Alternatives to Entanglement

David E. Steinberg

University of Pittsburgh

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Constitutional Law Commons

Click here to let us know how access to this document benefits you.

Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol80/iss3/5
Alternatives to Entanglement

BY DAVID E. STEINBERG*

INTRODUCTION

As interpreted in United States Supreme Court decisions, the First Amendment Establishment Clause proscribes laws that "foster 'an excessive government entanglement with religion.'" This entanglement doctrine has become a lightning rod for critical commentary, drawing condemnation from both justices and scholars. Nonetheless, the Court has demonstrated a continuing commitment

* Assistant Professor, The University of Pittsburgh School of Law. B.A. 1982, Northwestern University; J.D. 1986, Stanford Law School.

Research assistants Heather J. Harner, Amy B. Kubisiak, Janet V. Northey, and Sean P. Roman all made significant contributions to this Article. The author very much appreciates their fine work.

Generous research funding provided by the University of Pittsburgh helped to make this Article possible.

1 See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). In Lemon, the Court adopted a three-part test for Establishment Clause cases. A statute does not offend the clause if (1) the statute has a secular purpose, (2) the statute's principal or primary effect does not advance or inhibit religion, and (3) the statute does not foster excessive entanglement of government and religion. See id. at 612-13.


to an entanglement inquiry. This Article argues that the Court should end its commitment to the entanglement prong, because the Court’s entanglement inquiry is not coherent and conflicts with established constitutional principles.

Part I of this Article reviews the development of two different entanglement elements, neither of which has received a satisfactory justification or description. Administrative entanglement, the first element of the entanglement prong, proscribes certain ongoing relationships between religious organizations and government representatives. The Court has developed no methodology for distinguishing permissible church-state interactions from impermissible administrative entanglement. The Court’s administrative entanglement rulings appear hopelessly contradictory. The second element of the entanglement doctrine proscribes church-state relationships likely to result in “political divisiveness related to religious belief.” The Justices have provided few or no clues for identifying those state programs that suggest such political divisiveness.

Part II asserts that the entanglement doctrine conflicts with established constitutional principles. First, while the Court has

---


During the coming term, the Justices may reconsider not only the entanglement test, but much of the Court’s Establishment Clause jurisprudence. On March 18, 1991, the Court granted certiorari in Lee v. Weisman, ___ U.S. ___, 111 S. Ct. 1305 (1991). In an amicus curiae brief, the United States has encouraged the Justices to “replace” the Lemon test, previously employed in Establishment Clause cases, with a “liberty-focused principle.” See Brief for the United States as Amicus Curiae Supporting Petitioners at 6-7, Lee v. Weisman, No. 90-1014 (May 1991) (pending before Supreme Court) (copy on file with the author). The entanglement doctrine forms one part of the three-part Lemon test.


The Rhode Island federal district court held that this prayer reading violated the Establishment Clause. See id. at 71-75. In a two-paragraph majority opinion, the First Circuit affirmed the district court’s decision. See Weisman v. Lee, 908 F.2d 1090, 1090 (1st Cir. 1990); see also id. at 1090-97 (Bownes, J., concurring). But see id. at 1097-99 (Campbell, J., dissenting).

Although the United States has asked the Justices to replace the Lemon test, the government’s Weisman brief lacks any extended critique of this test. In fact, the government does not even describe the three-part Lemon inquiry. Instead, the amicus curiae brief focuses on history and precedent supporting the argument that the Rhode Island prayer reading did not violate the Establishment Clause.

4 Lemon, 403 U.S. at 623.
guarantied broad rights to political access under a variety of constitutional provisions, the entanglement doctrine discourages political participation by religious organizations and discourages political debate on religious issues. Second, the prohibition on political divisiveness conflicts with the First Amendment protection accorded political speech. Third, because the entanglement doctrine primarily affects those religious groups that endorse political activism, this doctrine results in religious discrimination.

Part III considers three alternative Establishment Clause models that do not rely on the entanglement doctrine. First, the Court could return to a secular purpose-primary effect model. Second, the Court could develop an Establishment Clause doctrine focusing on religious coercion. Third, the Court could adopt a classification model of Establishment Clause jurisprudence, similar to that used in Equal Protection Clause cases.

I. THE UNCLEAR BOUNDARIES OF THE ENTANGLEMENT DOCTRINE

During the past 20 years, the Supreme Court has begun almost every Establishment Clause opinion in a predictable fashion:

First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster "an excessive government entanglement with religion."\(^5\)

Despite its familiarity, the entanglement doctrine is of relatively recent origins.\(^6\) In fact, entanglement was not treated as an independent Establishment Clause concern until 1970.\(^7\)

\(^5\) Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)); see also County of Allegheny v. ACLU, ___ U.S. ___, 109 S. Ct. 3086, 3100 (1989) ("This trilogy of tests has been applied regularly in the Court's later Establishment Clause cases.").

In the pending Lee v. Weisman case, the United States has asked the Supreme Court to replace the Lemon test. See Brief for the United States as Amicus Curiae Supporting Petitioners at 6, Lee v. Weisman, No. 90-1014 (May 1991) (pending before Supreme Court) (copy on file with the author). At one point, the government concludes: "[A] majority of the members of the court, recognizing the confusion that Lemon has spawned, has on separate occasions advocated significant revision or abandonment of the Lemon test." \(^{1991-92}\) Id. at 6 & n.4 (citing opinions by Justice Kennedy, Justice Scalia, Chief Justice Rehnquist, Justice O'Connor, and Justice White).

For a discussion of the Lee v. Weisman litigation, see supra note 3.

\(^4\) Some authors have suggested that First Amendment historical evidence does not support the adoption of an entanglement test. See, e.g., Gaffney, supra note 1, at 212-24.

\(^7\) See Walz v. Tax Comm'n, 397 U.S. 664 (1970). Prior to this date, the Court had
The first suggestion of an entanglement doctrine came in *Walz v. Tax Commission*. The New York City Tax Commission had exempted property used for "religious, educational, or charitable purposes" from property taxes. The *Walz* majority held that this tax exemption did not violate the Establishment Clause. In the decision, the Court wrote for the first time that "an excessive government entanglement with religion" would violate the Establishment Clause. Chief Justice Burger's majority opinion relied on this entanglement doctrine to uphold the tax exemption, arguing that elimination of the exemption "would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."

In *Lemon v. Kurtzman*, the Court recognized that entanglement inquiry is relevant to all Establishment Clause cases. The *Lemon* opinion addressed Rhode Island and Pennsylvania programs that partially funded the salaries earned by private elementary and high school teachers, including teachers that worked in sectarian schools. Again writing for the majority, Chief Justice Burger concluded that the state programs violated the Establishment Clause, solely because each statute resulted in "an excessive entanglement between government and religion." The Court found excessive entanglement for two reasons. First, both of the statutes at issue authorized salary reimbursement only for the hours that private school instructors spent teaching secular subjects. Thus,

---

relied on a two-part test in Establishment Clause cases. The Court first would consider whether the challenged statute followed from some secular legislative purpose. Upon identifying a secular purpose, the Court would examine whether the statute resulted in an impermissible principal or primary effect of either advancing or inhibiting religion. See, e.g., Board of Educ. v. Allen, 392 U.S. 236, 243 (1968); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963); *see also infra* text accompanying notes 233-74 (reconsidering a secular purpose-primary effect model).

1. 397 U.S. 664 (1970); *see Ripple, supra* note 1, at 1197 (noting the origins of the entanglement doctrine in the *Walz* opinion).


4. See id. at 667.

5. See id. at 674.

6. Id.


8. *See id.* at 607. The Rhode Island program reviewed in *Lemon* involved only a teacher salary supplement. The Pennsylvania statute also authorized reimbursement for secular textbooks and instructional materials used by private schools. *Id.*

9. *Id.*

10. *Id.* at 608-09.
the Court felt that administrative entanglement would result from state monitoring undertaken to prevent state funding of lessons in religious doctrine.\textsuperscript{17} State examination of sectarian school finances also would result in administrative entanglement.\textsuperscript{18}

The \textit{Lemon} Court discussed a second and distinct entanglement concern, which resulted from "the divisive political potential of these state programs."\textsuperscript{19} While acknowledging that political debate typically represents a "normal and healthy manifestation of our democratic system of government," Chief Justice Burger wrote that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."\textsuperscript{20} The Court concluded that teacher salary supplements could result in political divisiveness because use of state monies would divide taxpayers into proponents and opponents of sectarian schools.\textsuperscript{21} Chief Justice Burger further asserted that the potential for political divisiveness "is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow."\textsuperscript{22} The \textit{Lemon} decision thus identified two distinct types of unconstitutional entanglement: \textsuperscript{23} A statute or government program might result in impermissible administrative entanglement between the state and religion, and a law might promote impermissible political divisiveness along religious lines.

\section*{A. Administrative Entanglement}

"Administrative entanglement" involves regular contacts between government and religion. Beyond this very general definition, the Court has added little specific content to the term. An absolute prohibition on all government contacts with religion would be inappropriate and impossible to implement. As the Court has writ-

\begin{itemize}
\item \textsuperscript{17} See id. at 619.
\item \textsuperscript{18} See id. at 620-21.
\item \textsuperscript{19} Id. at 622.
\item \textsuperscript{20} Id. The \textit{Lemon} opinion referred to an article by Paul Freund that previously had suggested this political divisiveness concern. See id. (citing Paul Freund, \textit{Public Aid to Parochial Schools}, 82 HARV. L. REV. 1680, 1692 (1969)).
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id. at 623.
\end{itemize}
ten, for example: "The Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations." Whether a particular case involves administrative entanglement is almost impossible to predict because the Court’s administrative entanglement conclusions often appear inconsistent and arbitrary.

In *Meek v. Pittenger*, the Court emphasized the excessive administrative entanglement resulting from a Pennsylvania program that provided a variety of state support to parochial and private schools. The state had provided schools with funding for testing services, counseling, textbook loans, and other instructional materials. The Court upheld the textbook loan program, but struck down almost all the other forms of state aid. The Court relied heavily on an administrative entanglement argument to invalidate the part of the Pennsylvania program that paid public school teachers and counselors to work with private school students. To ensure that these public school personnel did not discuss religious doctrine with students, the state would need to "engage in some form of continuing surveillance" within the private schools. Even with such surveillance, a public school teacher or counselor might "fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities." Thus secular instruction and religious indoctrination could become intertwined.

In *Aguilar v. Felton*, the Court invalidated a New York City program that funded sectarian schools, again emphasizing administrative entanglement problems. As in *Meek*, New York paid public school teachers and counselors to provide services at parochial and other private elementary and secondary schools. The

---

24 Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 305-06 (1985); see also *Lemon*, 403 U.S. at 614.
27 See id. at 352-55.
28 See id. at 359-62.
29 See id. at 362-73. But see id. at 371 n.21 (suggesting that the state might fund "speech and hearing services" in private schools).
30 Under the challenged program, both exceptional and remedial students would have received these services. See id. at 371.
31 Id. at 372.
32 Id. at 371.
schools receiving assistance under this program were attended by educationally deprived students, living in low income areas.\textsuperscript{35}

The Court focused on the daily visits of school personnel to sectarian school classrooms, stating that such repeated visits would result in "a permanent and pervasive state presence in the sectarian schools receiving aid."\textsuperscript{36} Unconstitutional administrative entanglement was said to exist because "[a]dministrative personnel of the public and parochial school systems must work together in resolving matters related to schedules, classroom assignments, [and] problems that arise in the implementation of the program."\textsuperscript{37} Additionally, city officials might impose regulations on sectarian schools that conflicted with principles "of deep religious significance to the controlling denominations."\textsuperscript{38}

Despite \textit{Meek} and \textit{Aguilar}, the Court often has rejected administrative entanglement arguments. For example, the Court upheld government aid to church affiliated counseling programs in \textit{Bowen v. Kendrick},\textsuperscript{39} a suit challenging the Adolescent Family Life Act (the "AFLA").\textsuperscript{40} The purpose of the Act is to grant federal funds to public and nonprofit private organizations that provide unmarried adolescent women services relating to pregnancy and childbirth.\textsuperscript{41} In \textit{Kendrick}, a number of recipients were "organizations with institutional ties to religious denominations."\textsuperscript{42}

The AFLA seems to present the same types of church-state relationships prohibited in \textit{Meek} and \textit{Aguilar}. \textit{Aguilar} invalidated a private school aid program that could result in secular influences on religious institutions. Similarly, the AFLA provides for a review of church counseling programs by the Secretary of Health and Human Services.\textsuperscript{43} Both \textit{Meek} and \textit{Aguilar} had concluded that

\textsuperscript{35} \textit{Id.} at 405-06. New York received the funding at issue in \textit{Aguilar} from the federal government, under Title I of the Elementary and Secondary Education Act of 1965, which is currently codified at 20 U.S.C. §§ 2701-2976 (1988). The Act authorizes Congress to "provide financial assistance to State and local educational agencies to meet the special needs of... educationally deprived children at the preschool, elementary, and secondary levels." \textit{Id.} § 2701(a)(2)(A). State and local agencies have discretion in determining how to spend these federal monies. \textit{Id.} § 2701(a)(2)(C).

\textsuperscript{36} \textit{Aguilar}, 473 U.S. at 413.

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} \textit{Id.} at 414.

\textsuperscript{39} 487 U.S. 589 (1988).

\textsuperscript{40} 42 U.S.C. §§ 300z to 300z-10 (1982 & Supp. V 1987).

\textsuperscript{41} See \textit{id.} § 300z; see also \textit{Bowen v. Kendrick}, 487 U.S. 589, 593-97 (1988).

\textsuperscript{42} \textit{Kendrick}, 487 U.S. at 597.

\textsuperscript{43} See \textit{id.} at 616-17 ("Unquestionably, the Secretary will review the programs set up and run by the AFLA grantees, and undoubtedly this will involve a review of, for example, the educational materials that a grantee proposes to use.").
regular contacts with religious institutions could improperly influence the beliefs and conduct of government employees. Yet, the AFLA contemplates regular contacts because the Act requires government inspectors to evaluate church counseling programs and expenditures.44

Nevertheless, the Kendrick Court upheld the AFLA. The Justices found that the AFLA did not result in administrative entanglement. As Chief Justice Rehnquist, writing for the Kendrick majority, stated: “[T]here is no reason to assume that the religious organizations which may receive grants are 'pervasively sectarian' in the same sense as the Court has held parochial schools to be.”45

The Court similarly rejected an administrative entanglement argument in Board of Education v. Mergens.46 Administrators at an Omaha, Nebraska public school would not allow students to establish a Christian club.47 The students challenged the denial of their club application, relying in part on the Equal Access Act.48 The Equal Access Act prohibits public schools from denying facilities to student groups "on the basis of the religious, political, philosophical, or other content of the speech at such meetings."49

In Mergens, the Court ruled that administrators could not exclude student religious groups from the high school campus. In reaching this result, the Court concluded that the Equal Access Act did not violate the Establishment Clause. The majority opinion gave little weight to the high school's administrative entanglement argument. Even though the Act contemplated that public school personnel might attend student religious group meetings for "custodial purposes,"50 the Court concluded that "custodial oversight ... merely to ensure order and good behavior" would not "impermissibly entangle government in the day-to-day surveillance or administration of religious activities."51

The Mergens majority failed to justify its administrative entanglement conclusion. In Meek and Aguilar, the Court had expressed

---

44 See id. at 617; see also id. at 651 (Blackmun, J., dissenting).
45 Id. at 616. But see id. at 625-26, 631-33, 635-42 (Blackmun, J., dissenting) (arguing that direct evidence showed that some AFLA programs involved religious doctrine).
49 Id. § 4071(a).
50 Mergens, ___ U.S. at ___, 110 S. Ct. at 2373 (quoting 20 U.S.C. § 4072(2)).
51 Id.
concern that public school employees might begin teaching sectarian doctrine at some point during their repeated visits to parochial schools. A public school teacher attending a student religious group meeting for “custodial purposes” is at least as likely to assume the role of an active group supporter, or to engage in discussions about religious doctrine. Aguilar also suggested that secular administrators could affect the religious practices of sectarian institutions. The Equal Access Act involves similar oversight problems. The Act instructs school administrators “to assure that attendance of students at meetings is voluntary.” If a student group endorsed assertive proselytizing, school regulations designed to ensure voluntariness could inhibit religious practices.

Though administrative entanglement concerns arise when state officials or employees come into contact with religious institutions, Supreme Court opinions have not specified the characteristics of impermissible church-state interactions. It is not clear why the school aid programs in Meek and Aguilar resulted in unconstitutional administrative entanglement, while the statutes challenged in Kendrick and Mergens did not.

B. Political Divisiveness

If the Court’s opinions on administrative entanglement are inconsistent, its political divisiveness decisions are virtually incomprehensible. In Lemon, the Court wrote that an excessive entanglement between religion and government could produce “political division along religious lines.” But Lemon and subsequent decisions have provided few clues for identifying those statutes that suggest an impermissible potential for political divisiveness.

52 See Aguilar, 473 U.S. at 411-12; Meek, 421 U.S. at 370-72.
53 Cf. 20 U.S.C. § 4071(c)(2) (prohibiting school sponsorship of meetings by student religious, political, or philosophical groups); id. § 4071(c)(3) (allowing school employees to attend student religious group meetings “only in a nonparticipatory capacity”).
54 See Aguilar, 473 U.S. at 413 (stating that the New York aid program resulted in excessive entanglement because religious schools “must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students”).
56 For example, assertive proselytizing constitutes an important component of the Jehovah’s Witnesses religion. See M. James Penton, Apocalypse Delayed: The Story of Jehovah’s Witnesses 114-17, 206-08, 242-45 (1985); Herbert Stroup, The Jehovah’s Witnesses 56-59 (1945).
57 Lemon, 403 U.S. at 622.
58 The Court has suggested that evidence of actual political divisiveness does not, of itself, demonstrate an Establishment Clause violation. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 684 (1984) (stating that actual divisiveness alone has never been held sufficient to invalidate government conduct).
The Court most frequently has found unconstitutional political divisiveness in cases challenging aid to sectarian schools.\(^{59}\) In *Committee for Public Education v. Nyquist*,\(^{60}\) the Justices reviewed a New York law that provided government aid to private elementary and secondary schools.\(^{61}\) The Court invalidated provisions funding private school maintenance and repair, authorizing tuition reimbursements, and allowing state income tax deductions for parents whose children attended sectarian and other private schools.\(^{62}\) The *Nyquist* majority found that these New York programs each contained a potential for political divisiveness. Justice Powell's majority opinion predicted that the New York funding of sectarian schools would generate "divisive political consequences,"\(^{63}\) because "aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies."\(^{64}\)

The Court applied the political divisiveness test outside of the school aid context in *Larson v. Valente*.\(^{65}\) Minnesota traditionally had required some charities to report contributions. As amended in 1978, the Minnesota reporting law applied only to those religions receiving less than half of their contributions from members or affiliated organizations.\(^{66}\) The *Larson* Court held that this reporting requirement violated the Establishment Clause.\(^{67}\) The Minnesota legislators had amended the reporting requirement to harass a few small sects that received the majority of their contributions from solicitation.\(^{68}\) The Court also found that the contribution reporting

---

\(^{59}\) One Court opinion asserts that the political divisiveness concern should be "confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools." Mueller v. Allen, 463 U.S. 388, 403 n.11 (1983). But see, e.g., Lynch, 465 U.S. at 684 (asserting that political divisiveness considerations apply in the display of a nativity scene in a public park); Larson v. Valente, 456 U.S. 228, 253 (1982) (holding a contribution reporting requirement that discriminated against specific small sects resulted in unconstitutional political divisiveness); Walz, 397 U.S. at 695-96 (Harlan, J., concurring) (assessing the political divisiveness that could result from a tax exemption applicable to property used for religious worship).

The Court never has convincingly explained why aid to sectarian schools raises more serious political divisions than do other church-state issues. See *Mueller*, 463 U.S. at 403 n.11; *infra* note 202.

\(^{60}\) 413 U.S. 756 (1973).


\(^{62}\) See id. at 774-98.

\(^{63}\) Id. at 797.

\(^{64}\) Id.

\(^{65}\) 456 U.S. 228 (1982).

\(^{66}\) Id. at 231-32.

\(^{67}\) See id. at 255.

\(^{68}\) See id. at 254-55. For further discussion of the *Larson* opinion, see *infra* notes 207-12 and accompanying text.
law directly implicated the entanglement doctrine. Justice Brennan's majority opinion concluded: "[T]he distinctions drawn by [the Minnesota statute] and its fifty per cent rule 'engender a risk of politicizing religion'—a risk, indeed, that has already been substantially realized."70

The Court, however, also has upheld government programs suggesting a similar potential for political divisiveness. In *Lynch v. Donnelly*,71 the plaintiffs challenged the sponsorship of a nativity scene by the City of Pawtucket, Rhode Island. The crèche was included as part of a Christmas display located in a downtown park.72 A municipal endorsement of a Christian symbol seems likely to result in political divisions along religious lines. Non-Christian believers might campaign vigorously either for the removal of the nativity scene, or for the inclusion of their own religious symbols in the City's display.73 In response, Christians might lobby for a continued Christmas display of the nativity scene, or for the permanent display of some other religious symbol.

Political divisiveness, however, was not a mere possibility in *Lynch*. The filing of the *Lynch* suit "unleashed powerful emotional reactions which divided the city along religious lines."74 Nevertheless, the Court upheld the City's display of the nativity scene. The religious divisions that surfaced after the *Lynch* suit was filed did not compel a finding of political divisiveness. The Court seemed to view the political tensions as a passing occurrence, noting that for 40 years Pawtucket's display of the nativity scene had remained largely uncontroversial.75 The majority also expressed concern that activists might use litigation to "create the appearance of divisiveness and then exploit it as evidence of entanglement."76

In *Marsh v. Chambers*,77 the Court also upheld government action that would seem to harbor the potential for producing divisiveness along religious lines.78 Traditionally, Nebraska begins

69 See Larson, 456 U.S. at 252.
70 Id. at 253 (quoting *Walz*, 397 U.S. at 697 (Harlan, J., concurring)).
72 Id. at 671-72.
73 Id. at 704 (Brennan, J., dissenting) ("In many communities, non-Christian groups can be expected to combat practices similar to Pawtucket's; this will be so especially in areas where there are substantial non-Christian minorities.").
74 Id. at 703 (Brennan, J., dissenting).
75 See *id.* at 684.
76 Id. at 684-85.
legislative sessions with a prayer read by a Presbyterian minister. Like the nativity scene challenged in *Lynch*, the *Marsh* legislative prayer might aggravate political divisions along religious lines. For instance, legislators and taxpayers might support or oppose the practice on the basis of their religious beliefs. According to the *Marsh* dissenters, the prayer reading had "split the Nebraska Legislature on issues of religion and religious conformity." The trial court record also suggests instances when a particular prayer read by the minister "led to controversy along religious lines."

Nevertheless, the *Marsh* Court held that the challenged prayer did not violate the Establishment Clause. The Justices relied heavily on the long tradition of prayer readings prior to legislative sessions and other government meetings. Chief Justice Burger, in his majority opinion, observed that the United States Congress continued to authorize a prayer reading by a paid chaplain, and that "most state legislatures begin their sessions with prayer." The *Marsh* majority did not address political divisiveness concerns raised by the legislative prayer.

The political divisiveness decisions are difficult to understand. The Court has seemed to view government aid to sectarian schools as raising the most serious threat of political divisiveness, but it has not presented evidence or reasons that explain why aid to sectarian schools presents unusual dangers. In sum, the political divisiveness prong of *Lemon*'s entanglement doctrine seems little more than a means of rationalizing a predetermined Establishment Clause conclusion.

---

79 Id. at 784-85. Presbyterian minister Robert E. Palmer received a $300 per month salary when the legislature was in session. Id.
80 Id. at 799-800 (Brennan, J., dissenting).
81 Id. at 800 (Brennan, J., dissenting).
82 See id. at 795.
83 As noted by the *Marsh* majority, during the same week that the United States House of Representatives approved the Bill of Rights, members of the first Congress also voted to begin their sessions with a prayer reading. See id. at 790; see also id. at 786 ("The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.").
84 See id. at 786.
85 Id. at 789 n.11.
86 See id. at 796-801 (Brennan, J., dissenting). (criticizing the *Marsh* majority's refusal to apply the three-part *Lemon* test, specifically the entanglement doctrine).
87 See Mueller, 463 U.S. at 403 n.11 (1983) (stating that political divisiveness concerns should apply only in aid to sectarian school cases); see also Nyquist, 413 U.S. at 795-98 (holding that aid to sectarian elementary and secondary schools violated the political divisiveness doctrine); *Lemon*, 403 U.S. at 622-25 (1971).
88 See Gaffney, supra note 1, at 211 (describing political divisiveness as "a standardless
C. Ignoring Entanglement in Free Exercise Clause Cases

The Supreme Court has adopted an artificial dichotomy between Free Exercise Clause and Establishment Clause cases. The Court has assessed cases involving a burden imposed on religions under the Free Exercise Clause, and has assessed cases involving a benefit conferred on religions under the Establishment Clause. This limitation seems difficult to explain. Many Free Exercise Clause cases appear to involve the same administrative entanglement and political divisiveness issues that have resulted in Establishment Clause violations.

Entanglement concerns are structurally inherent in free exercise exemption cases. In a typical exemption case, an individual does not assert that the general application of a statute violates the First Amendment. Instead, the individual seeks special relief from the statute because the law conflicts with the individual’s religious tenets. Ironically, the very judicial review of religious doctrine mask disguising the real reasons why federal judges nullify controversial legislation”); Paulsen, supra note 23, at 347 (stating that “the divisiveness concept is inherently unprincipled”).

See Philip E. Johnson, Concepts and Compromise in First Amendment Religious Doctrine, 72 Cal. L. Rev. 817, 821-22 (1984); Kurland, supra note 2, at 15.

This dichotomy is artificial because all church-state cases involve both benefits and burdens. For example, the Court always has considered government aid to sectarian schools as benefiting religion and raising an Establishment Clause issue. See, e.g., School Dist. v. Ball, 473 U.S. 373, 381-98 (1985); Aguilar, 473 U.S. at 408-14. Yet, such aid also burdens the religious beliefs of many taxpayers who must subsidize a religious institution that they oppose. The Court thus could treat aid to sectarian schools as raising a Free Exercise Clause issue.

Likewise, the Court has considered laws against proselytizing as burdening religious groups that wish to engage in such activities. See, e.g., Heffron v. International Soc’y for Krishna Consciousness, 452 U.S. 640, 647-56 (1981); Murdock v. Pennsylvania, 319 U.S. 105, 108-17 (1943). But, these laws also benefit religious groups that oppose proselytizing. In short, it is possible to reconceptualize any Establishment Clause case as a Free Exercise Clause case, and vice versa. See Kurland, supra note 2, at 15-18.

But see NLRB v. Catholic Bishop, 440 U.S. 490 (1979). In Catholic Bishop, the Court concluded that the NLRB lacked jurisdiction over religious employers. The Court relied in part on a statutory interpretation argument, concluding that Congress did not intend to confer NLRB jurisdiction over such employers. See id. at 504-07. The Court also suggested that NLRB jurisdiction might violate the free exercise rights of religious employers, by resulting in administrative entanglement. See id. at 501-04; see also Ripple, supra note 1, at 1210-14 (discussing entanglement analysis in Free Exercise Clause cases).

and beliefs necessary to determine an individual's eligibility for an exemption seems to constitute administrative entanglement. Furthermore, by definition, any special relief from a general statute accrues only to members of particular religions, potentially causing political divisiveness.92

The Court's decision in Thomas v. Review Board93 illustrates the presence of entanglement concerns in free exercise cases. In Thomas, a member of the pacifist Jehovah's Witnesses was transferred by his employer to a job fabricating turrets for military tanks.94 Because this new employment conflicted with his pacifist religious principles, Thomas left his job and applied for unemployment compensation.95

The State of Indiana denied the benefits claim filed by Thomas, relying on an Indiana law that proscribed unemployment compensation when a claimant voluntarily had quit his job.96 Thomas challenged this administrative decision, asserting that the state's denial of unemployment benefits unconstitutionally burdened his religious beliefs. The United States Supreme Court agreed with Thomas, holding that Indiana's denial of unemployment compensation violated the Free Exercise Clause.97

The Court's own act of exempting Thomas from the Indiana unemployment compensation rule seems to violate both the administrative entanglement and political divisiveness elements of the entanglement doctrine. Judicial enforcement of the religious exemption created in Thomas would require courts in each voluntary unemployment case to assess whether a claimant's job duties conflicted with the tenets of his religion. In other words, courts would investigate the principles of a particular claimant's religion and would necessarily determine the components of religious scripture.98

95 Id.
96 Id. at 711-12.
To prevent fraudulent benefits claims brought by individuals that have quit their jobs, courts applying an exemption also must determine whether each compensation claim is premised on a sincerely held religious belief. Based on these considerations, Chief Justice Rehnquist’s Thomas dissent concluded that determining whether to grant a judicial exemption inherently results in unconstitutional administrative entanglement.100

Judicial enforcement of a religious exemption also invites political divisiveness along religious lines. The Thomas decision allowed only pacifist believers to receive unemployment benefits after quitting a military-related job. Neither atheists nor members of religions that accept warfare would have this option. The preferential treatment accorded in the exemption provides a likely source of divisiveness along religious lines.

The entanglement problems generated by free exercise exemptions also are illustrated in Wisconsin v. Yoder.101 The Yoder decision exempted Amish teenagers from a Wisconsin law requiring school attendance by children under sixteen.102 The Court, deciding that traditional high school attendance would conflict with the Amish principle of separatism, exempted the Amish children from the Wisconsin compulsory schooling law.103

In reaching this result, the Justices undertook a painstaking review of Amish religious principles. The majority asserted that the Amish belief in separatism was “one of deep religious conviction,” and “fundamental to the Amish faith.” The Court also concluded that the state interest in universal education did not
outweigh the religious interests because "the Amish community has been a highly successful social unit within our society, even if apart from the conventional 'mainstream.'"\textsuperscript{105} This sort of investigation into and evaluation of religious beliefs seems to violate the administrative entanglement doctrine.

\textit{Yoder} further suggests a potential for political divisiveness. The \textit{Yoder} exemption excused only Amish teenagers from high school attendance. Other parents could not remove their children from Wisconsin high schools, even if these parents needed help in running a family business or farm.

The majority opinion in \textit{Thomas} did not mention the entanglement doctrine. Because the Court reviewed the case under the Free Exercise Clause, it did not invoke the excessive entanglement test, which traditionally is applicable only in Establishment Clause cases. Formalism, however, should not obscure inconsistent results. While the Court has invalidated state aid to sectarian schools on entanglement grounds, it has mandated religious exemptions that raise similar entanglement problems.\textsuperscript{106}

D. Summary

The excessive entanglement doctrine currently applied by the Court is unsatisfactory.\textsuperscript{107} The Court has described administrative entanglement and political divisiveness in only the vaguest terms. Administrative entanglement seems to proscribe laws that result in either too great an intrusion by government on religious institutions, or too great an influence by religious institutions on secular personnel. Court decisions on administrative entanglement reflect this subjective inquiry. The decisions are unpredictable and inconsistent.

Court discussions of potential political divisiveness are even less clear.\textsuperscript{108} The Court has not developed any method for identifying

\textsuperscript{105} \textit{Id.} at 222.

\textsuperscript{106} One recent Court opinion suggests that a majority of current Justices may view many religious exemptions with disfavor. See \textit{Smith}, --- U.S. at ---, 110 S. Ct. at 1602. \textit{See also} Marshall, \textit{supra} note 99, at 411 ("The maintenance of the free exercise exemption does not intelligibly, or even stringently, protect religious values and religious liberties.").

\textsuperscript{107} \textit{See} Ripple, \textit{supra} note 1, at 1217 ("[T]he excessive entanglement test invites a whole new degree of subjectivity and thus represents, in a very real sense, the ultimate defeat of attempts to use neutral principles to interpret the religion clauses.").

those laws that present impermissible political divisiveness. Finally, the Court has failed to reconcile fully free exercise decisions mandating religious exemptions with either administrative entanglement or political divisiveness concerns.

The current entanglement doctrine is unacceptable as a method of constitutional adjudication. The Court should either develop a consistent, principled, and predictable law of excessive entanglement or abandon the entanglement doctrine altogether.

II. THE CONFLICT BETWEEN ENTANGLEMENT AND CONSTITUTIONAL PRINCIPLES

The entanglement doctrine conflicts with several important constitutional principles. First, Supreme Court decisions have developed and protected rights to political participation. Both the administrative entanglement and political divisiveness doctrines, however, would seem to limit the political participation of religious groups. Second, Court decisions interpret the Free Speech Clause as applying with the greatest force in cases involving volatile or emotive political speech. The political divisiveness doctrine, however, disfavors religiously motivated political speech. Third, the Court’s Establishment Clause decisions have mandated that government may not discriminate against or show favoritism toward particular religious groups. But the very judicial application of the entanglement doctrine involves discrimination because the doctrine will effect only those religious groups that endorse political activism. Because the entanglement test conflicts with much accepted constitutional doctrine, the Court should disavow any entanglement inquiry.

A. Entanglement and Rights to Political Access

Since the 1960s, decisions ensuring rights to political participation have occupied a central place in the Supreme Court’s con-

---

109 See supra note 106.
110 See Aguilar, 473 U.S. at 429 (O’Connor, J., dissenting) (blaming entanglement test for “many of the inconsistencies in our Establishment Clause decisions”); Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 769 (1976) (White, J., concurring) (“The ‘excessive entanglement’ test appears no less ‘curious and mystifying’ than when it was first announced.”).
111 See infra part II.A.
112 See infra part II.B.
113 See infra part II.C.
114 See infra part II.D.
stitutional adjudication. The excessive entanglement doctrine, however, conflicts with Supreme Court decisions facilitating political access. Active political participation by religious groups implicates serious administrative entanglement and political divisiveness concerns.

Several different lines of Supreme Court cases have sought to facilitate political participation. Perhaps the most familiar of these doctrines requires that each individual's vote receive equal weight. For example, in *Reynolds v. Sims*, the Court considered an equal protection challenge to Alabama's legislative districting. The Alabama legislature had not revised voting district boundaries since 1901. By the early 1960s, a majority of state legislators were elected by only about twenty-five percent of Alabama voters.

The *Reynolds* Court held that this districting violated the Equal Protection Clause of the Fourteenth Amendment. Chief Justice Warren's majority opinion concluded: "Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators." The *Reynolds* Court required Alabama's legislators to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."

Even districting consistent with *Reynolds's* one-man, one-vote principle may violate the Equal Protection Clause if the districting is designed to minimize the voting power of racial minorities. *White v. Regester* involved an equal protection challenge to the 1970 reapportionment of the legislative districts of the Texas house of representatives. This reapportionment complied with the *Reynolds* one-man, one-vote standard. Nevertheless, the Texas redistricting violated the Equal Protection Clause by diluting the voting strength

---

117 *Id.* at 545.
118 *Id.* at 565.
119 *Id.* at 577; see also *Connor v. Finch*, 431 U.S. 407, 410-21 (1977) (holding that the district court's revision of Mississippi legislative districts did not comply with the one-man, one-vote standard); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969) (holding that even *de minimis* variations from numerically equal voting districts could violate the one-man, one-vote standard).
121 *Id.*
of blacks and Hispanics. The White Court concluded that the redistricting was “being used invidiously to cancel out or minimize the voting strength of racial groups.”

The Court also has invalidated impediments to political participation not involving an explicit de-emphasis of certain votes. In Harper v. Virginia Board of Elections, the Court held that a Virginia poll tax of $1.50 violated the Equal Protection Clause of the Fourteenth Amendment. The majority concluded that states could not qualify voting rights with conditions that would adversely affect poor citizens.

In Buckley v. Valeo, the Court reviewed several sections of the Federal Election Campaign Act of 1971. The Act included a provision prohibiting expenditures of more than $1,000 per year toward the campaign of any particular candidate. The Court held that this expenditure limitation violated the First Amendment because it limited the ability of individuals to address election issues or the merits of particular candidates.

The Court thus has recognized broad rights to political participation through a number of constitutional provisions. But, under the entanglement doctrine, religious organizations and believers may constitute the one group not protected by these rights. Active political participation by religious groups would raise both administrative entanglement and political divisiveness concerns.

The Court has used the administrative entanglement test to invalidate programs that could result in a religious influence on secular personnel and institutions. Yet, religious organizations presumably engage in political activity to achieve just such an

---

122 Id. at 765-66; see also Thornburg v. Gingles, 478 U.S. 30, 42-80 (1986) (holding that redistricting of the North Carolina legislature resulted in an unlawful dilution of minority votes); Rogers v. Lodge, 458 U.S. 613, 616-28 (1982) (holding that the selection of the Burke County, Georgia board of commissioners in an at-large election violated the Fourteenth and Fifteenth Amendments).

123 White, 412 U.S. at 765.


126 See id. at 668.


129 See id. § 437(g).


131 See id. at 47-51. The Buckley Court upheld provisions of the Act that limited contributions to federal candidates. See id. at 23-38.

influence. Religiously motivated political participation thus is at odds with the prohibition on administrative entanglement.

Political participation by religious groups also could lead to political divisiveness. The Court has held that statutes benefiting religious institutions may result in "political divisions along religious lines," dividing voters into opposing camps on the basis of religious affiliation. Political divisiveness along religious lines appears particularly likely when a religious organization supports a particular candidate, or takes a position on a contested political issue. Like the administrative entanglement test, the political divisiveness test appears inconsistent with Court decisions guarantying broad rights to political participation.

The Supreme Court has followed differing approaches in cases challenging the political participation of religions or religious leaders. The Court's most extensive discussion of religious political participation came in *McDaniel v. Paty.* Paul McDaniel, an ordained Baptist minister, was elected to serve as a delegate to the 1977 Tennessee Constitutional Convention. Tennessee law provided that no minister or priest could serve either in the state legislature, or as a delegate to a state constitutional convention. The Tennessee Supreme Court held that McDaniel could not serve as a convention delegate, and the minister appealed. The Court held that this disqualification of ministers from holding public office was unconstitutional. According to the Court, Tennessee's constitutional provision interfered with "the right to preach, pros-

---


135 See Gaffney, *supra* note 1, at 232 (arguing that the political divisiveness test is inconsistent with "the right of all citizens to participate fully in the process of political decision making in our democracy"); Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 24 (1973) (arguing that improper application of the political divisiveness test could result in "various religious groups feeling impelled or enticed by the test either to conceal or to feign interest in an area of legislative activity or inaction").

136 435 U.S. 618 (1978) (plurality opinion).

137 *Id.* at 621.

138 See TENN. CONST. art. IX, § 1.


140 See McDaniel, 435 U.S. at 629.
elytize, and perform other similar religious functions," and thus violated the Free Exercise Clause of the First Amendment.\textsuperscript{141}

Yet, the \textsl{McDaniel} Court stopped short of announcing a general rule that states may not bar religious leaders from political office. Instead, Chief Justice Burger's plurality opinion focused on the state interest asserted by Tennessee in support of the disqualification provision—"preventing the establishment of a state religion."\textsuperscript{142} The Court found this asserted state interest less than compelling. The plurality opinion concluded: "Tennessee has failed to demonstrate that its views of the dangers of clergy participation in the political process have not lost whatever validity they may have once enjoyed."\textsuperscript{143} The implication is that were a state to demonstrate that divisiveness could occur, it might legitimately prohibit political candidacies by religious leaders.\textsuperscript{144}

Justice White's \textsl{McDaniel} concurrence endorsed a similar narrow holding. Justice White would not have decided \textsl{McDaniel} on free exercise grounds. Instead, his concurrence argued that the Tennessee disqualification provision violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{145} Justice White viewed this limitation on ministers' political candidacies as "both underinclusive and overinclusive."\textsuperscript{146} Tennessee barred clergymen only from legislative positions, not from "executive and judicial offices."\textsuperscript{147} \textsl{McDaniel} thus suggests that a potential for political divisiveness could justify barring religious leaders from public office.\textsuperscript{148}

In \textsl{Harris v. McRae},\textsuperscript{149} the Court considered a variety of constitutional challenges to the Hyde Amendment to Title XIX of the Social Security Act.\textsuperscript{150} Under the Hyde Amendment, federal Title

\textsuperscript{141} See id. at 626.
\textsuperscript{142} Id. at 628.
\textsuperscript{143} Id.
\textsuperscript{144} See \textsc{Laurence H. Tribe, American Constitutional Law} § 14-14, at 1266 (2d ed. 1988); Ripple, supra note 1, at 1212 (arguing that the \textsl{McDaniel} opinion may indicate that "absent such a tradition of easy accommodation, entanglement values will not be treated quite so perfunctorily when weighed against free exercise claims").
\textsuperscript{145} \textsl{McDaniel}, 435 U.S. at 643 (White, J., concurring).
\textsuperscript{146} Id. at 645 (White, J., concurring).
\textsuperscript{147} Id. (White, J., concurring). Justice White also viewed the disqualification of ministers as overinclusive because "it applies with equal force to those ministers whose religious beliefs would not prevent them from properly discharging their duties as constitutional convention delegates." Id.
\textsuperscript{148} See \textsc{Tribe, supra} note 144, § 14-14, at 1279-82.
\textsuperscript{149} 448 U.S. 297 (1980).
\textsuperscript{150} Title XIX established a joint federal-state program designed to provide assistance to needy individuals. See generally 42 U.S.C. §§ 1396-1396p (1982 & Supp. V 1987).
monies cannot be used to fund abortions, except "where the life of the mother would be endangered if the fetus were carried to term," or in cases of rape or incest. The Harris plaintiffs alleged that the Hyde Amendment violates the Establishment Clause "because it incorporates into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences." The Hyde Amendment also raises administrative entanglement and political divisiveness problems. The Amendment seemed to involve the type of religious influence on secular institutions proscribed by the administrative entanglement test. By endorsing the position on abortion taken by a particular church, the Hyde Amendment also suggested a potential for political divisiveness along religious lines.

Though Harris arguably involved the same conflict between political access rights and entanglement present in McDaniel, the Court needed only one paragraph to dismiss the plaintiffs' Establishment Clause challenge. Justice Stewart's majority opinion labeled the Hyde Amendment "as much a reflection of 'traditionalist' values towards abortion as it is an embodiment of the views of any particular religion." This Establishment Clause discussion gave little weight to any similarity between the Hyde Amendment and Catholic doctrine. The majority wrote: "That the Judeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." The Harris opinion did not mention the entanglement test.

A third Court opinion addressing religious involvement in politics also provides little insight into the political access rights of

---

153 See id. For an example of the proscription, see Meek, 421 U.S. 349 (invalidating loan of instruction materials to parochial schools because of excessive entanglement).
154 See Tribe, supra note 135, at 18-25 (describing issues raised by abortion as resulting in an unusually high potential for political divisiveness).
155 See Harris, 448 U.S. at 319. The Harris plaintiffs also unsuccessfully contended that the Hyde Amendment violated the Due Process Clause of the Fifth Amendment, see id. at 312-18, 321-26, and the Free Exercise Clause, see id. at 320-21.
156 Id. at 319 (citing McRae v. Califano, 491 F. Supp. 630, 741 (E.D.N.Y.) (trial court), rev'd, Harris v. McRae, 448 U.S. 297 (1980)).
157 Id.
158 None of the four dissents in Harris gave any significant attention to the Establishment Clause problems raised by the Hyde Amendment, and none of these dissents mentioned the entanglement test. See id. at 329 (Brennan, J., dissenting); id. at 337 (Marshall, J., dissenting); id. at 348 (Blackmun, J., dissenting); id. at 349 (Stevens, J., dissenting).
religions and religious leaders. Under a Massachusetts statute challenged in *Larkin v. Grendel's Den, Inc.*, the governing body of a church could prohibit liquor consumption at a nearby bar or restaurant. In 1977, Grendel's Den, in Cambridge, Massachusetts, applied to the Cambridge License Commission for a liquor license. The Holy Cross Armenian Catholic parish, located next to Grendel's Den, vetoed the restaurant's liquor license application. Grendel's Den subsequently filed suit, contending that Massachusetts's delegation of license veto powers was unconstitutional.

The Court agreed that this delegation violated the Establishment Clause. The Massachusetts statute improperly delegated "to private nongovernmental agencies power to veto certain liquor license applications," a power that "ordinarily is vested in agencies of government." The license veto delegation thus had the unconstitutional "primary and principal effect of advancing religion." The statute also resulted in an excessive entanglement of government and religion by "vesting significant governmental authority in churches." In an unilluminating passage, Chief Justice Burger attempted to specify the entanglement problems raised by the statute:

> [T]he core rationale underlying the Establishment Clause is preventing 'a fusion of government and religious functions. . . .'

The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.

To summarize, the entanglement doctrine conflicts with Court decisions that guaranty rights to political access. Political participation by religions and religious leaders apparently would violate both the administrative entanglement and political divisiveness elements of the entanglement doctrine. Although the *McDaniel* opinion recognizes this conflict, the Court has not suggested a principled

---


160 The Massachusetts law gave the same liquor license veto power to the governing bodies of schools. The law applied to bars and restaurants located within 500 yards of a church or school. See Mass. Gen. L. ch. 138, § 16C (1974).


162 See *id.* Justice Rehnquist filed a lone dissent. See *id.* at 127.

163 *Id.* at 122.

164 *Id.* at 126-27.

165 *Id.* at 126.

166 *Id.* at 126-27 (quoting School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963)).
reconciliation of the entanglement doctrine with rights to political access.

B. Political Speech and Political Divisiveness

Political speech receives extensive protection under the First Amendment's Free Speech Clause. The Supreme Court has endorsed "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." The Court and commentators have viewed political debate as an essential part of the participatory democratic government outlined in the Constitution. Neither truly representative elections nor popular participation in policy formation would be possible without the unrestrained freedom to discuss political issues. Despite this high value on political speech, the entanglement doctrine prohibits controversial or volatile speech on religious issues.

Given the commitment to an open discussion of political issues, individuals engaging in a moderate and conventional political dialogue rarely will require the protection of the First Amendment. Only speakers who profess radical or unorthodox messages are likely to invoke the First Amendment. The Supreme Court has recognized the importance of dissident speech, which "induces a condition of unrest, creates dissatisfaction with conditions as they are, and even stirs people to anger."


See Buckley, 424 U.S. at 14 ("Discussion of political issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.").

See generally JOHN H. ELY, DEMOCRACY AND DISTRUSt 93-94 (1980) (arguing that the Free Speech and Free Press Clauses "were centrally intended to help make our governmental processes work, to ensure open and informed discussion of political issues, and to check our government when it gets out of bounds"); ALEXANDER MeIKLeJohN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948) ("The principle of freedom of speech springs from the necessities of the program of self-government.").

See Gaffney, supra note 1, at 234 (stating that religiously motivated speech is protected "only if it does not touch on divisive religious issues"); Paulsen, supra note 23, at 346 ("[T]he entanglement doctrine comes perilously close to suggesting that religious groups and individuals are not entitled to the same civil and political rights as others.").

The Court's free speech decisions often have protected indi-
viduals engaging in extreme and hostile discourse. For example, in
*Brandenburg v. Ohio*, a leader of the Ku Klux Klan was convicted
under an Ohio criminal syndicalism statute. The conviction was
based on events occurring at a Ku Klux Klan rally, where the
defendant's speech attacked blacks and Jews, and suggested the
possibility of violence at some future date.

The Court reversed this conviction, holding that the Ohio crim-
inal syndicalism law violated the First Amendment. The Court
concluded that a State could proscribe speakers from advocating
the use of force only "where such advocacy is directed to inciting
or producing imminent lawless action and is likely to incite or
produce such action." Because the Ohio statute punished persons
that "advocate or teach the duty, necessity or propriety" of vio-

In *NAACP v. Claiborne Hardware Co.*, the Court again
applied the First Amendment to protect volatile political speech
that suggested possible violence. The *Claiborne Hardware* litiga-
tion challenged a boycott organized by black activists in Clai-
borne County, Mississippi. The boycott demanded that local white
merchants treat black customers with respect and hire black em-

White merchants that had lost business during the boycott
initiated suit in Mississippi state court. The state court chancellor

---

175 See *id.* at 446 & n.1.
176 See *id.* at 449.
177 *Id.* at 447.
178 *Id.* at 448 (quoting *Ohio Rev. Code Ann.* § 2923.13 (Anderson 1953) (repealed 1974)).
179 See *id.* at 448-50.
182 *Id.* at 899-900.
183 *Id.* at 888.
184 See *id.* at 904-05.
found liability under three different civil conspiracy theories and entered judgments against 130 defendants. But the Supreme Court stated that the boycott contained elements of "speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." Direct acts of violence could not be imputed to the vast majority of defendants, requiring the state court to find liability based on guilt by association. The Claiborne Hardware Court held that the conspiracy judgment punished the defendants for their speech and association, violating the First Amendment guaranty of freedom of speech.

The entanglement doctrine is inconsistent with the broad recognition of rights to political speech. Religiously motivated political speech might result in administrative entanglement problems. Also, the political divisiveness doctrine seems to severely restrain speech addressing religious issues. The political divisiveness test seeks to discourage "political division along religious lines." Religiously motivated speech on political issues almost certainly would generate political divisiveness along religious lines. Accordingly, the political divisiveness doctrine, if strictly enforced, would eliminate protection for religiously motivated political speech.

To date, the Court has not discussed political divisiveness concerns in cases involving religiously motivated political speech. In-

---

185 Id. at 890-92.
186 Id. at 907.
187 Id. at 925.
188 See id; see also Texas v. Johnson, 491 U.S. 397 (1989) (holding that the First Amendment protects a protestor who burns the American flag); Boos, 485 U.S. 312 (1988) (holding that the First Amendment protects protestors' rights to display critical and possibly inflammatory signs outside of foreign embassies).
189 The administrative entanglement doctrine is implicated by situations where secular authorities may interfere with church institutions and doctrine. See Aguilar, 473 U.S. at 412-13; Lemon, 403 U.S. at 619-20. Government may regulate all forms of speech, including political speech, with "time, place, and manner" restrictions. See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 784-91 (1989) (holding that New York City could require music performers to use both a sound system and sound technicians provided by the city, to ensure that noise from a concert would not disturb nearby residents); Kovacs v. Cooper, 336 U.S. 77, 78-79 (1949) (upholding a city ordinance that prohibited loud and raucous sound amplification). In some cases, such restrictions might result in government intrusion on religious organizations, which is prohibited by the administrative entanglement doctrine.
190 Lemon, 403 U.S. at 622; see supra notes 19-20 and accompanying text.
191 See Choper, supra note 92, at 683-84 (arguing that an attempt to prevent religious conflict in the legislative process would be contrary to First Amendment liberties); Ripple, supra note 1, at 1226 (stating that the entanglement doctrine suggests "a reappraisal of the traditionally privileged place of political and associational rights of religious institutions and individual citizens motivated by religious principles").
stead, the Court has granted religiously motivated political speech the same broad protection as political speech resulting from other motivations. In *West Virginia Board of Education v. Barnette*, the plaintiffs brought an Establishment Clause challenge against a law requiring public school students to participate in a flag salute ceremony. The *Barnette* plaintiffs were members of the Jehovah’s Witnesses church, whose beliefs conflicted with the ceremony. The *Barnette* suit suggested a potential for the type of political divisiveness proscribed by the entanglement test. Prohibiting the school ceremony could lead to political conflict along religious lines between the Jehovah’s Witnesses and proponents of the flag salute.

Justice Jackson’s majority opinion, however, did not invoke entanglement or divisiveness. Instead, Justice Jackson applied the strict scrutiny test traditionally employed in political speech cases. The Court’s conclusion that the flag salute ceremony violated the Free Speech Clause has become a familiar part of the Court’s First Amendment doctrine: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .”

In *Wooley v. Maynard*, the Court more recently provided broad First Amendment protection to religiously motivated political speech. Plaintiff George Maynard was convicted of violating a New Hampshire statute by obscuring the state motto “Live Free or Die” on his automobile license plates. Like the *Barnette* plaintiffs, Maynard was a member of the Jehovah’s Witnesses religion. Maynard contended that the state motto violated his religious belief in pacifism. Relying heavily on *Barnette*, the *Wooley*

---

192 319 U.S. 624 (1943).
194 See id. at 633 (“It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish.”).
195 Id. at 642.
197 *Wooley v. Maynard*, 430 U.S. 705, 707-08 (1977). After he was found guilty of concealing the motto for a second time, Maynard received and served a 15-day jail sentence. *Id.* at 708.
198 Id. at 707 n.2.
Court affirmed the reversal of Maynard's conviction. The Court wrote that Maynard's conviction conflicted with the broad First Amendment protection accorded political speech and belief. The New Hampshire law improperly required Maynard "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."

Neither Barnette nor Wooley mentioned political divisiveness as a concern. Nonetheless, these and other First Amendment decisions represent a serious, unaddressed conflict between the political divisiveness test and the political speech doctrine. Political speech cases have concluded that political dissension, racist epithets, and even an advocacy of violence receive substantial First Amendment protection. Yet, the Court has invalidated statutes under the entanglement test because the potential political divisiveness along religious lines would present "a threat to the normal political process." Perhaps some rationale explains why conduct likely to result in political divisiveness both is protected under the Free Speech Clause and prohibited under the Establishment Clause. The Court has not given such an explanation.

C. Entanglement and Religious Discrimination

Supreme Court decisions have condemned government discrimination against particular religions, describing a prohibition on such unequal treatment as a core element of the Establishment Clause. As one Court opinion concludes: "An attack founded on disparate treatment of 'religious' claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring government neutrality in matters of religion." The entanglement

---

199 See id. at 714-15.
200 Id. at 715.
201 Barnette was decided in 1943, more than 25 years before the Court first endorsed a political divisiveness test.
202 See, e.g., Kurland, supra note 2, at 19 (arguing that under the political divisiveness test, "the Supreme Court's opinions in the school prayer cases and in the abortion cases would themselves be violations of the [First Amendment].
203 Lemon, 403 U.S. at 622.
204 Cf. Gaffney, supra note 1, at 233 (arguing that the political divisiveness test "misconstrues the purpose of the [First Amendment as a mandate for consensus politics"); Kurland, supra note 2, at 19 (suggesting that the school prayer cases violate the First Amendment).
205 See Larson, 456 U.S. at 246 (describing the "principle of denominational neutrality"); Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) (stating that government must be "neutral in matters of religious theory, doctrine, and practice").
doctrine, which primarily affects those religions that embrace political activism, is itself discriminatory and violates religious neutrality.

- The Court's decision in *Larson v. Valente* explicitly invoked the Establishment Clause prohibition on religious discrimination.\(^{207}\) The *Larson* decision invalidated a Minnesota law imposing contribution reporting requirements. The reporting requirements applied only to religious groups that received more than half of their contributions from nonmembers.\(^{208}\) The *Larson* Court acknowledged that Minnesota had a legitimate interest in preventing fraudulent solicitation.\(^{209}\) However, the state's legislators intentionally had imposed the reporting requirement on only a few small sects that collected most of their revenues from solicitation, while exempting traditional religions supported primarily by members.\(^{210}\) The Act was unconstitutional because it involved "the selective legislative imposition of burdens and advantages upon particular denominations,"\(^{211}\) and specifically was intended to burden the Unification Church.\(^{212}\)

The Court also relied on a finding of religious discrimination in *Epperson v. Arkansas*.\(^{213}\) An Arkansas statute prohibited public high school instructors from teaching "the theory or doctrine that mankind ascended or descended from a lower order of animals."\(^{214}\) The *Epperson* Court struck down this Arkansas prohibition on the teaching of evolutionary theories. Justice Fortas, in his majority opinion, recognized broad state discretion in formulating a school curriculum.\(^{215}\) Justice Fortas even suggested that a school district might exclude any classroom discussion of man's origins.\(^{216}\) But Arkansas could not favor a "fundamentalist sectarian conviction,"\(^{217}\) while attempting "to silence proponents of Darwinian evolution."\(^{218}\)

\(^{207}\) *Larson* also relied in part on a finding of potential political divisiveness. See *supra* text accompanying notes 68-70.

\(^{208}\) See *Larson*, 456 U.S. at 231-32; *supra* text accompanying notes 65-66.

\(^{209}\) See *Larson*, 456 U.S. at 248.

\(^{210}\) See *id.* at 255 (stating that the "express design" of the Minnesota reporting requirement was "to burden or favor religious denominations").

\(^{211}\) *Id.* at 254.

\(^{212}\) *Id.* at 254-55.

\(^{213}\) 393 U.S. 97 (1968).

\(^{214}\) *Id.* at 98-99.

\(^{215}\) *See id.* at 104.

\(^{216}\) See *id.* at 109; *see also id.* at 111 (Black, J., concurring) (indicating that prohibiting teaching of all human development may be permissible).

\(^{217}\) *Id.* at 108.

\(^{218}\) *Id.* at 109.
In the most general sense, the entanglement doctrine proscribes some forms of interaction between government and religion. But, various religions view interaction with government very differently. Some religions, including a number of mainstream Protestant groups, seek to avoid relationships with government. On the other hand, the Catholic Church and Fundamentalist Christian religions actively have engaged in political participation and lobbying. The prohibition on political divisiveness and administrative entanglement largely affects only activist religions, and has little or no impact on politically passive religious groups. The following hypothetical situation demonstrates why such discrimination is inappropriate.

Assume that every December the municipality of Hulls Landing has displayed a Christian nativity scene and a Jewish menorah in a public park. Hulls Landing has erected these symbols without the involvement of any religious organization. The City has used public funds to maintain the symbols. Hulls Landing has sponsored these two symbols for decades without any significant public reaction.

Now, a Fundamentalist church, recently established in Hulls Landing, wishes to display a plaque of the biblical Ten Commandments together with the other symbols. Some Hulls Landing resi-
dents are suspicious of the Fundamentalist church and oppose the new symbol. In response, the Fundamentalists agree to pay all costs associated with the Ten Commandments display and encourage municipal officers to review and modify any unseemly features of the plaque. After a heated political debate, the Hulls Landing City Council approves a Ten Commandments display.

A group of Hulls Landing residents now brings an Establishment Clause suit, which challenges all city displays of religious symbols. The entanglement test suggests a strange distinction. The municipality’s posting of the nativity scene and the menorah raises no entanglement problems. The traditional posting of these symbols has resulted in neither administrative entanglement nor political divisiveness. But the display of the Ten Commandments violates the entanglement doctrine. The municipality’s review and modification of this newer display would violate the administrative entanglement doctrine. The volatile political debate generated by this display would raise serious political divisiveness concerns. Beyond the doctrinal nuances of the entanglement test, it is hard to understand why these two displays should generate different Establishment Clause results. The Fundamentalists’ resort to political action constitutes the only significant difference between the new and traditional Hulls Landing displays.

The hypothetical also suggests that small or unpopular religions may face significant entanglement problems. Government decision makers often will accommodate popular religions with little prompting, both because these religions include numerous voters, and because these religions embrace familiar tenets. The religious practices of small and nontraditional sects are much less likely to

---

223 This hypothetical illustrates a perverse result of the administrative entanglement doctrine. The more closely and conscientiously a government supervises a program involving a church-state relationship, the more likely a court will find unconstitutional administrative entanglement. See Aguilar, 473 U.S. at 428-29 (O'Connor, J., dissenting).

224 In Lynch, the Court rejected a political divisiveness challenge to a municipality's sponsorship of a Christian nativity scene. But as noted above, the Lynch Court's reasoning seems inconsistent with other Court discussions of political divisiveness. See supra text accompanying notes 71-76.

225 If anything, perhaps the Ten Commandments display described in this hypothetical should raise less serious Establishment Clause concerns than the other symbols. Private contributions by the Fundamentalist church will pay for the new display, while tax revenues fund the erection of the nativity scene and the menorah.

226 This hypothetical again suggests an incompatibility between the entanglement doctrine and constitutional rights to political access. See supra part II.A.
enjoy a similar familiarity or accommodation. Members of minority religions may have a greater need for political action and may face more frequent entanglement problems.

For example, Christians wishing to observe a Sunday Sabbath need not undertake any form of government lobbying. Most employers close their businesses on Sunday, either voluntarily or under the requirements of state law. Similarly, Catholics who wish to use sacramental wine during religious services will not run afoul of any government code. On the other hand, the Seventh-Day Adventist that celebrates a Saturday Sabbath may require some government action to free this day from work. And, Native American believers that ingest the hallucinogenic cactus peyote as a central part of religious ceremonies must seek a legislative exemption from criminal laws proscribing peyote use. These less popular religions may need to rely on political participation and lobbying to a greater extent than more mainstream churches. By limiting church-state interaction, the entanglement doctrine discriminates against religions that embrace political activism. The entanglement doctrine contradicts First Amendment jurisprudence prohibiting governmental discrimination among religions.

D. Summary

The entanglement test is inconsistent with constitutional principles enunciated by the Supreme Court. By prohibiting active religious involvement in politics, the entanglement doctrine conflicts with Supreme Court decisions recognizing rights to political access. The entanglement doctrine also discriminates against reli-


231 See Employment Div. v. Smith, ____ U.S. ___, ___, 110 S. Ct. 1595, 1606 (1990) (noting that “a number of States have made an exception to their drug laws for sacramental peyote use”).
gions that embrace political activism—often small and nontraditional sects. Finally, the entanglement prohibition on political divisiveness is at odds with First Amendment protection accorded political speech, even emotive and volatile political speech.

Under some circumstances, the conflict between the entanglement doctrine and other constitutional principles might suggest a need to harmonize divergent bodies of law. But, a restructuring of First Amendment law to account for the entanglement doctrine seems inappropriate. As indicated in Part I of this Article, the Court never has identified clearly the values protected by, or the contours of, the entanglement doctrine. Instead, this incongruence between the vague entanglement doctrine and the firmly settled tenets of First Amendment jurisprudence leads to only one conclusion: The Court should abandon the entanglement doctrine.

III. ALTERNATIVES TO ENTANGLEMENT

The concluding part of this Article considers three alternative Establishment Clause theories that do not include the entanglement test: (1) a secular purpose-primary effect model, (2) a coercion model, and (3) a classification model. This part does not attempt to develop a comprehensive Establishment Clause theory. Instead, it seeks to identify some of the merits and drawbacks of competing proposals. The following discussion evaluates the coherence of each alternative model and examines the compatibility of each model with current Establishment Clause case law. Although each model suffers from problems unresolved by this Article, each would improve Establishment Clause jurisprudence by eliminating the unfortunate doctrine of entanglement.

A. A Secular Purpose-Primary Effect Model

Prior to the development of the entanglement doctrine, Establishment Clause opinions employed only a two-part test. First, the Court required a showing that some secular purpose supported a challenged law. If the Court found a secular purpose, the Justices then required the defendant to demonstrate that the principal or

23 For examples of such general constructs, see Choper, supra note 92, at 673; Daniel O. Conkle, Toward a General Theory of the Establishment Clause, 82 Nw. U. L. Rev. 1113 (1988); McConnell, supra note 227.

23 For a discussion of the evolution of the entanglement doctrine, see supra notes 8-23 and accompanying text.
primary effect of the law neither advanced nor inhibited religion. In *Lemon v. Kurtzman*, the Court changed to a three-part test by adding the entanglement doctrine.

To return to its original two-part test, the Court need only abandon the entanglement doctrine. Because only two decisions have invalidated statutes solely for excessive entanglement, a secular purpose-primary effect model would require little reformulation of decided case law.

Nevertheless, a return to a secular purpose-primary effect model probably is not desirable. Virtually no statute should violate the deferential secular purpose test. The primary effect test, then, would become the sole determinant of Establishment Clause validity. However, the primary effect test lacks the analytic content to foster principled Establishment Clause decisions. The primary effect test also is inconsistent with some Free Exercise Clause decisions.

1. **Secular Purpose**

The secular purpose test involves deferential scrutiny of a government decision maker's motivations. The test appears roughly analogous to the rational basis scrutiny of equal protection jurisprudence, which considers whether a statute is "reasonable in light of its purpose." Just as cases applying rational basis scrutiny

---


236 See Aguilar v. Felton, 473 U.S. 402, 408-14 (1985) (invalidating a state program that paid public school teachers to work in private schools); *Lemon*, 403 U.S. at 613-25 (invalidating supplementary salary payments made by the state to private school teachers). Cases similar to *Lemon* and *Aguilar* have found that aid to religion constituted the "principal or primary effect" of the challenged statute. See, e.g., School Dist. v. Ball, 473 U.S. 373, 384-98 (1985) (holding that the primary effect test was violated by the rental of sectarian school classrooms by a public school); Meek v. Pittenger, 421 U.S. 349, 367-73 (1975) (holding that a state program paying public school personnel to provide counseling and health testing services at sectarian schools has a primary effect of advancing religion). The Court easily could recharacterize *Aguilar* and *Lemon* as primary effect holdings.

237 See infra notes 269-73 and accompanying text.

238 See infra part III.A.2.

239 See infra notes 269-73 and accompanying text.

have deferred to plausible explanations of legitimate legislative purpose, the vast majority of Establishment Clause cases have found some legitimate secular legislative purpose. For example, the Court obligingly has held that a municipality's Christian nativity scene served a secular purpose by illustrating the historic origins of Christmas. In upholding a federal law that opened public school facilities to student religious groups, the Court found persuasive the secular purpose of preventing "discrimination against religious and other types of speech." The Court also has written that state aid to sectarian schools is supported by the secular purposes of "preserving a healthy and safe educational environment" for schoolchildren, or maintaining private schools "as an economic alternative to a wholly public [school] system."

In a few cases, the Court has exhibited less deference in applying the secular purpose test. In *Estate of Thorton v. Caldor, Inc.*, the Court held that no secular purpose supported a Connecticut law that guarantied that Sabbath observers need not work on their day of rest. Though the law arguably furthered the secular goal of economic efficiency, by eliminating employer-employee arguments about Sabbath work, the Court did not recognize this purpose. In *Stone v. Graham*, the Court found a lack of a secular purpose for a Kentucky requirement that public schools post the Ten Commandments in classrooms. The *Stone* Court rejected the state's secular purpose argument, which described the Commandments as depicting "the fundamental legal code of Western


242 See *William B. Petersen, "A Picture Held Us Captive": Conceptual Confusion and the Lemon Test*, 137 U. Pa. L. Rev. 1827, 1845 (1989) (noting that "since the Court first adopted the Lemon test, it has only twice invalidated a statute on the basis of purpose criterion"); *Simson, supra* note 2, at 909 (stating that "unless a law is proven to be predicated entirely on nonsecular purposes, [the purpose] requirement is met").

243 See *Lynch*, 465 U.S. at 680. The Court failed to grapple with the fact that the historic origins of Christmas are religious, not secular. This omission illustrates the deferential nature of secular purpose review.


Civilization and the Common Law of the United States." Despite the aberrational *Caldor* and *Stone* decisions, the Court typically applies the secular purpose test with great deference to legislative motives. Under deferential scrutiny, creative counsel almost always can conjure up a secular purpose for the challenged legislation. Thus, the secular purpose test rarely will dictate Establishment Clause results. Under a two-part test, it is the second part, the primary effect test, that would determine most Establishment Clause decisions.

2. Primary Effect

Every law that benefits religion does not violate the Establishment Clause. A municipality’s construction of sidewalks or funding of fire fighting services will benefit churches located in the city. But the Establishment Clause proscribes only laws that have the "principal or primary effect" of advancing or inhibiting religion.

A central flaw in the primary effect test is definitional. The Court has failed to identify government action having "a principal or primary effect" of advancing religion. For instance, the amount of state funding provided to religious institutions is not determinative. In upholding tuition tax credits for parents of private school students, and substantial non-categorical grants to sectarian col-

---

211 *Id.* at 41. A few years later, the Court accepted an almost identical statement of secular purpose, and upheld municipal sponsorship of a Christmas nativity scene. *See Lynch*, 465 U.S. at 680-81 (holding that a Pawtucket, Rhode Island nativity scene illustrated the historic origins of Christmas).

252 This is not to suggest that the *Caldor* and *Stone* Courts arrived at bad results. Even if the statutes at issue in *Stone* and *Caldor* had survived secular purpose scrutiny, they likely would have violated the primary effect test. For discussion of the primary effect test, see infra part III.A.2.


214 *See Tribe, supra* note 144, § 14-9, at 1205 ("The definition of 'secular' here must be a generous one."); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. Pitt. L. Rev. 83, 131 (1986) ("Most legislation has at least some secular purpose.").

215 *See, e.g.*, Roemer, 426 U.S. at 747; Everson v. Board of Educ., 330 U.S. 1, 17 (1947); *see also Tribe, supra* note 144, § 14-10, at 1215.


257 *See Mueller*, 463 U.S. at 396-403.
leges, the Court allowed significant public funding for sectarian schools. On the other hand, the primary effect test was violated by a more modest program, under which a Michigan public school district rented space in sectarian schools for enrichment courses and community education.

Nor does the character of state activities necessarily determine whether a law will have a primary effect of advancing or inhibiting religion. The Court has held that a municipality's maintenance of a Christmas nativity scene does not have the primary effect of advancing religion. But a state program that provides secular classroom materials to sectarian elementary and secondary schools violates the primary effect test.

The lack of any clear definition of the phrase "principal or primary effect" invites a case-by-case interpretation. Though fact-specific decision making is consistent with an analysis of degree implicit in the primary effect test, the approach produces inconsistent and unpredictable decisions seemingly unrelated to First Amendment principles.

Decisions on government aid to sectarian schools support persuasive arguments against case-by-case interpretation of Establishment Clause issues. In Wolman v. Walter, Establishment Clause law reached an ebb. The Court's decision turned on minute and seemingly arbitrary distinctions. In Wolman, the Court upheld Ohio programs providing sectarian and private schools with textbook loans, standardized testing, diagnostic programs, and therapeutic services, but simultaneously struck down Ohio funding for private school field trips and instructional materials.

The Wolman decision has received sharp criticism. The specific factual distinctions emphasized by the Court greatly limit the possible legislative responses to church-state issues. The absence of

---

258 See Roemer, 426 U.S. at 755-61.
259 Under the program upheld in Roemer, Maryland provided $1.7 million to private colleges and universities in 1971. Id. at 743.
260 See Ball, 473 U.S. at 384-98.
262 See Meek, 421 U.S. at 362-66.
263 433 U.S. 229 (1977) (plurality opinion).
264 See id. at 241-48.
265 See id. at 248-55.
266 See, e.g., id. at 264-66 (Stevens, J., dissenting); G. Sidney Buchanan, Governmental Aid to Sectarian Schools: A Study in Corrosive Precedents, 15 Hous. L. Rev. 783, 785 (1978) ("The Supreme Court's distinctions in Wolman v. Walter are difficult to grasp and even more difficult to defend.").
any coherent principles will frustrate attempts to predict the judicial response to new Establishment Clause questions. Most disturbingly, decisions such as Wolman appear to overturn legislative judgment on the basis of incoherent legal rules and subjective preferences, rather than constitutional principles.

Additionally, the primary effect test conflicts with a number of Free Exercise Clause decisions, including cases that authorize religious exemptions. In Wisconsin v. Yoder, the Court exempted Amish teenagers from a compulsory high school attendance law. The primary effect of this exemption without question benefited religion. Other than frustrating universal education, the only effect of the exemption was to benefit the Amish religion. Nevertheless, the Court granted the exemption without addressing the Establishment Clause or the primary effect test.

Returning to a secular purpose-primary effect test would eliminate the constitutional problems posed by the entanglement doctrine. A secular purpose-primary effect model, however, does not provide a principled or coherent method for deciding Establishment Clause cases. Dissatisfaction with secular purpose-primary effect analysis may in fact have led to the unfortunate introduction of

---

267 In addition, the lack of principles facilitates avoidance of precedent. For example, the Court invalidated a state program that paid public school personnel to provide diagnostic services to private school students in Meek but subsequently upheld a similar state program in Wolman. A state program granting a tax deduction to parents who had paid private school tuition was held unconstitutional in Nyquist, but the Court later upheld a similar tax deduction in Mueller. But see Mueller, 463 U.S. at 397-99 (asserting that the Nyquist and Mueller programs included important differences).

268 See Choper, supra note 92, at 680 (criticizing the Court’s ad hoc decisions); Simson, supra note 2, at 908 (criticizing the Court’s Establishment Clause tests); Evan M. Tager, Note, The Supreme Court, Effect Inquiry, and Aid to Parochial Education, 37 Stan. L. Rev. 219, 234-35 (1984) (asserting that primary effect rulings “have become totally unpredictable,” but also suggesting that the Court could develop a coherent primary effect test).


270 See id. at 217-19. For a discussion of Yoder, see supra notes 101-05 and accompanying text.

271 See Yoder, 406 U.S. at 221-29 (1972).

272 Free exercise cases that recognize rights to religious expression may have a similar effect of advancing religion. See Mergens, ___ U.S. ___, 110 S. Ct. 2356, 2370-73 (upholding a federal statute guarantying student religious groups access to high school facilities); Widmar, 454 U.S. at 267-76 (prohibiting a state university’s exclusion of religious groups).

the entanglement doctrine. A return to the two-step analysis probably will generate little enthusiasm.274

B. A Coercion Model

The coercion model prohibits only those government interactions with religion likely to influence the religious beliefs of individuals. A number of First Amendment scholars have advocated an Establishment Clause focus on coercive relationships.275 Establishment Clause decisions have shown a marked sensitivity to suggestions of religious coercion. For example, the Court in Stone v. Graham held that posting the Ten Commandments in public schools violated the Establishment Clause because the display might "induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."276

Coercion concerns also may explain the Court's divergent treatment of public prayer cases. In School District of Abington Township v. Schempp, the Court invalidated Pennsylvania and Maryland laws requiring teachers to begin each public school day with a prayer reading.277 But in the subsequently decided Marsh v. Chambers,278 the Court upheld a prayer reading at Nebraska legislative sessions.279 The Marsh Court observed: "Here, the individual [legislator] claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination' . . . or peer pressure."280

A coercion test is clearer and more predictable than a secular purpose-primary effect model. Unlike the nebulous phrase "primary effect of advancing religion," the term "coercion" does possess some definitional content. Under a coercion test, only government relationships relating to religious indoctrination raise Establishment Clause concerns.281

274 See Tager, supra note 268, at 226-27 (concluding that the Court's approach in private school aid cases "betrays its general uneasiness with effect inquiry").
275 See Choper, supra note 92, at 675; McConnell, supra note 227, at 35; see also Michael W. McConnell, Coercion: The Lost Element of Establishment, 27 WM. & MARY L. REV. 933 (1986).
276 See, e.g., Stone, 449 U.S. at 42.
279 See id. at 786-95.
280 Id. at 792 (quoting Tilton v. Richardson, 403 U.S. 672, 686 (1971)).
281 Also, unlike a secular purpose-primary effect model, a coercion model could prove consistent with religious exemptions that are mandated under the Free Exercise Clause. See supra notes 269-73 and accompanying text.
Nevertheless, the appropriateness of a coercion model remains highly debatable. Although the term "coercion" is capable of definition, identifying church-state relationships likely to result in religious coercion is a far more difficult matter. For example, consider which of two statutes would have a more coercive effect. The first statute authorizes public school teachers and students to recite a brief voluntary prayer each day. The second funds a Christmas nativity scene in a shopping district. The Court has invalidated school prayer as a form of religious coercion, while upholding a nativity scene. However, Justices dissented from both decisions, calling into question the Court's ability to divine religious coercion.

Even if the Court could identify coercion with accuracy, the test remains simplistic. Although the Establishment Clause undoubtedly should prevent religious coercion, proscribing coercion does not necessarily represent the only purpose served by the clause. State aid to sectarian schools does not involve appreciable religious coercion. Families voluntarily choose sectarian schools as an alternative to public education. Nonbelievers may take offense when government uses tax monies to fund sectarian schools. But such taxation does not coerce dissenters into joining a religion that sponsors sectarian schools.

Despite the absence of overt coercion, government funding of religious schools may raise Establishment Clause concerns. Oppo-

---

282 See Choper, supra note 92, at 700 (stating that a coercion test requires "a number of delicate, factual judgments"); Ira C. Lupu, Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion, 140 U. PA. L. REV. 555, 577 (1991) ("Once one gets beyond the obvious case of dire threats—your prayers or your life—there remain knotty problems of whether coercion attends conditioning government benefits upon participation or passive acquiescence in religious ceremony.").

283 See Schempp, 374 U.S. at 226; Engel, 370 U.S. at 424-36.


285 See id. at 725 (Brennan, J., dissenting) (describing nativity scene as "a coercive, though perhaps small, step toward establishing the sectarian preferences of the majority at the expense of the minority"); Schempp, 374 U.S. at 308-20 (Stewart, J., dissenting) (stating that the government has no duty to insulate public school children from any awareness of religion); Engel, 370 U.S. at 445 (Stewart, J., dissenting) (stating that a voluntary school prayer does not "interfere[] with the free exercise of anybody's religion").

286 See Ball, 473 U.S. at 385 (stating that the Establishment Clause prohibits indoctrination); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480 (1973) (same).

287 See Nyquist, 413 U.S. at 786 ("The absence of any element of coercion, however, is irrelevant to questions arising under the Establishment Clause."); Engel, 370 U.S. at 430 ("[T]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion. . . .").
sition to the funding of religions through taxation provided strong support for the adoption of the Establishment Clause. In addition, Establishment Clause concerns may follow from the endorsement of religion that accompanies sectarian school funding.

C. A Classification Model

A third approach to Establishment Clause analysis adopts the equal protection jurisprudence focus on statutory classifications. This model prohibits government use of legislative classifications that distinguish between different religions, or between religion and nonreligion. Also, the use of a nonreligious classification would violate the Establishment Clause, if this classification were motivated by a desire to favor or persecute certain religions.

Some Establishment Clause decisions appear entirely consistent with a classification model. In Estate of Thornton v. Caldor, the Court struck down a Connecticut statute benefiting Sabbath observers. The Connecticut law provided: "No person who states..."

---

288 See Choper, supra note 92, at 677 ("The practice perceived by the Framers as perhaps the most serious infringement of religious liberty sought to be corrected by the Establishment Clause was forcing the people to support religion by the use of compulsory taxes for purely sectarian purposes."). See generally JAMES MADISON, Memorial and Re- monstrance Against Religious Assessments, in THE COMPLETE MADISON 299, 300 (Saul K. Padover ed., 1953).

289 See County of Allegheny v. ACLU, 492 U.S. 573, 579 (1989) (noting that recent Court opinions scrutinize statutes for religious endorsement); Lynch, 465 U.S. at 688 (O'Connor, J., concurring) (stating that the Establishment Clause should proscribe "government endorsement or disapproval of religion"); Tager, supra note 268, at 222-23 (stating that "government should not place its imprimatur on religion"). Government aid to private schools might appear as an endorsement of the Catholic Church because the church sponsors such a high percentage of private schools. See, e.g., Aguilar, 473 U.S. at 406 (noting that 84% of the private school students aided by a New York City program attended Catholic schools); Wolman, 433 U.S. at 234 (noting that 92% of Ohio students enrolled in private schools attended Catholic affiliated schools).


292 See Caldor, 472 U.S. at 706.
that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. This Connecticut statute explicitly classified on the basis of religious belief. Only Sabbath observers could refuse to work on a particular weekday.

The Court held that this Connecticut statute violated the Establishment Clause. Some of the Caldor Court's reasoning is difficult to understand, but the Court's invalidation of the Connecticut statute is consistent with a classification model of the Establishment Clause. As Chief Justice Burger's majority opinion concluded: "This unyielding weighing in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses. . . ."

The Court also has invalidated some statutes resulting from religious motivations, even though these statutes did not incorporate explicit religious classifications. In Wallace, the Court struck down an Alabama statute that authorized public schools to observe a one minute period of silence "for meditation or voluntary prayer." The Wallace decision reviewed the legislative history of the moment of silence statute, concluding that Alabama legislators had intended "to return prayer to the public schools" in spite of prior Supreme Court decisions prohibiting school prayer. As two concurring opinions explicitly noted, the Wallace decision did not hold that all moment of silence statutes would violate the Establishment Clause. Instead, the decision only held that the

---

293 CONN. GEN. STAT. § 53-303(e) (1985).
294 See Caldor, 472 U.S. at 708-11.
295 The Court also attacked the statute because it imposed an "absolute duty" on employers to facilitate employee Sabbath observance and because the law made no allowance for "special circumstances." Id. at 709. The Court thus seemed to suggest that a more qualified Sabbath exemption might be constitutional. A qualified Sabbath exemption might make greater sense as a matter of public policy, but it is difficult to understand why the absolute or qualified nature of the exemption should make any difference for Establishment Clause purposes. See McConnell, supra note 227, at 56 (stating that the absolute nature of the Caldor accommodation "is of dubious relevance under the establishment clause"); Paulsen, supra note 23, at 337 n.115 (stating that Caldor "is as incomprehensible as its opinion is slight").
296 Caldor, 472 U.S. at 710.
297 Wallace, 472 U.S. at 40.
298 See id. at 57-59.
299 Id. at 59.
300 See Schempp, 374 U.S. at 222-27; Engel, 370 U.S. at 424-36.
301 See Caldor, 472 U.S. at 62 (Powell, J., concurring); id. at 67-76 (O'Connor, J., concurring).

One other challenge to a moment of silence statute has reached the Court. The Court dismissed this appeal for lack of jurisdiction. Karcher v. May, 484 U.S. 72, 77-83 (1987).
particular statute in question was motivated by an unlawful intent.\textsuperscript{302} Thus, \textit{Wallace} is also consistent with the classification approach.

The Court often has written that preventing discrimination on the basis of religious belief constitutes a core purpose of the Establishment Clause,\textsuperscript{303} and this reading seems intuitively plausible. Without question, government may provide religions with the same fire protection, road maintenance, and general public services received by nonreligious institutions.\textsuperscript{304} On the other hand, serious Establishment Clause problems result from government funding of a special bus service carrying believers to church,\textsuperscript{305} or a rule exempting only religions from property taxes.\textsuperscript{306} Establishment Clause concerns often arise when government treats religions differently from other organizations, through use of a religious classification.

On the other hand, a classification model conflicts with Free Exercise Clause cases.\textsuperscript{307} In \textit{Yoder}, where the Court exempted Amish students from compulsory high school attendance, the Court relied on an explicit religious classification. Non-Amish students were not exempted from compulsory high school attendance, even if such attendance imposed hardships. Because this third model prohibits religious classifications, this model seems inconsistent with religious exemptions.\textsuperscript{308}

\begin{footnotes}
\footnotetext[302]{Wallace v. Jaffree, 472 U.S. at 59.}
\footnotetext[303]{See, e.g., Larson v. Valente, 456 U.S. 228, 244 (1982).}
\footnotetext[304]{See Widmar, 454 U.S. at 274-75; Everson, 330 U.S. at 17.}
\footnotetext[305]{See Buchanan, supra note 266, at 793-94.}
\footnotetext[306]{The Court upheld a New York City rule that exempted houses of worship from property taxes, in Walz v. Tax Commission, 397 U.S. 664 (1970). In a concurring opinion, Justice Harlan argued that the rule was constitutional because New York had granted the tax exemption to a variety of charitable organizations. Justice Harlan thus concluded: "I can see no lack of neutrality in extending the benefit of the exemption to organized religion." \textit{Id.} at 697.}
\footnotetext[307]{The holdings in these free exercise cases also conflict with a secular purpose-primary effect model. See supra notes 269-73 and accompanying text.}
\footnotetext[308]{See Kurland, supra note 2, at 16; Merel, supra note 291, at 807. A classification model may not foreclose all religious exemptions. For example, the Equal Protection Clause proscribes all racial classifications that burden minorities, but allows the use of explicit racial classifications in some programs designed to benefit minorities. See, e.g., Metro Broadcasting, Inc. v. FCC, \textit{---} U.S. \textit{---}, 110 S. Ct. 2997, 3008-28 (1990) (upholding a FCC affirmative action program). By analogy, a classification model could authorize religious exemptions when such classifications benefit minority religious groups. See Marc Galanter, \textit{Religious Freedoms in the United States: A Turning Point}, 1966 \textit{Wis. L. Rev.} 217, 288; Steinberg, supra note 91, at 102-38; Mark Tushnet, \textit{The Emerging Principle of Accommodation of Religion (Dubitante)}, 76 \textit{Geo. L.J.} 1691, 1713 (1988).}
\end{footnotes}
Reliance on a classification model also involves practical difficulties. First, courts need to identify those statutes resulting from improper religious motivations. Identifying legislative motivation is a notoriously difficult task. The motivations of any individual government decision maker may prove difficult to identify, and legislative bodies rely on the votes of numerous individuals to adopt a statute. Enactment usually results from multiple motivations.

Even in cases where government action clearly results from religious motivations, classification analysis may not yield a clear Establishment Clause answer. The Court might review religious classifications under a "strict scrutiny" standard, similar to the strict scrutiny that applies in racial discrimination cases. Under strict scrutiny analysis, the Court would invalidate any religious classification, unless the government demonstrated that the classification was necessary to achieve a "compelling governmental interest."

Adoption of strict scrutiny review would require very significant changes in the Court's Establishment Clause jurisprudence. Strict scrutiny, as traditionally applied, would invalidate such familiar practices as prayer readings prior to government meetings, the printing of the phrase "In God We Trust" on United States currency, and the recognition of Christmas as an official holi-

---

309 See Palmer v. Thompson, 403 U.S. 217, 224-25 (1971) (describing some of the difficulties in ascertaining legislative motivation); Petersen, supra note 242, at 1834-40 (arguing that the Court should not rely on analysis of legislative motives in Establishment Clause cases). But see Paul Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Motive, 1971 Sup. Cr. Rev. 95, 119-24 (arguing that courts often will be able to determine the motivation of a government decision maker).

310 See United States v. O'Brien, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it. . . ."). On some of the difficulties faced by courts attempting to discern legislative motives, see generally Brest, supra note 309, at 119-30 (questioning the difficulty of determining legislative intent); Theodore Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U. L. Rev. 36, 114-17 (1977) (questioning the persuasiveness of objections to motive analysis).


313 The Supreme Court upheld the Nebraska practice of beginning legislative sessions with a prayer reading in Marsh, 463 U.S. at 786-95.

314 Cf. Lynch, 465 U.S. at 676 (suggesting that the inscription "In God We Trust" on United States currency raises no constitutional problem); Aronow v. United States, 432 F.2d 242 (9th Cir. 1970) (holding that phrase "In God We Trust" does not violate the Establishment Clause).
Although the Court has unconvincingly attempted to formulate some secular purpose resulting in these government actions, these familiar practices all involve government recognition of certain religious beliefs and exercises. None of these practices furthers a compelling governmental interest independent of religious practices.

In an attempt to reconcile precedent with a classification model, the Court could apply some form of intermediate scrutiny to religious classifications. In other words, the Court could require that religious classifications "serve important governmental objectives and... be substantially related to the achievement of those objectives." Under an intermediate scrutiny standard of review, religiously motivated government programs that serve important government objectives would be permissible.

Intermediate scrutiny review would allow the Court's precedent to harmonize with a classification model. Intermediate scrutiny, however, would involve markedly less predictability and certainty than strict scrutiny. Instead, intermediate scrutiny review would result in rulings as unpredictable as the decisions produced by a primary effect analysis.

CONCLUSION

The Supreme Court has demonstrated a marked reluctance to reevaluate Establishment Clause doctrine. One commentator has criticized the use of a "standard profile," with the Court mechan-

315 Cf. Allegheny, 492 U.S. at 601 ("[T]he government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day. . . ."); Lynch, 465 U.S. at 676 (noting that Congress has recognized Christmas as an official holiday and has excused federal employees from work on Christmas).

316 Lynch, 465 U.S. at 681 (finding the illustration of the historical origins of Christmas through a public nativity scene to be a secular purpose); Marsh, 463 U.S. at 792 (finding continuance of tradition of legislative prayer to be a secular purpose).


318 The Court has applied an intermediate scrutiny test in cases alleging gender discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. The law that has developed in gender discrimination cases is anything but clear and predictable. Compare Kirchberg v. Feenstra, 450 U.S. 455, 459-63 (1981) (invalidating a Louisiana law that gave husbands the unilateral ability to dispose of marital property) and Reed v. Reed, 404 U.S. 71, 75-77 (1971) (invalidating an Idaho law that preferred males in the assignment of an estate administrator) with Rostker v. Goldberg, 453 U.S. 57, 64-83 (1981) (upholding a federal law that required only men to register for military conscription) and Dothard v. Rawlinson, 433 U.S. 321, 332-37 (1977) (upholding an Alabama decision to hire only male prison guards to work in all-male maximum security prisons).
ically applying precedent rather than exploring the unique church-state relationship at issue in each new Establishment Clause case.\textsuperscript{319} Another author has complained of the Court's refusal to reconcile "corrosive precedents," resulting in Establishment Clause distinctions lacking any fundamental integrity.\textsuperscript{320}

The Court's allegiance to the entanglement doctrine is consistent with this refusal to reevaluate Establishment Clause concepts.\textsuperscript{321} The entanglement doctrine has received both caustic criticism from religion clause scholars,\textsuperscript{322} and attacks from some of the Justices themselves.\textsuperscript{323} After more than twenty years, the Court still has developed no clear method for divining when a church-state relationship involves unconstitutional administrative entanglement. And, although the entanglement doctrine also prescribes government programs suggesting a potential for "political division along religious lines,"\textsuperscript{324} the Court has avoided any serious attempt to give specific content to this phrase.\textsuperscript{325}

If the entanglement doctrine represented nothing more than a manipulable test that masked other Court reasoning, the continued invocation of the doctrine might not seem terribly disturbing. But the entanglement doctrine directly conflicts both with well-established First Amendment principles and with constitutional rights to political participation. The Court typically has resolved this conflict by ignoring the entanglement doctrine in certain cases. Yet, this intermittent reliance on the entanglement doctrine only has added

\textsuperscript{319} See Ripple, supra note 1, at 1221; see also id. at 1222 ("In effect, characterizations previously given certain religious institutions or certain religious-civil relationships in earlier cases became presumptively conclusive.").

\textsuperscript{320} See Buchanan, supra note 266, at 783-84; see also id. at 818 (arguing that court decisions assessing aid to sectarian schools have not developed any "durable [F]irst [A]mendment philosophy").

\textsuperscript{321} In the pending Lee v. Weisman case, Solicitor General Kenneth H. Starr has invited the Justices to reevaluate current Establishment Clause law. See Brief for the United States as Amicus Curiae Supporting Petitioners, Lee v. Weisman, No. 90-1014 (May 1991) (pending before the Supreme Court) (copy on file with the author). For a discussion of the Lee v. Weisman litigation, see supra note 3.

\textsuperscript{322} See supra note 2.


\textsuperscript{324} Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

\textsuperscript{325} See Kurland, supra note 2, at 20 ("The word entanglement is only an antonym for separation. The former assures no more guidance than the latter."); Ripple, supra note 1, at 1224 ("In re-evaluating the entanglement test, the Court will have to confront the reality that despite a decade of experience, it has yet to find a satisfactory internal discipline which will curb excessive judicial subjectivity.").
to its vague character, and to the lack of clarity in Establishment Clause law.

The third part of this Article proposes three alternative Establishment Clause models that do not incorporate any concept of entanglement. Given the complex problems raised by church-state relationships, none of these models provides a simple solution to all Establishment Clause issues. Consistent use of one of these models, however, could improve the coherence of church-state decisions. Regardless of the ultimate choice, principled Establishment Clause adjudication will be possible only after the Court abandons the entanglement doctrine.