974) (holding that mother of a viable fetus, stillborn as a result of injuries received within the womb, is entitled to sue the officer who caused the accident which led to prenatal injuries).

extend to the fetus the full protection of all state laws, including protection under the state's wrongful death and homicide laws.[266] Absent such a consistent scheme, however, the actual intention of the legislature is suspect, and may be exposed as promoting a particular religious belief, thereby undermining the claimed secular purpose and offending the establishment clause.

a. Kentucky

Kentucky abortion laws indicate that the Commonwealth's intention is to protect human embryos "regardless of their degree of biological development."[267] Kentucky's homicide and wrongful death statutes, however, do not reflect this concern. While the Kentucky Criminal Homicide Statute[268] says only that "a person is guilty of criminal homicide when he causes the death of another human being,"[269] the Kentucky Supreme Court ruled that to be considered a human being under the statute, one must be born alive.[270]

Similarly, the Kentucky Wrongful Death Act[271] refers to accountability arising when "the death of a person results from an injury inflicted by the negligence or wrongful act of another."[272] Again, the Kentucky Supreme Court was left to interpret the meaning of the word "person." In *Mitchell v. Couch*,[273] the court considered whether the mother of a stillborn infant, allegedly born dead as the result of prenatal injuries, could sue under the wrongful death statute. The court cautioned:

> It should be pointed out that there is a definite medical distinction between the term "embryo" and the phrase "viable fetus." The embryo is the fetus in its earliest stages of development, but the expression "viable fetus" means the child has reached such a state of development that it can presently live outside the female body as well as within it.[274]

Denying the plaintiff's claim, the court concluded that "when a pregnant woman is injured through negligence and the child, *if it be a viable infant* within the definition recited above, [is injured] a right of recovery exists."[275]

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266. For an explanation of the Tennessee model which achieves this internal parity, see *infra* notes 319-28 and accompanying text.

267. KY. REV. STAT. ANN. § 311.710(5) (Michie/Bobbs-Merrill 1988).

268. *Id.* § 507.

269. *Id.* § 507.10.

270. Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983).

271. KY. REV. STAT. ANN. § 411.130 (Michie/Bobbs-Merrill 1970).

272. *Id.* § 411.130(1) (Michie/Bobbs-Merrill 1970).

273. 285 S.W.2d 901 (Ky. 1955).

274. *Id.* at 905.

275. *Id.* at 906 (emphasis added).

Despite the Kentucky legislature's stated intention to "protect the lives of all human beings regardless of their degree of biological development,"[276] the laws of the state of Kentucky reflect this intention only in the area of abortion.[277] Kentucky's inconsistent protections for the unborn, however, appear to be the rule, not the exception.[278]

b. Nebraska

The Nebraska state legislature has indicated its sense of frustration with the United States Supreme Court's abortion rulings, stating, "[t]he members of the Legislature expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of the United States Supreme Court's decision on abortion [in *Roe v. Wade*]."[279]

Unlike Kentucky, the state of Nebraska left little doubt as to whom it intended to protect from homicide. The Nebraska statute specifically states that a "[p]erson, when referring to the victim of a homicide, shall mean a human being who had been born and was alive at the time of the homicidal act."[280]

Unlike in their homicide statute, however, the Nebraska legislature failed to define the term "person" in their wrongful death statute.[281] In 1951, the Supreme Court of Nebraska, in *Drabbels v. Skelly Oil Co.*,[282] ruled that because at common law there was no recovery for stillborn infants, a similar bar applied to the state's former wrongful death statute.[283] Following the *Drabbels* decision, the legislature enacted the existing wrongful death statute.

The new wrongful death statute was examined in *Egbert v. Wenzl.*[284] The plaintiff, alleging her viable fetus was stillborn as a result of prenatal injuries proximately caused by defendant, requested the court to overrule *Drabbels* and rule that the Nebraska wrongful death statute's definition of a "person"

276. KY. REV. STAT. ANN. § 311.710(5) (Michie/Bobbs-Merrill 1988).

277. Both incidents requiring the Kentucky Supreme Court to interpret the meaning of "person" and "human being" were necessitated by the vagueness of the statute's wording. Had the legislature intended to protect life from the moment of conception they could have redrafted the statute to reflect this concern. The legislature's failure to do so raises questions as to how broad their desire was to protect all stages of human development.

278. *See infra* notes 279-300 and accompanying text.

279. NEB. REV. STAT. § 28-325(2) (1977); *see supra* note 261.

280. *Id.* § 28-302(2).

281. *Id.* § 30-809. "Action for wrongful death; creation. Whenever the death of a person shall be caused by the wrongful act, neglect or default, of any person [a cause of action arises] . . . ."

282. 155 Neb. 17, 50 N.W.2d 229 (1951).

283. *Id.*

284. 199 Neb. 573, 260 N.W.2d 480 (1977).

went beyond the common law definition[285] to include a viable infant. Ruling for the defendant, the court said,

> In view of the common law rule that an unborn fetus was not a person insofar as the law of torts is concerned, we think that if there had been an intention to create an action for the wrongful death of a viable fetus it would have been specifically so stated by the Legislature when the wrongful death statute was enacted.[286]

Thus, the protection afforded the unborn in Nebraska wrongful death actions was even lower than that afforded in similar cases in Kentucky, requiring not only viability, but live birth. Despite its frustration that it was barred from protecting the unborn, the Nebraska legislature not only explicitly excluded the unborn from its homicide statute, but similarly acquiesced in the court's requirement that a child be born alive to receive protection under the wrongful death statute.

c. Pennsylvania

Pennsylvania's legislature has sought to extend to the unborn the equal protection of the common and statutory law of the Commonwealth of Pennsylvania.[287] The unborn are defined as "organism[s] of the species homo sapiens from fertilization until live birth."[288]

Like Kentucky, Pennsylvania's homicide statute does not define the term "human being."[289] As in Kentucky, however, the term "human being" has been construed by the Pennsylvania courts to mean a person who is born alive.[290]

Pennsylvania's wrongful death act is also vague,[291] as are judicial interpretations of the statute. Initially, in *Scott v. Kopp,*[292] the Supreme Court of Pennsylvania followed the common law rule requiring birth before a wrongful death action could arise.[293] In *Amadio v. Levin,*[294] however, the Supreme

285. At common law, a child had to be born alive in order to claim any damages as a result of prenatal injuries. *Id.* at 574, 260 N.W.2d at 481-82.

286. *Id.* at 576, 260 N.W.2d at 482.

287. 18 PA. CONS. STAT. § 3202 (1989).

288. *Id.* § 3203.

289. "(a) Offense defined.—A person is guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being." 18 PA. CONS. STAT. § 2501 (1972). According to the corresponding historical note, Pennsylvania's homicide statute is taken from the Model Penal Code which defines a human being as "a person who has been born and is alive." MODEL PENAL CODE § 210.0 (1).

290. Pennsylvania Comm. v. Brown, 6 D.&C.3d 627 (1978).

291. "(a) General rule.—An action may be brought to recover damages for the death of an individual caused by the wrongful act . . . of another." 42 PA. CONS. STAT. § 8301.

292. 494 Pa. 487, 431 A.2d 959 (1981).

293. *Id.* at 489, 431 A.2d at 960.

Court of Pennsylvania overruled *Kopp*,[295] concluding that "[t]he time has arrived . . . [to] recognize that survival and wrongful death actions lie by the estates of stillborn children for fatal injuries they received while viable children *en ventre sa mere*."[296] In *dicta*, the court indicated that it may have intended protection to extend beyond viability.[297] Concurring and casting the deciding vote, Justice Zappala of the Pennsylvania Supreme Court limited the scope of his agreement, stating, "[b]ecause the Complaint in this case asserts that [the stillborn child] was 'viable' at the time of the allegedly negligent conduct of the defendants caused her death, the questions involved in circumstances implicating 'viability' in other ways must be left for another day."[298]

While the parameters of the court's decisions are debatable, the actions of the legislature are clear. Following the *Kopp* decision, legislation was introduced to allow a stillborn fetus to bring a cause of action. This legislation, however, was not reported out of committee.[299] While the Pennsylvania legislature has passed abortion regulations stating it wishes to "extend to the unborn the equal protection of the laws,"[300] it has failed to legislatively effectuate that desire in the areas of criminal homicide and wrongful death actions.

d. Missouri

The status of the unborn in Missouri is unclear, in part because Missouri's statement that life begins at conception and that all laws shall be interpreted so as to extend to the unborn rights of other citizens has not faced a challenge in the setting of a homicide or a wrongful death action. Additionally, Missouri's current homicide statute does not define the term "person."[301] Also, thus far, no Missouri court has ruled on the definition of "person" as used in the statute.[302] The general rule regarding whether a person must be born alive in order to be considered a homicide victim, however, is "at common law, and except as the statutes may otherwise provide, it is necessary

294. 509 Pa. 199, 501 A.2d at 1085 (1985).
295. *Id.* at 208, 501 A.2d at 1089.
296. *Id.* at 203, 501 A.2d at 1086-87.
297. *Id.* at 204, 501 A.2d at 1087.
298. *Id.* at 230 n.7, 501 A.2d at 1101 n.7 (Zappala, J., concurring).
299. *Id.* at 233-35, 501 A.2d at 1103 (Nix, C.J., dissenting). Chief Justice Nix's dissent focused on the failure of the legislature to pass this bill, arguing that the action of the court, in light of the legislature's actions, "entered the realm of statute-making, a function long recognized not to be performed by this Court." *Id.*
300. 18 PA. CONS. STAT. ANN. § 3202(c) (Purdon 1983).
301. MO. ANN. STAT. § 565.020 (Vernon 1990).
302. *Id.*

that the child be fully born."[303] The current homicide statute does not, on its face, appear to challenge the common law rule.

Missouri's wrongful death statute, allowing an individual to sue for the wrongful death of another "person," also lacks a definition of the word "person."[304] The Supreme Court of Missouri has held that the wrongful death statute "does provide a cause of action for the wrongful death of a viable fetus."[305] The court, however, explicitly limited the scope of its ruling, reserving the right to deal with application of the wrongful death statutes to nonviable fetuses.[306]

Missouri's new antiabortion statute,[307] which extends all rights granted to other persons to an unborn child at any stage of development, purports to define the term "person" for all statutes.[308] If this statute does define "person" uniformly for all state statutes, Missouri will have created an internally consistent set of laws defining when life begins. This provision, however, remains untested. Early challenges indicate that the provision may not be uniformly applied. For example, Missouri has refused to allow a mother to take a tax deduction for her fetus, and has refused a claim that pregnant women cannot be incarcerated because their fetuses are imprisoned in violation of the thirteenth amendment.[309] Missouri has also denied the defense of necessity to charges of trespassing in an abortion clinic.[310] Missouri may,

303. 40 C.J.S. *Homicide* § 2(b) (1944).

304. MO. ANN. STAT. § 537.080 (Vernon 1988).

305. O'Grady v. Brown, 654 S.W.2d 904, 911 (Mo. 1983).

306. *Id.* at 911.

307. MO. REV. STAT. § 1.205 (1986).

308. 1. The general assembly of this state finds that:

(1) The life of each human being begins at conception;

. . . .

2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States. . . .

MO. REV. STAT. §§ 1.205.1-.2 (1990).

309. *See generally* Saletan, *If fetuses are people . . . reductio ad absurdum in Missouri; abortion legislation,* THE NEW REPUBLIC, Sept. 18, 1989, at 18 (the article outlines early court challenges resulting from Missouri's conclusion that life begins at conception. These challenges include questions regarding entitlements to driver's licenses, drinking, voting, admittance to x-rated movies, and mandatory retirement.).

310. State v. O'Brien, 784 S.W.2d 187 (Mo. Ct. App. 1989). The basis of the court's decision was that § 1.205 R.S.Mo.(1986) subjected itself to the U.S. Constitution, and thus a defense of necessity was unavailable because the harm sought to be avoided (abortion) was constitutionally protected. *Id.* at 192. This raises the issue as to whether § 1.205, subject to the Constitution, can define human life beyond the language of the fourteenth amendment, which defines citizens as those "born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

through subsequent decisions, demonstrate that the state's view of when life begins, contained in its antiabortion statute,[311] is applied uniformly.

It is clear, however, that the antiabortion, homicide and wrongful death statutes in Kentucky, Nebraska, and Pennsylvania contain serious internal inconsistencies. The existence of these inconsistencies evidences the application of a different standard regarding the definition of life in statutes regulating abortion. Because religious beliefs play such a significant role in determining one's view of when life begins, and religious institutions have taken such an active role in advocating statutes that regulate abortions based on the belief that life begins at conception, the mere presence of these inconsistencies should trigger judicial inquiry as to whether the law is motivated by a desire to promote religious views. If the law is motivated by the legislator's religious purposes, the statute violates the establishment clause.[312]

Inquiry should not cease upon detecting a potentially consistent statutory scheme, however. Even if the statute's view of when life begins is uniformly applied throughout its statutory scheme, other factors may undermine the stated legislative intent. For example, chief among these factors for Missouri's antiabortion bill, is that the bill was written in part by the Missouri Catholic Conference.[313] Moreover, other evidence may be offered which tends to undermine the legislature's stated intent.[314] For example, such may be the case when the stated legislative intent of abortion regulation is to protect the health of pregnant women,[315] to protect the health of pregnant

311. MO. REV. STAT. § 1.205 (1990).

312. Edwards v. Aguillard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985).

313. *See* Brief of Americans United For Separation Of Church And State as *Amicus Curiae* in support of Appellees at 6-7, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (No. 88-605). While religious groups are, and should be, permitted to participate in the legislative process, when a *religious group* writes legislation, passed nearly verbatim, the legislature should take great pains to examine the legislation to be sure it meets the *Lemon* criteria, for this type of legislation may contain or be motivated by religious sentiments.

314. *Infra* notes 315-17 and accompanying text. Generally, a discrepancy between stated legislative intent and fact may form the basis for a due process challenge. Such challenges are limited by the deference granted by the court to state legislatures. Williamson v. Lee Optical, 348 U.S. 483, 487 (1955) ("But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Id.* at 487-88.). A challenge brought under the establishment clause, however, would not be so limited because of the court's willingness, as stated in *Nyquist, Aguillard,* and *Jaffree,* to examine the nature and intent of state legislatures.

315. "(b) The legislature finds as fact that: . . . (2) the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature . . . ." Ala. Code § 26-21-1 (1990). *But cf.* Brief of *Amicus Curiae* American Pub. Health Ass'n, at 11, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (No. 88-605). According to the American Public Health Association (a group consisting of over 50,000 patients, physicians, and health professionals), a woman who carries a child to full term is sixteen

teenagers in connection with parental consent statutes,[316] or to increase population levels.[317] In addition, there are other situations where very few inferences need be made to demonstrate religious intent.[318]

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times more likely to die than a woman receiving a legal abortion. Thirty percent of women carrying a pregnancy to full term experience major medical problems. *Id.* at 11-12. Also, 20% of all pregnancies require the major surgical procedure of a cesarean section, thus exposing the woman to the additional risks accompanying major surgery. *Id.* at 12. Only 0.2%-0.7% of women who have legal abortions experience any complications. *Id.* at 14; *see also* Brief of The American Medical Ass'n as *Amicus Curiae* at 9-10, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (No. 88-605). The American Medical Association (over 280,000 physicians) supports the comparative figures and believes they are even higher, saying "[t]he reported mortality figures may understate the relative safety of abortion compared to childbirth. According to a number of studies, mortality statistics published by the federal government underestimate the number of maternal deaths from childbirth by as much as 37%-50%." *Id.* The American Medical Association also points out that there is no evidence that having an abortion creates any significant mental problems. *Id.* at 20-22. What evidence they do have indicates that women who have abortions are less likely to experience psychiatric disability than women who want, but are denied, abortions. *Id.* at 22. *But see* DAUGHTERS OF ST. PAUL, PRO-LIFE CATECHISM 18 (1984) (claiming that abortion causes significant mental problems for the mother).

316. The legislature finds that immature minors often lack the ability to make fully informed choices that take into account both immediate and long-range consequences of their actions; that the medical, emotional and psychological consequences of abortion are serious and of indeterminate duration, particularly when the patient is immature . . . .

W. Va. Code § 16-2F-1 (1990). *But cf.* Brief *Amicus Curiae* In Support of Appellees By Center for Population Options, et al. at 2-3, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (No. 88-605) (stating that the health problems associated with pregnancies for older women increase when the pregnancy involves a teen. The one million teens who became pregnant in 1983, 29,000 of whom were 14 or under, were 24% more likely to die from carrying a pregnancy to term than having a first trimester abortion).

317. Such a proposition implies that the state has an interest in increased population. One possible argument is that an expanding economy creates a labor shortage. Studies, however, indicate that there is no such shortage occurring in the foreseeable future. Mandel, *Plenty of Workers are Waiting in the Wings,* BUS. WK., Mar. 13, 1989, at 90-98. Also, presently no war, famine, or disease threatens population to a point requiring population increases. Justice Stevens noted the lack of such a secular purpose, stating that "[t]here have been times in history when military and economic interests would have been served by an increase in population . . . , [however], [n]o one argues today [that a state] can assert a societal interest in increasing its population as its secular reason for fostering potential life." *Webster,* 109 S. Ct. at 3084 (Stevens, J., dissenting).

318. From the Boston Globe:

Rep. Robert Dornan (R-Calif.) stood up on the House floor last week and told all his fellow Catholic members of Congress that the pope wanted them to vote against Medicaid financing of abortions for victims of rape and incest.

Dornan was so excited that his thoughts tumbled out. "The Holy Father is a father in Rome, as is Mother Teresa, fighting for her earthly life at this moment . . . . The pope had a Mass on his lawn and he said, "stand up for life."

. . . .

In Dornan's view, the church—or maybe just Dornan—has a right to demand a "catholic loyal vote, like all loyal ethnic groups."

e. Tennessee: A Model State Using Viability to Achieve its Secular Interest in Protecting Unborn Human Life

In sharp contrast to the inconsistent statutory schemes of Kentucky, Nebraska, Pennsylvania, and Missouri,[319] which apply a definition of life as beginning at conception exclusively to antiabortion statutes, Tennessee's legislation creates a consistent legislative scheme designed to protect unborn human life that has reached the point of viability.[320]

Under Tennessee's homicide statute,[321] first degree murder is the "intentional, premeditated and deliberate killing of another."[322] By statute, "[f]or purposes of [Tennessee's homicide statute] 'another' and 'another person' include a viable fetus of a human being."[323]

Tennessee's wrongful death statute also focuses on viability. In a series of wrongful death actions,[324] Tennessee courts followed the common law rule, allowing a wrongful death action to arise only if the child was born alive. In response to this series of cases, Tennessee amended its wrongful death statute to include "a fetus which was viable at the time of injury. A fetus shall be considered viable if it had achieved a stage of development wherein it could reasonably be expected to be capable of living outside the uterus."[325]

Consistent with its homicide and wrongful death statutes, Tennessee focused on viability in its abortion regulation.[326] Under the Tennessee statute after the point of viability has been reached, an abortion may only be performed to preserve the life of the mother.[327]

Boston Globe, Nov. 2, 1989, at 21, col 1.

319. *See supra* notes 267-311 and accompanying text.

320. *See infra* notes 321-28 and accompanying text. This Comment offers Tennessee's statutory scheme only as an example of a consistent and secularly supportable legislative program, and does not take a position on the content of Tennessee's abortion regulations, particularly as they relate to parental consent, waiting periods, and requirements imposed on the physician when consulting with a patient regarding an abortion.

321. TENN. CODE ANN. § 39-13-201 (Supp. 1990).

322. *Id.* § 39-13-202.

323. *Id.* § 39-13-214.

324. Hamby v. McDaniel, 559 S.W.2d 774 (Tenn. 1977); Durrett v. Owens, 212 Tenn. 614, 371 S.W.2d 433 (1963); Shousha v. Matthews Drivurself Serv., Inc., 210 Tenn. 384, 358 S.W.2d 471 (1962); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).

325. TENN. CODE ANN. § 20-5-106(b) (1980).

326. TENN. CODE ANN. § 39-4-201(c)(1)(2) (1982). During the first three months of pregnancy, any woman may, after consultation with her attending physician, have an abortion. In the period following the first trimester but prior to viability, any woman may have an abortion, but it must be performed in an approved medical facility. This final requirement is commensurate with Tennessee's requirement that, should a fetus, previously believed to be nonviable, be born alive, the doctor must take all steps necessary to save the life of that fetus. TENN. CODE ANN. § 39-15-202(c)(1)-(3) (Supp. 1990).

327. TENN. CODE ANN. § 39-15-201(c)(3) (Supp. 1990).

Thus Tennessee, unlike Nebraska, Kentucky, Pennsylvania and Missouri, has enacted a legislative scheme which uniformly applies legal protections to the viable fetus. The presence of a consistent statutory scheme, focusing on viability, makes Tennessee's abortion laws less suspect under the establishment clause. Unlike statutes focusing on a religious belief that life begins at conception, viability presents the state with a secular, rather than a religious or philosophical foundation upon which to base its laws. This secular basis arises because being viable "means the child has reached such a state of development that it can presently live outside the female body as well as within it."[328] It is the ability to survive outside the womb that separates the life of the fetus from the life of the mother. As an independent life comes into being, at the point of viability, the state exercises its secular duty to protect human life. This is not the case when laws are based on the belief that life begins at conception; prior to viability, there is not an identifiable secularly defined individual life, only the potential for life.[329] Without such a secular basis, these statutes cannot withstand sincere constitutional analysis using the establishment clause.

In dismissing the claim of an establishment clause violation in *McRae,* the Court stated that the fact that a statute "may coincide with the religious tenets of the Roman Catholic Church does not, *without more,* contravene the Establishment Clause."[330] Presumably, internal statutory inconsistencies, statutes written by religious groups, and questionable secular relationships[331] could add up to "more" in the eyes of the Court.

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328. Mitchell v. Couch, 285 S.W.2d 901, 905 (Ky. 1955).

329. In his dissent to the plurality opinion of the *Webster* court, Justice Blackmun responded to the plurality's claim that "the State's interest in potential life is compelling throughout pregnancy, not merely after viability" by stating:

> In answering the plurality's claim that the State's interest in the fetus is uniform and compelling throughout pregnancy, I cannot improve upon what JUSTICE STEVENS has written:
>
> > . . . the assertion that the government's interest is static simply ignores this reality . . . [U]nless the religious view that a fetus is a 'person' is adopted . . . there is a fundamental and well-recognized difference between a fetus and a human being . . . . Recognition of this distinction is supported not only by logic, but also by history and by our shared experiences.
> >
> > . . . The viability line reflects the biological facts and truths of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman.

Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3075 (1989) (Blackmun, J., dissenting) (quoting Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 778-79 (1986)).

330. Harris v. McRae, 448 U.S. at 320 (emphasis added).

331. *See supra* notes 315-17 and accompanying text.

2. Antiabortion Statutes Have the Primary Effect of Benefiting Religion

To coexist with the establishment clause, a statute must not have the primary effect of aiding or advancing religion.[332] When examining primary effect, the Court looks to whether the statute encourages subtle or overt indoctrination, creates a symbolic union between church and state, or has the effect of subsidizing religion.[333] Despite state claims, advocates do not all agree that women benefit from antiabortion statutes.[334] Indeed, because such statutes legitimize the denomination's perspective that life begins at conception,[335] in some cases it would appear that the primary, if not only, beneficiaries of antiabortion statutes are religious denominations which oppose abortion.[336]

Additionally, it appears that the benefit conferred upon religious groups which oppose abortion amounts to a violation of the second prong of the *Lemon* test as defined in *Engel, Ball,* and *Aguillard.* First, antiabortion statutes based on religious beliefs can be interpreted to encourage indoctrination into religious denominations. As the Court indicated in *Engel,* when a state embodies a religious tenet in its laws, religious minorities are coerced into conformity.[337] Subtle indoctrination occurs where a state, in adopting an antiabortion statute, is in effect endorsing that tenet and its denominational supporter.[338] This is particularly true in the highly charged atmosphere surrounding the abortion controversy, where religious organizations have a visible role in attempting to get antiabortion legislation passed.[339]

Second, when a state incorporates a religious tenet into its law, a symbolic union is created between church and state. This union is particularly evident in situations where a religious group actively participates in writing an an-

332. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); School Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963).

333. Grand Rapids School Dist. v. Ball, 473 U.S. 373, 397 (1985).

334. *See supra* notes 315-16.

335. *See* DAUGHTERS OF ST. PAUL, *supra* note 315.

336. Although not the only denomination active in the antiabortion movement, the Roman Catholic Church, as a result of its active role in advocating abortion regulation, is an obvious beneficiary. Following the Court's decision in *Roe,* the Catholic Church, in 1973 alone, spent four million dollars on lobbying Congress with regard to antiabortion issues, and that figure does not include the amount of money spent at the state level. TRIBE, *supra* note 226, at 145. In fact, some commentators maintain that the Catholic Church, in the years following *Roe,* controlled most antiabortion institutions. *Id.* at 145-46. This belief is bolstered by a comment of the National Right to Life Committee's executive director, who stated, "[t]he only reason we have a pro-life movement in this country is because of the Catholic people and the Catholic Church." *Id.* at 146.

337. *See supra* note 73.

338. Grand Rapids School Dist. v. Ball, 473 U.S. 373, 397 (1985).

339. *See supra* note 336.

tiabortion statute which is subsequently made into law.[340] The result of this participation is a union between church and state, as well as the "advancement of a particular religious belief."[341] Such state advocation of religious doctrine is patently impermissible under the establishment clause.[342]

3. *Antiabortion Statutes Entangle Church And State*

Under *Lemon,* the Court determines excessive entanglement by examining the organizations that are benefited, the type of state support, and the resulting relationship between church and state.[343] The major force behind the antiabortion movement is a large and well organized group of religious organizations.[344] The goal of these groups is to outlaw abortion, which they perceive as the taking of a life; their beliefs define life as beginning at conception.[345] The nature of the aid conferred upon these religious groups when a state adopts its views is without doubt "a fusion of governmental and religious functions."[346] Such a fusion places the police power of the state in a supporting role for the enforcement of religious ideals.[347] Additionally, because religious diversity on the issue of abortion seems, at times, limitless,[348] antiabortion regulations can create a "*selective* legislative imposition of burdens and advantages upon particular denominations."[349] Active involve-

340. *See* Brief of Americans United for Separation of Church and State at 6-7, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (No. 88-605).

341. Edwards v. Aguillard, 482 U.S. 578, 585 (1987).

342. *Id.*

343. Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).

344. *See* PAIGE, THE RIGHT TO LIFERS (1983). Religious groups involved in the antiabortion movement include: Catholics United for Life, National Organization of Episcopalians for Life, American Baptist Friends of Life, Baptists for Life, Southern Baptists for Life, Lutherans for Life, Moravians for Life, United Church of Christ Friends for Life, Task Force of United Methodists on Abortion and Sexuality, Christian Action Council. *See* Brief of Catholics United for Life Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (No. 88-605); Christian Advocates Serving Evangelism, Brief of Christian Advocates Serving Evangelism, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (No. 88-605). Other religious groups include the Lutheran Church-Missouri Synod, The Christian Life Commission of the Southern Baptist Convention, and The National Ass'n of Evangelicals. *See* Brief for The Lutheran Church Synod Missouri, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (No. 88-605).

345. *See, e.g.,* V. DILLION, IN DEFENSE OF LIFE 5-6 (1971); *see also* A. MERTON, ENEMIES OF CHOICE 1-2 (1981).

346. School Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963).

347. Such a relationship appears obvious when a state arrests, tries, convicts, and imprisons an individual for performing an abortion under a statute which is religiously based.

348. *Compare* Brief *Amicus Curiae* for Catholics for a Free Choice, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (No. 88-605) (favoring a woman's right to an abortion) *with* Brief *Amicus Curiae* for Catholics United for Life, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (opposing a woman's right to an abortion).

349. Larson v. Valente, 456 U.S. 228, 254 (1982) (emphasis in original).

ment of the state in legitimizing particular religious views is clearly one of the primary evils which the Framers of the establishment clause sought to avoid.[350]

Finally, by basing its laws on religious views, the state is subjugated to those views, which are constantly changing.[351] Moreover, the state becomes the protector of the denomination's stance on life, thus creating "a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies."[352] Such a dependency of churches upon the state threatens "wholesome" neutrality, the intended guarantee of the establishment clause.[353]

4. Antiabortion Statutes Involve the State in a Political Issue Which is Divided Along Religious Lines

Throughout its history, religious diversity has been an attribute of American society.[354] Such diversity appears to preclude a unanimous sectarian view of when life begins.[355] It is within and across denominational lines that the dispute regarding the beginning of life has centered.[356] The resulting battle over when life begins can thus be cast as an ecclesiastical dispute. In *Lemon,* the court warned of such a dispute. After pointing out that legislators faced with issues implicating religion will often "find their votes aligned with their faith,"[357] the *Lemon* Court warned that while ordinarily vigorous political debate is a sign of a healthy democracy, "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[358] The goal of the anti-abortion movement has been to gain the support of government officials to enforce its view of

350. Lemon v. Kurtzman, 403 U.S. 602, 612, 620 (1971).

351. *See* Brief for Catholics for a Free Choice at 5-6, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (No. 88-605).

352. School Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963).

353. *Id.*

354. *See generally* Everson v. Board of Educ., 330 U.S. 1, 8-10 (1947) (outlining religious strife in the colonies).

355. Brief *Amicus Curiae* for American Jewish Congress at 11-17, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (No. 88-605). Views regarding abortion defy unanimity, even within sects. While many Roman Catholics reject abortion, some allow it under certain circumstances. Baptists generally consider their opposition to abortion as non-binding. The Episcopal Church continues to support a woman's right to have an abortion, as do the Presbyterians, who focus on viability. Many Protestant theologians maintain that life does not begin at conception, as do many Jewish groups. *Id.*

356. *See supra* notes 345, 349.

357. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

358. *Id.*

when life begins.[359] The extent of this attempt is alarming.[360] As the Court noted in *Everson,* civil strife is likely to result when religion seeks or maintains the support of government.[361] As the Court has indicated, government support of religious causes results in the diversion of secular resources from secular needs and into ecclesiastical disputes.[362] The current debate regarding abortion is unquestionably diverting time, money, and effort from the advancement of crucial secular policies.[363]

5. *Antiabortion Statutes Do Not Fall within the Historical Exemption to the Establishment Clause*

While a statute need fail only one prong of the *Lemon* test to be considered unconstitutional,[364] some antiabortion statutes would seem to violate all three prongs of the *Lemon* test, as well as the political divisiveness test. The remaining factor for the court's consideration of such a statute in the establishment clause context is whether the abortion regulation has a historical basis. Under *Lynch* and *Marsh,* if abortion regulations based on the belief that life begins at conception had a long history of coexistence with secular institutions, such statutes would be allowed to stand regardless of their outcome under the *Lemon* test.[365] Antiabortion statutes seem to fail the historical element of the establishment clause analysis as well.[366] This does not mean, however, that states must adopt a complete hands-off approach to abortion.

III. Using the Establishment Clause as an Alternative Resolution to the Abortion Debate: Advantages to Judges, Abortion Rights Advocates and the Antiabortion Movement

While there appears to be little agreement as to whether life begins at conception, the test of viability appears a more logical basis for state regulation of abortion. Unlike problems posed by statutes based on potentially

359. *See* A. Merton, *supra* note 345, at 1-2.

360. *See supra* note 336 and accompanying text.

361. Everson v. Board of Educ., 330 U.S. 1, 8-9 (1947).

362. *See supra* note 159.

363. *See, e.g.,* L. Tribe, *supra* note 226, at 147-50 (discussing the effect of the abortion issue on the 1976 presidential elections).

364. Valuari, *supra* note 51, at 142.

365. *See supra* notes 204-13 and accompanying text.

366. Roe v. Wade, 410 U.S. 113, 129-52 (1973) ("It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of states today are of relatively recent vintage." *Id.* at 129; Brief of 281 American Historians, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (No. 88-605); L. Tribe, *supra* note 226, at 27-51.

religious definitions of when life begins, statutes based on viability pose a stronger argument that the state is attempting to protect the life of a citizen.[367] Because viability is, by definition, the point at which a fetus may survive on its own,[368] the state can establish an independent, medical basis for claiming a right to protect life.[369] A viability test derived from uniform application of a secular definition of when life begins would not only be consistent with the establishment clause, but would also have positive implications for both supporters and opponents of abortion. Judges, however, are the most likely to benefit.

For judges, the use of a viability test, derived from application of the establishment clause, has important implications, providing an alternative analysis on the abortion issue; this analysis is not associated with substantive due process rights and constitutional penumbras.[370] First, the establishment clause offers judges a textual basis on which to ground their opinions. Also, unlike the presumptions underlying *Roe,* the establishment clause offers clear and thorough tests on which sound and consistent decisions may rest. The result offers a rational and legally supportable alternative with which to judicially resolve the abortion debate. It must be acknowledged that while this test is unlikely to eliminate debate surrounding the abortion issue, it allows the courts to remove themselves from the controversy. Courts have been likely targets in the abortion debate because of the weak legal arguments underlying *Roe.*[371] The use of the establishment clause would remove this magnet for criticism, allowing judges to declare that their decisions are based on sound precedent and should stand under the doctrine of *stare decisis.* While at least one leading scholar has rejected this approach,[372] it ap-

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367. *See supra* note 329 and accompanying text.

368. WEBSTER'S THE NEW INTERNATIONAL DICTIONARY 2548 (1966) ("viable . . . b *of a fetus:* having attained such form and development of organs as to be normally capable of living outside the uterus . . . " *Id.*).

369. *See infra* note 374.

370. *See supra* note 20.

371. *See, e.g.,* Loewy, *Why* Roe v. Wade *Should Be Overruled,* 67 N.C.L. REV. 939 (1989) ("The unique wrongness of *Roe* lies in its utter lack of support from any source that is legitimate for constitutional interpretation . . . . " (emphasis in original).

372. In his recent book, *Abortion: The Clash of Absolutes,* Professor Tribe states:

> "[A]s a matter of constitutional law, a question such as [abortion], having an irreducibly moral dimension, cannot properly be kept out of the political realm merely because many religions and organized religious groups inevitably take strong positions on it. Religious views and groups played prominent roles [in supporting the temperence movement, and opposing slavery and the Vietnam War] . . . . The participation of religious groups in political dialogue has never been constitutional anathema . . . . Thus, the theological source of beliefs about the point at which human life begins should not cast a constitutional shadow across whatever laws a state might adopt to restrict abortions that occur beyond that point.

pears that there is growing judicial support for an expanded role for the establishment clause in deciding challenges to antiabortion statutes.[373]

For abortion rights advocates, use of the establishment clause would continue to allow women to have abortions up to the point of viability.[374] Abor-

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L. TRIBE, *supra* note 226, at 116.

It appears, however, that Tribe falls into the same trap as the Court did in *McRae*. *See supra* note 246 and accompanying text. While religious groups may be active participants in the political process, the resulting statute must, nonetheless, be consistent with the establishment clause. Walz v. Tax Comm'n, 397 U.S. 664, 694-96 (1970). Provided that a religious group seeks to pass a law with a secular purpose, there would appear to be no violation of the establishment clause. Thus, even though organized religious groups were active in opposing slavery and the Vietnam War, the purpose of the legislation sought was secular: In the case of slavery and the Vietnam War, saving and bettering the lives of humans who were, without question, living human beings.

In contrast, the temperance movement, although there may have been some secular purposes, would appear to have been at least partially motivated by religious purposes. *See* KROUT, THE ORIGINS OF PROHIBITION 101-23 (1925). The demise of the eighteenth amendment, however, indicates the weakness of laws based on religious views.

Unlike slavery, the Vietnam War, and larceny statutes, *see supra* note 246 and accompanying text, abortion is quite a different case; there is no identifiable secular purpose. The stated secular purpose is to protect human life, but until the point of viability there is no secular basis to maintain that there is a life to protect, only beliefs shaped and motivated by religion. As such, the stated secular purpose is undermined and revealed as little more than the protection not of life, but a religious belief regarding life. The problem with antiabortion statutes is not that they seek to protect life, but that the definition of life they seek to protect is one based on religious beliefs.

373. During the legislative debate regarding Guam's antiabortion statute, a legislator commented that his support for the bill was based on his belief that Guam is "a Christian community." Guam Society of Obstetricians and Gynecologists, *et al.*, v. Ada, No. 90-00013 at 6 (D. Guam, August 23, 1990) (LEXIS, Genfed library, Dist file). While the district court's opinion held that the statute was unconstitutional because it violated the privacy rights defined in *Roe*, it commented that the legislator's remarks:

> [call] to mind the 1856 admonition of Chief Justice Black of the Commonwealth of Pennsylvania, as quoted by Justice Brennan: 'The manifest object of the men who framed the institutions of this country was to have a State without religion, and a Church without politics — that is to say, they meant that one should never be used as an engine for any purpose of the other, and that no man's rights in one should be tested by his opinions about the other. As the Church takes no note of men's political differences, so the state looks with equal eye on all the modes of religious faith. . . . Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the state more religious, by keeping their respective functions entirely separate."

Id. at 6 n.1 (citations omitted); Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3082-83 (1989) (Stevens, J., dissenting); *see supra* note 16 (for the substance of Justice Stevens' view).

374. Because the point of viability has changed only slightly, courts will likely still permit a woman to have an abortion through the second trimester. While medical assistance has rendered increased survival rates for infants born at 24-28 weeks, the lack of capillary development, which would accommodate oxygen transfer, limits survival rates below 24 weeks. Brief of American Medical Ass'n at 7, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989).

tion rights advocates, however, under a scheme focusing on viability as a result of a secular decision to protect viable life, might have to concede the right of the state to require abortions occurring late in the second trimester to be carried on in a medical facility,[375] as well as the right to require examinations to determine viability. Such legislation, however, would have to be motivated by the secular purpose of protecting viable human life, not by an attempt to protect a religiously defined life.

The use of the establishment clause to adjudicate abortion cases also offers benefits to antiabortion advocates. First, one of the major objections posed by antiabortion advocates, that the Court's current abortion pronouncements, based on *Roe,* lack a textual basis, is resolved by relying on the text of the first amendment's establishment clause.

Second, the development of a comprehensive series of laws focusing on viability, thus consistent with the establishment clause, would mandate that a state exercise its interest in the viable fetus not only in the area of abortion, but also in the areas of wrongful death actions and homicide prosecutions. This might not be the case if a state were permitted to regulate abortion based on the religious views of its voters.[376] Under the Court's decision in *Roe,* while the state was entitled to exercise its compelling state interest at the time of viability, the state was by no means required to do so.[377] Under current law, therefore, it would be possible to pass, consistent with some religious views, a law that permitted abortion until the time of live birth.[378] The establishment clause, unlike current law, would invalidate such a statute because it would be based on the advancement of a particular religious belief.[379] Thus, unlike traditional arguments regarding abortion,[380] the establishment clause viability test assures comprehensive protection of fetal life which reaches the point of viability.[381]

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375. See *supra* note 326 for the rationale of requiring second trimester abortions to be performed in medical facilities.

376. Some religions believe that life does not begin until the infant emerges from the body of the mother. This is the belief held by many Jewish Americans. Brief *Amicus Curiae* for American Jewish Congress at 15, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989).

377. Roe v. Wade, 410 U.S. 113, 163-64 (1973) ("For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion . . .").

378. For an example of a religion believing that life does not begin until birth see *supra* note 376.

379. Edwards v. Aguillard, 482 U.S. 578, 585 (1987).

380. *See supra* note 20.

381. *See supra* notes 319-29 and accompanying text.

Third, by focusing on viability, if, as Justice O'Connor predicts,[382] medical technology shortens the period between conception and viability, the number of abortions would continue to decrease over time.[383] Fourth, the use of the viability test would not coerce those who believe that life begins at conception into compromising those beliefs; as they can under *Roe*, those religiously opposed to abortion could continue to refuse to have abortions.

Finally, the continuing strength of the establishment clause also strongly benefits religious institutions that oppose abortions by preventing the preference of one religion over another, thus assuring the ability of all denominations to seek new members. As the recent growth in the prestige of Christian groups indicates,[384] antiabortion advocates have an effective alternative to legislatively imposing their views on the public, gaining support for the proposition that life begins at conception through increased membership. Indeed, one of the major principles underlying the establishment clause was that voluntary acceptance of a religious creed is more likely to increase membership than is coercion.[385]

IV. CONCLUSION

While Thomas Jefferson's image of a wall standing between church and state seems fairly straightforward, the Court has spent close to half a century attempting to define the parameters of Jefferson's wall. While several of the court's early decisions reached incompatible results in nearly identical suits, the trend in establishment clause analysis has favored increasing consistency. Since 1971, *Lemon v. Kurtzman* has been consistently relied upon by the Court in determining establishment clause questions. While questions regarding historical exemptions, endorsement, and the role of the political divisiveness test persist, the three-prong *Lemon* test remains intact and undiminished. It is the *Lemon* test's stability and continuous support that makes it appealing for use in settling the abortion debate.

382. City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 457-58 (1983).

383. While discussions about artificial wombs are intriguing, in the nearly two decades since *Roe* was decided, the point of viability has not changed, and is not likely to change in the foreseeable future. *See* L. TRIBE, *supra* note 226, at 220-21.

384. *Jerry Falwell's Crusade; Fundamentalist Legions seek to remake Church and Society,* TIME, Sept. 2, 1985 at 48.

385. As Madison warned in his *Memorial and Remonstrance Against Religious Assessments,* "Does the policy of this Bill tend to lessen the disproportion [between believers and non-believers]? No; it at once discourages those who are strangers to the light of [revelation] from coming into the Region of it . . . ." J. MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENT (1795), *reprinted in* Walz v. Tax Commissioner, 397 U.S. 664, 725-26 (1970).

The turmoil resulting from the current debate and indecision regarding abortion requires a new approach. The use of the establishment clause, focusing on viability, will not, in itself, end the abortion debate. It does, however, offer a stable point at which all parties can agree there is a life to protect. Moreover, it gives the state a secularly, rather than a religiously, based test for exercising its interest in human life. In a religiously pluralistic society, compromise is a necessity, not a luxury, and the use of the establishment clause offers such a compromise. Both sides must be willing to surrender some ground, for continuing to pursue absolutes is doomed to failure. For the courts, using the establishment clause would allow them to hand down a concrete and well founded decision which provides freedom of religion for all and coercion of none.

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