Winter 1999

Some Realistic Thinking about Secular Effects

Paul E. Salamanca
University of Kentucky College of Law, psalaman@uky.edu

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

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

Part of the Constitutional Law Commons, and the First Amendment Commons

Repository Citation
https://uknowledge.uky.edu/law_facpub/571

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
SOME REALISTIC THINKING ABOUT SECULAR EFFECTS

PAUL E. SALAMANCA*

I. INTRODUCTION

Notwithstanding complaints about incoherence in Establishment Clause doctrine, courts by and large administer the Clause responsibly. They do so by mediating between a number of powerful considerations, none of which can ever be entirely disregarded. These considerations include, but are not limited to, separation of church and state, the value of religiosity, the imperative of affording equal treatment to religious and similarly situated nonreligious entities, and the proper role of courts in a democratic political system. This is not to say that courts cannot overstep their bounds and provoke an adverse reaction from other powerful elements within the polity. It is only to say that courts, being sensitive to important political considerations, tend to avoid the kind of provocation that would undermine their role in the political system.

In Part II of this article, I briefly summarize the apparent incoherence of Establishment Clause doctrine. In particular, I note that the various “rules” of nonestablishment are logically irreconcilable and tend to undermine the significance of the Free Exercise Clause, itself part of the Constitution. I then offer four possible explanations for this incoherence, the first two of which are based on indirect arguments and the second two of which are based on direct arguments. First, I suggest that any rule, such as the Establishment Clause, that contains the seeds of incoherence and that was originally intended to apply in limited circumstances may well appear profoundly incoherent when applied on a massive scale. Second, I observe that the decision by most nations of the world not to disestablish religion may be circumstantial evidence of the difficulty of the task. Third, I argue that any government that expects to act rationally in all instances must predicate its actions on some conception of the “good life,” thereby implicating establishment. Finally, I note that people cannot subsist as a matter of psychology without religion of some sort; therefore, positive government must make religious choices in order to function. These last two arguments partake of the “republican” approach to lawmaking, which expects government and citizenry to support each other in fostering individual and collective virtue.

* Assistant Professor of Law, University of Kentucky, College of Law. I would like to thank Richard Ausness, Michael Healy, John Rogers and Peter Spiro for reading and commenting on drafts of this article. I am also indebted to participants in the 1998 Annual Meeting of the Central States Law School Association for their helpful suggestions.

1. Critics have often argued that the Supreme Court’s interpretation of the Clause is internally inconsistent. See, e.g., Michael A. Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 NOTRE DAME L. REV. 311, 315-17 (1986).

2. See infra notes 16-28 and accompanying text.

3. See infra notes 29-40 and accompanying text.

4. See infra notes 41-45 and accompanying text.

5. See infra notes 46-55 and accompanying text.

6. See infra notes 56-62 and accompanying text.

7. See infra notes 80-85 and accompanying text for a discussion of “republicanism.”
In Part III, I argue that courts nevertheless make sense of the Establishment Clause by mediating between such logically irreconcilable values as separation of church and state and republicanism. To help illustrate this point, I use the arguments set forth by James Boyd White in his monograph *When Words Lose Their Meaning.* In one chapter of this work, White described a rhetorical community in which players addressed each other by reference to a set of important considerations, remembering always to include each consideration at some level in their argument. As White noted, if any player in this community dared to eliminate one consideration from the mix, as one did, that player risked outlawry and destruction at the hands of the others. I argue that the same risks apply to Establishment Clause jurisprudence. If the courts systematically ignored an important consideration underlying the Clause, such as separation of church and state, the polity would react strongly and somehow force the courts to rectify the error. I then list some powerful considerations that inform Establishment Clause doctrine.

In Part IV, I bring my observations to bear on a specific rule promulgated pursuant to the Establishment Clause. In particular, I note that the prevailing test for implementing the Establishment Clause, the so-called "Lemon test," calls for an empirical analysis of the effect of legislation. Specifically, the test asks whether the "primary effect" of a law under review is to promote or inhibit religion. I then note that the Supreme Court typically honors this rule in the breach by expressly disavowing any willingness to quantify effects. In light of my earlier analysis, however, I conclude that the Supreme Court should not engage in an overly technical measurement of a law’s effect, but instead should take the measure of the law’s effect as appreciated by the polity in context in making its ultimate decision.

II. THE INCOHERENCE OF ESTABLISHMENT CLAUSE DOCTRINE

Arguably, the Supreme Court has interpreted the Establishment Clause less coherently than any other provision of the Constitution. This Clause provides that

8. See infra notes 63-85 and accompanying text.
10. See infra notes 68-85 and accompanying text.
12. See infra text preceding note 91.
14. See infra notes 92-117 and accompanying text.
15. See infra notes 118-20 and accompanying text.
16. Justice Scalia once described the Court’s prevailing test for non-establishment, the so-called "Lemon test," as a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . .” *Lamb’s Chapel v. Center Moriches School Union Free School Dist.,* 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment). According to Justice Scalia, Lemon’s secret is its adaptability:

The secret of the Lemon test’s survival . . . is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts.” Such a docile and useful monster is worth keeping
"Congress shall make no law respecting an establishment of religion . . . ." 17 This claim can be made notwithstanding the controversy that has surrounded such other heavily litigated provisions of the Constitution as the Equal Protection Clause, 18 the Due Process Clauses, 19 and the Commerce Clause, 20 because interpretation of these clauses, however controversial, has nevertheless tended to be coherent. Thus, although scholars and jurists have debated whether the framers of the Equal Protection Clause expected it to prohibit segregation in schools, 21 whether due process has a substantive component 22 and where the line falls between interstate and local commerce, 23 they nevertheless have drawn lines and made fairly coherent distinctions. 24

...
Establishment Clause doctrine, on the other hand, has been a largely incoherent department of constitutional law. For example, myriad opinions of the Supreme Court involving the Clause have relied on the necessity for "strict separation between church and state." Nevertheless, the Court has approved numerous programs that provide a benefit to religious individuals or entities on the ground that the government is free to accommodate religion, within a broad range, or on the ground that government is obligated to treat religious entities in the same manner as similarly situated nonreligious entities.

These rules are not logically reconcilable. Moreover, strict separation, if taken to its full measure, may preclude operation of the Free Exercise Clause, which requires the government not to interfere with religious conduct. As I attempt to demonstrate later in this article, the Supreme Court manages to reconcile these formally irreconcilable rules by mediating between important considerations. In the next subpart, however, I will attempt to explain why we have an apparently incoherent clause in our Constitution.

A. Indirect Explanations

1. Scope and Significance of the Clause

The present scope and significance of the Establishment Clause of today were probably not even imaginable in the late eighteenth century. As several scholars have noted, the framers of this Clause did not expect the government to which it originally applied—the federal government—to manage many of the affairs of the nation. Although they may not have seen the states as petty sovereignties after ratification of the Constitution, they expected them to carry on much of the

25. See, e.g., Everson v. Board of Educ. of Ewing, 330 U.S. 1, 15-16 (1947). The Everson Court's words on the subject are famous:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Id. (citation omitted).

26. See, e.g., Zorach v. Clauson, 343 U.S. 306 (1952) (upholding a "release time" program, whereby students were released from public school for religious instruction).

27. See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819 (1995) (requiring a state university to pay the printing costs of a student newspaper with an explicitly evangelical perspective where the newspaper qualified in every other respect for funding).

28. This is a longstanding argument made by many commentators. See, e.g., Alan Schwarz, No Imposition of Religion: The Establishment Clause Value, 77 YALE L.J. 692, 692 (1968) ("[I]t is arguable that the establishment clause invalidates military service exemptions granted conscientious objectors, while the free exercise clause compels them."). The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend I.


It is not uncommon to hear our system described in terms of a cross between the unitary form (wherein the central government reigns supreme over the constituent units) and the confederal form (wherein the constituent units are sovereign). Over the decades this cross has come to be
business of government, leaving Congress to police interstate commerce, to defend the nation's borders against attack, to discharge the national debt, and to defend political minorities against excesses in state legislation. These were the evils the framers had in mind when they met at Annapolis and Philadelphia.

This has extraordinary meaning for the Establishment Clause, because, as Jay Bybee has argued, it illuminates the Clause's role as a disabling provision. As Bybee wrote:

The First Amendment is a subject-matter disability, as opposed to a procedural disability. Instead of qualifying the conduct of governmental affairs, it puts a category of laws beyond the competence of Congress. The disability is so complete that Congress is expressly forbidden to enact laws respecting an establishment of religion, or laws abridging the free exercise of religion, freedom of speech and press, and the right to petition the government. The First Amendment is a rule about rules.

Thus, the Clause was originally intended simply to disable Congress from interfering with state choices regarding established religion. That meant, for example, that Congress could not impose an established religion on a state, such as Virginia, that had affirmatively disestablished religion. It also meant, however, that the Establishment Clause disabled Congress from interfering with a state's decision to have an established religion, as was the case in Massachusetts until the

known as "federalism," which is generally considered to be—a third and distinct principle for the distribution of powers.

Id. 30. James Madison wrote in The Federalist, No. 45 (James Madison):

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.


As long as the revision of the Articles was based solely on the need to solve specific problems of finance, commerce, and foreign policy, its support was erratic and fearful. But once men grasped, as they increasingly did in the middle eighties, that reform of the national government was the best means of remedying the evils caused by the state governments, then the revision of the Articles of Confederation assumed an impetus and an importance that it had not had a few years earlier.


33. Id. (footnotes omitted).

The Clause merely provided that Congress could make no law respecting an establishment of religion, one way or the other. Only the states could do that. What began as a categorical disability on a government of circumscribed powers evolved into a much more complex and challenging rule when applied either to a federal government of virtually unlimited power, or to state governments, which at least in theory possess the police power. The federal government has been a “positive government” since at least the 1960’s, with the advent of Medicaid and Medicare, and the enactment of the Elementary and Secondary Education Act of 1965, and probably since the 1930’s, which saw the enactment of the Social Security laws. This is in contrast to the “night watchman” or minimalist state described by various political philosophers. Moreover, states, the theoretical repositories of the police power, have been subject to the Establishment Clause since the Supreme Court decided Everson v. Board of Education of Ewing in 1947.

35. See generally id. at 113-17, 139-60. Ironically, the voters of Massachusetts chose to eliminate the state’s mild support for Trinitarian Congregationalism only after Unitarian Congregationalism began to exclude Trinitarians from public funding. See id. at 159-60. Noonan wrote:

Between 1820 and 1834 nearly one hundred Congregationalist parishes fell under Unitarian control—over one-quarter of the Congregationalist parishes in the commonwealth. The Trinitarians estimated that the Unitarians took $608,000 worth of property. The Trinitarians, as they watched the process, became champions of abolishing Article III [which provided public support for the religion established in each town]. The entrenched Unitarians defended the establishment.

Id. at 159 (citations omitted). In a similar vein, John Witte has described a variety of measures designed to frustrate unpopular faiths in the early years of the Republic. In fact, most, if not all, major faiths were subjected to harassment somewhere in the Union. See John Witte, Jr., The Essential Rights and Liberties of Religion in the American Constitutional Experiment, 71 NOTRE DAME L. REV. 371, 405-06 (1996); see also Everson v. Board of Educ. of Ewing, 330 U.S. 1, 14 & n.17 (1947) (discussing discrimination on the basis of faith in the individual states after the adoption of the First Amendment).

36. See Witte, supra note 35, at 404-05.

37. An analogous situation arose in connection with judicially recognized private rights of action arising from acts of Congress. Given the original legislation’s failure to authorize, much less specify the contours of, such rights of action, courts found themselves bereft of guiding principles when subsequent litigation forced them to identify the boundaries of the rights of action they had earlier recognized. See, e.g., Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975). As then-Justice Rehnquist wrote in that decision:

Having said all this, we would by no means be understood as suggesting that we are able to divine from the language of § 10(b) [of the Securities Exchange Act of 1934] the express "intent of Congress" as to the contours of a private cause of action under Rule 10b-5. When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn. Such growth may be quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it, but it would be disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present state of the law with respect to Rule 10b-5.

Id. (citation omitted).

38. See Paul E. Salamanca, The Role of Religion in Public Life and Official Pressure to Participate in Alcoholics Anonymous, 65 U. CHI. L. REV. 1093, 1152-53 (1997); cf. John H. Garvey, What’s Next After Separationism?, 46 EMORY L.J. 75, 80-81 (1997) (noting that “separationism” has vastly different meaning in a society in which virtually all resources are controlled by the government; observing that “We are not yet at that point. But neither are we in the same place we were during the eighteenth century.”); see also Donald A. Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development Part II. The Nonestablishment Principle, 81 HARV. L. REV. 513, 522-23 (1968) (describing a similar society).

39. See, e.g., CARL J. FRIEDRICH, AN INTRODUCTION TO POLITICAL THEORY: TWELVE LECTURES AT HARVARD 17 (1967). Noting the development of positive government, Friedrich described President Roosevelt’s “freedom from want” and “freedom from fear” as “freedom through government,” e.g., “freedoms which men can only attain with the help of their government.” Id. at 5.

Thus, any attempt to understand how a provision of the Constitution could end up appearing profoundly incoherent must begin with the observation that the “subject-matter disability” presented by the original Clause would have had little to disable and, therefore, would not often have been invoked. That is, the framers would have given little thought to a provision that had remote practical significance at the time it was ratified other than its function as a disabling provision. Consequently, incoherence in the ultimate interpretation of the Clause would not have occurred to them.

A second indirect explanation for the Clause’s incoherence lies in the weight of the undertaking represented by the Establishment Clause. Circumstantial proof of this weight lies in our fellow nations’ general refusal to make a similar undertaking.

2. Other Nations

Drafted for a government of limited power, the Establishment Clause is an awesome project when applied to a government of general power. In fact, many nations of the world do not make the attempt. Britain, our closest legal and political relative, has at least a weakly established church. At the extreme, parts of the Moslem world are far from embracing disestablishment. Even international accords regarding religious freedom do not call for disestablishment. In fact, John Witte has written that: “International law and many domestic laws regard the material and moral cooperation of church and state as conducive, and sometimes essential, to the achievement of religious liberty.”

This is a complex argument that bears elaboration. Many nations of the world believe that morally sentient progress requires government to maintain some form of open-ended relationship with at least one religious tradition. At a formal level, the United States rejects this.

This does not mean, of course, that the United States is unique in its choice to disestablish religion. France, for instance, has formally disestablished the Roman Catholic Church. But the relative rarity of our choice is circumstantial evidence that it is a difficult one to implement.

41. See generally James W. Torke, The English Religious Establishment, 12 J.L. & RELIGION 399, 405-06 (1995-96) (“The nature of the Church of England and its place in English life cannot be fully understood without a sense of its history. The Church predates not only England itself but even the sense of the English as a distinct people.”). Torke also wrote: “[F]or practical purposes, the present relationship of church and state in England may be seen as a kind of dualism with the Church a distinct and relatively autonomous institution, yet still bearing much national symbolic weight and still enjoying an official voice in the House of Lords.” Id. at 410.

42. See Witte, supra note 35, at 440 (“Islamic revivalists in various countries urge ... arrangements to enhance the ‘Islamicization’ of the community.” (footnote omitted)).

43. According to John Witte, neither the International Covenant on Civil and Political Rights of 1966, nor the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981, nor the Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe of 1989 call for disestablishment, even though these documents call at length for freedom of exercise, conscience and belief. See id. at 434-40 (describing international legal instruments relating to religious freedom).

44. Id. at 440.

B. Direct Claims

Now I would like to make my claims more directly, and I would like to do so from two different directions: legal and psychological.

1. The Legal Argument

At an abstract level, absolute nonestablishment and substantive due process are not compatible. The most elementary rule of substantive due process is that a law must not be irrational. That is, it must not be arbitrary or purposeless. As thousands of law students learn every year, even a law that regulates economic phenomena must be rationally related to a legitimate governmental purpose. In other words, there must be some rational argument connecting what the legislature does with what it wants to do.

Some observations can be made in light of this. For an act to be "rational," it must be consistent with an underlying principle. For that underlying principle to be rational, it in turn must be consistent with a deeper, more profound principle, and so on. Now these arguments concededly approach two famous and not generally accepted proofs of the existence of God. Aquinas, for instance, talked about the "prime mover"—the rationale, if you will, that needs no rationale. And Anselm talked about "that than which there is no thing greater"—the all-encompassing rationale. I will make no claim to have succeeded where these two individuals failed. But if there is a characteristic that is common to all rational acts, whatever that characteristic is—Chris Gamwell has referred to it as the "comprehensive condition" that "makes human activity as such authentic"—then there is a basis for the argument that, in order to satisfy the most basic rule of due process, government must have some ultimate vision of the good life in mind whenever it acts. Otherwise, it is irrational. If this is so, then government cannot act without predicking its actions on religious values.

Now I concede that this argument is ambitious. But it is only strained if one thinks of "religion" as dogma and traditional faith—as something associated with buildings made of clapboard or stone. We need not think of religion in that way. Instead, we can think of religion as the assembly of values and beliefs that makes...

47. See, e.g., United States v. Carlene Prods. Co., 304 U.S. 144, 152 (1938) ([R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." (footnote omitted)).
48. See Pierre Schlag, Law as the Continuation of God by Other Means, 85 CAL. L. REV. 427, 428-34 (1997) (discussing the "cosmological proof of God" and the "argument from design").
49. See id. at 434-37 (discussing the "ontological proof of God").

An answer to the comprehensive question . . . includes an understanding of reality as such and, in this sense, a metaphysical aspect. Every religion, then, includes a metaphysical claim about the character of reality and, further, the claim that reality so understood makes human activity as such authentic, at least in the sense that reality as such permits human authenticity.

Id.
51. See generally FRIEDRICH, supra note 39, at 77-78 (discussing political philosophy).
individual and collective decision-making authentic and sincere.\textsuperscript{52} Once we look at religion this way, we can see that it embraces many sources of strength in our lives, and can include such varied phenomena as traditional religion and magic.\textsuperscript{53}

Indeed the Supreme Court itself adopted a somewhat broad understanding of religion in \textit{United States v. Seeger}.\textsuperscript{54} In this case, the Court included within the definition of religion (for purposes of the conscientious objector statute in use at the time) "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God . . . ."\textsuperscript{55} When perceived in this light, "religion"—and therefore establishment—becomes a requirement for rational action.

2. The Psychological Argument

My second argument is psychological, and relates to human beings' innate need for some form of religion. Specifically, this argument is based on the writings and speeches of Carl Jung, who began his career as a follower of Sigmund Freud, but who ended up striking off in his own direction. Whereas Freud looked very closely at the sexual dynamics involving parents and children, Jung looked at a broader range of symbols, and thus saw sex as one factor in a larger context.\textsuperscript{56}

Much of Jung's work was based on symbols and interpretation of dreams. For Jung, symbols could be "numinous"—that is, life-giving, psychologically genitive, or more or less godlike.\textsuperscript{57} Jung saw religious symbols as numinous in nature. As he put it:

Religion appears to me to be a peculiar attitude of mind which could be formulated in accordance with the original use of the word \textit{religio}, which means a careful consideration and observation of certain dynamic factors that are conceived as "powers": spirits, daemons, gods, laws, ideas, ideals, or whatever name man has given to such factors in his world as he has found powerful,

\textsuperscript{52} See \textit{Gamwell}, supra note 50, at 24-25.

\textsuperscript{53} As I note later in this article, as a matter of psychology, people rely on a variety of sources for personal spiritual strength. See infra note 58 and accompanying text. Sociologists of religion have made similar observations. For example, sociologists have noted that people will turn to magic, as a supplement to traditional religion, to the extent traditional religion does not respond to their needs. See, e.g., Rodney Stark, \textit{Bringing Theory Back In, in RATIONAL CHOICE THEORY AND RELIGION: SUMMARY AND ASSESSMENT} 12-14 (Laurence A. Young ed., 1997) (deducing propositions relating to religious practice). Among the propositions set forth by Stark is: "Proposition 94: To the extent that the demand for magic continues after religious specialists have ceased providing it, others will specialize in providing it." Id. at 13. Another is: "Proposition 104: Religion . . . will tend to oppose magic outside its system." Id. at 14.

\textsuperscript{54} 380 U.S. 163 (1965).

\textsuperscript{55} Id. at 176. To be sure, the Supreme Court carefully distinguished a so-called "philosophy" from a "religion" in \textit{Wisconsin v. Yoder}, 406 U.S. 205, 215-16 (1972). But that distinction has not been free from scholarly criticism. See, e.g., George C. Freeman, III, \textit{The Misguided Search for the Constitutional Definition of "Religion,"} 71 GEO. L.J. 1519, 1559-60 (1983).


Freud's attitude toward the spirit seemed to me highly questionable. Wherever, in a person or in a work of art, an expression of spirituality (in the intellectual, not the supernatural sense) came to light, he suspected it, and insinuated that it was repressed sexuality. Id. at 149.

\textsuperscript{57} See \textit{Carl G. Jung, 11 THE COLLECTED WORKS OF C.G. JUNG} §§ 6-7, at 7-8 (Sir Herbert Read et al. eds., 2d ed. 1969) (describing "numinosum" as "a dynamic agency or effect not caused by an arbitrary act of will").
dangerous, or helpful enough to be taken into careful consideration, or grand, beautiful, and meaningful enough to be devoutly worshipped and loved.\textsuperscript{58}

Jung made no claim about the actual validity or truth of any faith. He simply claimed to be a physician who observed phenomena in his patients’ psyches and tried to act accordingly.\textsuperscript{59} But the point for my purposes here is not the ultimate validity of religion. It is its instrumentality in making sick people well, or helping healthy people stay that way. If religion in a form authentic to the believer is therapeutic to the believer, and if the state is somehow implicated in the process, then the Establishment Clause is potentially problematic, because it instructs the state to avoid establishing religion.\textsuperscript{60}

Now one could respond to this argument by saying that the state should simply stay out of the way, and let people be as religious as they like. But that is not easy for the positive state. The night watchman state could simply put a navy at sea, an army in the field, and regulate the transit of steamboats between New York and New Jersey.\textsuperscript{61} But the positive state is omnipresent. Most critically, the positive state educates most of our young. Whatever the merits of public versus private education, it is not possible to deny that many of the most controversial issues involving the Establishment Clause have also involved education of the young.\textsuperscript{62}

III. METHODOLOGIES

How does the Supreme Court handle this? And how does the constitutional polity, which includes the Supreme Court, handle this? I want to try to answer these questions in reverse order. In Part III, I will discuss the manner in which the polity addresses the Establishment Clause by reference to the law and literature movement. I will then try to assess the Supreme Court’s work in that context in Part IV, with specific reference to empirical means of measuring the religious effects of legislation.

A. Rhetorical Communities

In one of his early books, entitled \textit{When Words Lose Their Meaning}, Professor James Boyd White discussed a part of Thucydides' history of the Peloponnesian Wars.\textsuperscript{63} In this part, various Greek city-states, the operative political units of the

\textsuperscript{58} Id. § 8, at 8.

\textsuperscript{59} See id. § 10, at 9. Jung wrote:

The psychologist, if he takes up a scientific attitude, has to disregard the claim of every creed to be the unique and eternal truth. He must keep his eye on the human side of the religious problem, since he is concerned with the original religious experience quite apart from what the creeds have made of it.

\textsuperscript{Id. § 10, at 9.}

\textsuperscript{60} Cf. Salamanca, supra note 38, at 1153.

\textsuperscript{61} See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (regarding, among other things, the licensing of coastwise vessels).


\textsuperscript{63} See White, supra note 9, at 59-92.
time, were discussing their obligations and prerogatives vis-à-vis other city-states, all in the context of a rebellion that had occurred in a particular city-state.\textsuperscript{64} According to White, the city-states generally used three values as referents in their arguments. These values were justice, expediency and gratitude.\textsuperscript{65} Although they could argue with great creativity in light of these values, they could not entirely dismiss them, nor could they distort any of them beyond a point recognized by other city-states, without rupturing the rhetorical community that made these discussions possible at all.\textsuperscript{66} This rupture occurred when Athens subordinated justice to expediency and destroyed any other city-state’s reason for talking to Athens, leading to Athens’ eventual defeat.\textsuperscript{67}

B. Establishment

So too it can be with Establishment. Unlike the Greeks, we do not necessarily name all the considerations that inform the development of the law, but we know what they are, and we know that we cannot ignore them without peril. Among them are separationism, equal treatment of religious and similarly situated non-religious entities, and “republicanism”—the idea that religion is a good thing for individuals and society.

1. Separationism

There is, to start with, the idea of “separation of church and state,” which many think of as requiring so-called “strict” separation. This value is critically important to a great many Americans, if not the vast majority. But what exactly is it? Does it mean that a city cannot put out a fire at a church?\textsuperscript{68} Perhaps the most persuasive answer to these questions lies not in how church and state can be separated, but in

\textsuperscript{64} See id. at 60. White wrote:

The first of the precipitating causes [of the war] Thucydides identifies is a dispute between Corinth, one of the Peloponnesian powers, and Corcyra, one of her western colonies, which leads by gradual stages to a meeting at Athens at which a representative of Corcyra asks that his city be admitted into alliance with Athens and a Corinthian representative opposes him.

\textit{Id.}

\textsuperscript{65} See id. at 63.

\textsuperscript{66} See id. at 65. White wrote:

The topics of appeal—justice, interest, and gratitude—are not fragmented, . . . but deeply related, and for the most part they work together to form a highly coherent discourse. An alliance will be expedient only if the ally has a proper character, after all, and justice calls for different treatment of the good and the bad.

\textit{Id.} He added later in this paragraph:

The topics of justice, expediency, and gratitude are apparently related in another sense as well, namely, that they are all obligatory; for it appears that a speech that omitted any one of them would be starkly incomplete, a confession of failure.

\textit{Id.}

\textsuperscript{67} See id. at 69-70, 81-82. White translated the Athenians’ arguments as follows:

For it has always been established that the weaker be kept down by the stronger; and at the same time we thought we were worthy of rule, and used to be thought so by you until, considering your own advantages, you began . . . to use the argument from justice, which no one, when he had a chance to get something by force, ever put before it and refrained from taking the advantage.

\textit{Id. at 69.}

\textsuperscript{68} See Everson v. Board of Educ. of Ewing, 330 U.S. 1, 17-18 (1947) (raising this and similar issues).
how much we want them separated, and why. After all, church and state do not exist in separate universes, with no causal connections between the two. In addition, as I will argue in the next few paragraphs, preference for separationism may at least in part be attributable to distaste for traditional religion. I will note in conclusion, however, that whatever the motive for strict separation, it is an important part of the calculus.

Leo Marx, an historian of American culture, wrote a fascinating book entitled *The Machine in the Garden*, in which he discussed the national psyche as reflected in American literature. With respect to the "garden" aspect of this title, Marx went through several prominent literary works regarding North America, mostly by writers in this country. Time and again he demonstrated the profundity of our self-perception as a "virgin" nation. According to this national mythology, we possessed the great opportunity that the Europeans never had, but always dreamed about, to start fresh. Concededly, this mythology had to pass over the presence of Native Americans on the continent, as well as the experiences of people brought involuntarily to North America, but Marx simply described the dominant mythology of the nation. He did not seek to dislodge it. Moreover, he noted, this mythology did not entirely ignore Native Americans. Instead, it sought to incorporate them into the vision, as virginal themselves. In any case, Marx found this mythology running through much of our literature. Perhaps the most evocative expression of this myth identified by Marx is F. Scott Fitzgerald's description of the "fresh, green breast of the new world" witnessed by the Dutch sailor in *The Great Gatsby*.

This mythology may play a subtle role in separationism. Our land has not known an indigenous god, or, to put the matter more accurately, the European-American psyche has not associated a god with North America. For the most part, we have not brought religious warfare to our continent, nor have we permitted meddling by the government with our religious institutions. We have maintained that aspect of our virginity.

But this is only part of the picture. The idea of not having an indigenous god was itself brought to North America by Europeans. It is part of a European panacea. In fact, it is a fundamental aspect of modern psychology. As Carl Jung noted, the modern psyche has largely moved beyond a projected god of personality to a perception of a more symbolic internal god.

---

70. *Cf. id.* at 36 ("What most fascinated Englishmen [about America] was the absence of anything like European society; here was a landscape untouched by history—nature unmixed with art. The new continent looked, or so they thought, the way the world might have been supposed to look before the beginning of civilization.").
71. *See id.*
72. *See id.* at 360 (quoting F. Scott Fitzgerald, *The Great Gatsby*).
73. Our inability or unwillingness to relate the landscape of North America to a deity or a religious cult is exemplified in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), in which the Supreme Court held that the federal government could permit logging and similar economic activities in a portion of a National Forest traditionally used for religious purposes by three Native American tribes, notwithstanding the Free Exercise Clause.
74. *See Jung, supra note 57, § 136, at 80. Regarding a circular diagram known as a "mandala" that Jung would ask his patients to draw, and which he often examined for evidence of psychological condition, Jung said: I have seen many hundreds of mandalas, done by patients who were quite uninfluenced, and I have found the same fact in an overwhelming majority of cases: there was never a deity
In this respect, the new world can be seen as physical space in which such ideas can grow more easily than in a world filled with evidence of indigenous gods. Thus, strict separationism can be seen at least in part as a desire to rid the world of “gods” in the traditional sense, rather than as a simple desire to separate church and state. This is not to say, of course, that only antipathy to a “God of personality” underlies strict separationism. But it may explain part of the strong motivation for separationism in our political culture. Other important considerations served by strict separationism include preventing any single religion from dominating the national political discourse,\(^7\) ensuring that individual religious choices are sincere,\(^6\) and protecting religious traditions and institutions from domination by the government.

2. Equality

Another important value in the rhetorical community I have been trying to describe is equality. From this value arises the notion that when government acts it should treat a religious entity precisely as it would treat a similarly situated non-religious entity. This value is gaining steam in Establishment Clause jurisprudence, and at times has threatened—but nevertheless failed—to overtake the debate.\(^7\) Under the extreme articulation of this value, any amount of official aid to religion does not constitute establishment provided the government does not confer the aid to religious entities as such, but merely assists such entities because of their non-religious characteristics. For example, this value would require a school district to make its facilities available to religious and non-religious groups on a nondiscriminatory basis.\(^7\) It would also require the government to permit the placement of a cross in a public park across the street from a statehouse if the government has habitually allowed non-religious unattended displays in the same park.

3. Republicanism

A third value is the need for positive government to function rationally, and consistent with the needs of the human psyche. Pressure is mounting to enlist religion, or religiously oriented programs, in answering this imperative.\(^8\) For example, there

75. See Witte, supra note 35, at 397 & n.130 (citing THE FEDERALIST NO. 10 79 (Clinton Rossiter ed., 1961)).

76. See Michael W. McConnell, Accommodation of Religion, 1985 SUP. CT. REV. 1, 10 (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS § 1 (1785)) (“If ‘[t]he Religion then of every man must be left to the conviction and conscience of every man,’ each person must be as free to disbelieve as he is to believe.”).

77. See Salamanca, supra note 38, at 1127-39 (describing the “equal access principle” in Establishment Clause jurisprudence).


80. For an interesting popular discussion of this issue, see Joe Klein, In God They Trust, THE NEW YORKER, June 16, 1997, at 40.
is pressure upon the government in many urban areas to help defray the cost of private, sectarian education, the argument being that such education is more effective than public education. And, where the government already helps to pay for private, non-sectarian education, the equality argument aligns with this consideration of expediency. There is also Alcoholics Anonymous, a quasi-religious organization of which the government makes enormous use in fighting alcoholism and drug abuse. And the list goes on. Habitat for Humanity is a significant force in the world of charity. It often receives public assistance in the acquisition of land, and it is explicitly sectarian at its highest level. Thus, to facilitate government that is responsive to the needs of the citizenry, government may need to be supportive of religion.

At a broader level, the idea of divorcing religion and morality, on the one hand, and the state, on the other, is not one embraced by the entire polity. Although it may be embraced by much of the polity, there are strong traditions on both sides of the issue, just as the Supreme Court has given us rhetoric on both sides of the issue.

IV. EMPIRICISM AND THE ESTABLISHMENT CLAUSE

What we are left with, then, is necessarily a very complex picture of the relationship between church and state in the United States and what the Constitution permits and requires. The Supreme Court by and large addresses this issue with the so-called "Lemon test," first adopted in the 1971 decision Lemon v. Kurtzman and recently reaffirmed in principal part in Agostini v. Felton. Under Lemon, a law is unconstitutional if it lacks a secular purpose, if its primary effect is to promote or inhibit religion, or if it fosters excessive entanglements between church and state. But only one of Lemon's three prongs—the "effects" prong—may have real meaning. In the 1997 Agostini decision, the Supreme Court seemed to fold the "entanglements" prong into the "effects" prong. Moreover, legislation almost never runs afoul of the "purposes" prong. This is because government's purpose is

---

82. See Salamanca, supra note 38, at 1154-55.
84. John Witte has written that the "Puritan" and "Republican" strains were roughly as powerful at the time of the founding as the "Separationist" and "Enlightenment" strains. See Witte, supra note 35, at 377-78. Witte wrote "[t]he so-called original intent of the American constitutional framers respecting government and religion cannot be reduced to any one of these views. It must be sought in the tensions among them and in the general principals that emerge from their interaction." Id. at 378.
85. Compare Everson v. Board of Educ. of Ewing, 330 U.S. 1, 15 (1947) ("Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.") with Zorach v. Clauson, 343 U.S. 306, 313-14 (1952) ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."). Although it is doubtful that the Supreme Court would reaffirm Zorach today, it often upholds secular programs that promote an ostensible secular purpose, even if religion is a direct beneficiary. See, e.g., Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970) (upholding a tax exemption for church property drafted broadly enough to encompass a variety of non-profit charitable entities).
86. 403 U.S. 602 (1971).
89. See Agostini, 521 U.S. at 232-33.
rarely simply to promote religion. Government can almost always argue that it seeks to promote a broad secular goal—"peace on earth" will do—with promotion of religion being an unintended side effect. Thus, in practice, the battle often boils down to the effects prong. What, then, is a "religious" effect, as opposed to a "secular" effect?

The word "effect" has an empirical sound to it. We can almost imagine psychologists and sociologists measuring secular and religious effects of government acts. But can this really be done? Paraphrasing Justice Scalia, can a rock be heavier than a line is long? As a formal matter, there is no empirical way to compare effects absent a currency into which disparate effects can be translated.

But the Supreme Court does not really try to measure effects. In fact, on two occasions when measurement might have decided the case (were it possible), the Court expressly disavowed a willingness to roll up its sleeves and measure. The earlier of the two cases was *Mueller v. Allen.* The more recent was *Agostini.*

A. *Mueller v. Allen*

In *Mueller,* the Supreme Court upheld, under the *Lemon* analysis, a tax exemption for parents' out-of-pocket cost of educating their children in any institution, public, private but non-sectarian, or private and sectarian. The Court had little difficulty concluding that the statute satisfied the first prong of the *Lemon* test. The Court concluded that an educated citizenry helped the state, that private schools relieved the public of the burden of educating a significant number of students, and that private schools provided a valuable "benchmark" for public schools.

The Court gave more attention to *Lemon*’s second prong, however. First, the Court noted that the deduction allowed under the statute was only one among many. The state also permitted parents to deduct the cost of medical expenses for which they had received no reimbursement, as well as any contributions the parents had made to charity. The Court also noted that parents of all students—including students attending public schools—could take advantage of the deduction. The Court acknowledged, however, that the taxes foregone ultimately redounded to the

---


> The secular purpose prong has proved mercurial in application because it has never been fully defined .... If the purpose prong is intended to void those aids to sectarian institutions accompanied by a stated legislative purpose to aid religion, the prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion.

Id. at 108. *See also Lynch v. Donnelly,* 465 U.S. 668, 692-93 (1984) (O'Connor, J., concurring) (describing legislative prayers and the printing of "In God We Trust" on coins as serving "the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society").


95. *See id.* at 395.

96. *See id.* at 396.

97. *See id.* at 397.
benefit of the schools attended by children. 98 The Court responded to this observation by noting that parents' decisions, not decisions by the state, dictated whether or not money would go to sectarian institutions. 99

The most important aspect of Mueller for purposes of this article concerned petitioners' argument that, "notwithstanding the facial neutrality of [the statute at issue], in application [it] primarily benefit[ted] religious institutions." 100 According to petitioners, most parents of children attending public school incurred no expenses for tuition at all, and other expenses deductible under the statute were negligible. Moreover, they contended that 96% of the children in private schools attended institutions with religious affiliations. 101 The Court's response was instructive, and devastating to the empirical tenor of Lemon's second prong:

We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under [Minnesota's] law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. . . .

. . . [W]e believe it wiser to decline to engage in the type of empirical inquiry into those persons benefited by state law which petitioners urge. 102

As the dissent pointed out, a significant effect of the legislation was the financing of private, sectarian education, and thereby, the promotion of religion. 103 In fact, the dissent described this effect as "primary," 104 "direct," and "immediate." 105 In other words, it was exactly the kind of effect that would fail Lemon's second prong.

B. Agostini v. Felton

A later decision in which the Supreme Court eschewed empirical analysis under Lemon was Agostini. 106 This decision involved the constitutionality of a plan in New York City whereby public employees would enter the premises of private, sectarian educational institutions to teach various remedial courses pursuant to Title I of the Elementary and Secondary Education Act of 1965. 107 In 1985, the Supreme Court had ruled that this practice violated the Establishment Clause in Aguilar v. Felton. 108 In addition, on the same day that Aguilar was decided, the Court invalidated a

98. See id. at 399.
99. See id. The Court has often relied upon this distinction. See, e.g., Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481, 487 (1986).
100. Mueller, 463 U.S. at 400 (footnote omitted).
101. See id. at 401.
102. Id. at 401-02.
103. See id. at 411 (Marshall, J., dissenting) ("[A]ny generally available financial assistance for elementary and secondary school tuition expenses mainly will further religious education because the majority of the schools which charge tuition are sectarian.").
104. Id. at 409.
105. Id. at 405.
106. 521 U.S. 203.
similar program based on local rather than federal law in *School Dist. of Grand Rapids v. Ball.*

The issue in *Agostini,* therefore, was whether the doctrinal underpinnings of *Aguilar* and *Ball* were still valid. Concluding that they were not, the majority overruled these decisions and upheld the New York plan. Three of the most significant propositions upon which the earlier cases had rested had involved *Lemon*’s effects prong. They were: (1) that public employees carrying out their duties on the grounds of a private, sectarian institution would incorporate religious ideas into their work; (2) that the presence of public employees in these institutions would convey a “symbolic union” between church and state; and (3) that provision of these services to students would constitute a direct financial benefit to sectarian education because sectarian institutions would be relieved of the expense of providing these services themselves. *Aguilar* involved an additional proposition that monitoring the activities of public employees in sectarian institutions would constitute an excessive entanglement between church and state.

The *Agostini* Court made relatively short work of each of these propositions. First, the Court noted that it had “abandoned” the assumption that the mere presence of public employees on sectarian grounds automatically causes state-sponsored indoctrination or creates the impression of a symbolic union between church and state. More importantly, the Court rejected the argument that the most salient effect of the plan would be to help finance private, sectarian education. The Court supported this rejection by noting that parents chose to send their children to such institutions. The public money, the Court indicated, simply followed the parents’ choices. Therefore the benefit to religion was incidental and justifiable under the equality value.

The ostensible “neutrality” of the plan was clear to see, but, at least in theory, a court adhering to the second prong of *Lemon* would need to ascertain the plan’s primary effect, irrespective of neutrality. The majority rejected such analysis, however, quite explicitly: “Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid.” This is reminiscent of the Court’s remarks in *Mueller.*

---

110. See *Agostini,* 521 U.S. at 237.
111. See id.
112. See *Aguilar,* 473 U.S. at 409-14.
113. See *Agostini,* 521 U.S. at 223.
114. See id. at 228. The Court also refused to assume that the provision of services pursuant to Title I would relieve sectarian schools of the burden of providing services that they otherwise would provide themselves. See id. at 229.
115. See generally *Rosenberger* v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 878-79 (1995) (Souter, J., dissenting) (arguing that the “basic rule” of the Establishment Clause is a ban on direct aid to religion, whereas the idea of equal treatment is only its “marginal criterion”); *Schwarz,* supra note 28, at 730-37 (discussing the implementation of a “no imposition” standard, which would require close analysis of various forms of neutral aid that nevertheless facilitate religious growth).
117. At least one state supreme court has taken up this verse of *Agostini* and *Mueller.* See *Jackson* v. Benson, 578 N.W.2d 602, 619 n.17 (Wis. 1998), *cert. denied,* 119 S. Ct. 466 (1998) (upholding a school choice program against challenge under the Establishment Clause of the federal Constitution, stating that “[t]he percent of program
C. Whither "Effects"?

If the Supreme Court will not measure "effects," then what is the significance of the prong? Well, if James Boyd White is correct, the answer is not "nothing." The answer, instead, lies in how the constitutional polity responds to the Court's methodology. This larger rhetorical community, of which the Supreme Court is only a component, will tolerate, or even expect, constitutional provisions to be interpreted with a certain amount of liberality, but only so much. Moreover, real empiricism—that is, real measurement—would be a difficult, if not impossible, undertaking for a laboratory, let alone an appellate court. In addition, as White noted, if the language that united a rhetorical community—such as the constitutional polity of the United States—imposed unbearable restraints, we would disregard it, and build a new community. If, on the other hand, the language imposed no restraints at all, we would not bother to invoke it. It is the virtue of a vital rhetorical community that its language permits a great range of experimentation and ad libitum behavior, but nevertheless cannot be manipulated to mean simply anything without ending the community. The meaning of this for Establishment Clause jurisprudence is that, notwithstanding its apparent "incoherence," it actually resolves cases of great social significance and pays sufficient homage to the text and history of the Constitution, all while preserving the idea of constitutional discourse for resolution of subsequent cases.

V. CONCLUSION

I have attempted to demonstrate that Establishment Clause jurisprudence is only "incoherent" if taken at face value. Notwithstanding the formal inconsistency of the most commonly invoked rules of religious freedom and non-establishment—separationism, equality, and republicanism—all of them can and do play an important role in a thriving rhetorical community of which the courts are an essential component. Moreover, given the circumstances under which the Establishment Clause was originally formulated, given the momentousness of the project the Clause represents, and given the importance of the underlying subject matter to a functional polity, perhaps nothing more could or should be expected from the judiciary.

118. See generally Wex S. Malone, Ruminations on Cause-In-Fact, 9 STAN. L. REV. 60 (1956). In this article, Professor Malone argued that, notwithstanding causal relationships between various phenomena, such as two discrete causes that combine to produce a specific effect, our point of view and our point of reference often causes us to identify one cause or the other as "the cause in fact" of the effect. In other words, Malone argued that many determinations that we consider matters of empiricism are in fact matters of moral judgment.

119. See WHITE, supra note 9, at 67.

120. Arguably, just such a thing happened in our own nation's experience with the Supreme Court's decision in Scott v. Sanford, 60 U.S. (19 How.) 393, 404 (1856), in which the Court held, among other things, that an African American descended from slaves could never be a citizen of the United States under the federal Constitution. Within four years the nation elected a Republican President and the South seceded from the Union.