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CHURCH AND STATE: A CRITICAL ANALYSIS
OF THE LEMON TEST

I. INTRODUCTION

Few areas of constitutional analysis have presented such serious
problems of interpretation, test-formulation, and application as the
establishment clause of the first amendment. Since its ratification
in 1791, the fruit of its varied interpretations has run the gamut
from permitting state supported churches to forbidding legislative
action because of a suspicion of a covert "religious purpose."

One popular method of determining the meaning of the first
amendment is to appeal to the "Framers Original Intent." This
analysis is necessary insofar as a constitution is supposed to be a
relatively long-lasting and unchanging exposition of rights guaranteed
to a society, and therefore the original ideas set forth in a constitu-
tion should be adhered to. However, the "intent" of a body of

1. The first amendment reads in part: "Congress shall make no law respecting an
establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.
2. The establishment clause, by its language, only controlled the federal Congress. U.S.
CONST. amend. I. The Framers recognized that the church-state issue should be left up to
the states. "Indeed, the religion clauses of the First Amendment had only a small impact on
church-state relations during the entire history of the United States prior to 1940 -since prior
to that time (as is universally acknowledged) those clauses only applied to the Federal
Government." Berman, Religion and Law: The First Amendment in Historical Perspective 35
EMORY L.J. 1 (1986). Consider also this statement by John Adams:
I am for the most liberal toleration of all denominations of religionists, but I hope
that Congress will never meddle with religion further than to say their own prayers,
and to fast and to give thanks once a year. Let every colony have its own religion
without molestation.
E. GREENE, RELIGION AND THE STATE 83 (1941).
For many years after the ratification of the federal Constitution and the first amendment,
many states continued support of churches. For example Massachusetts continued support
until 1833, New Hampshire until 1819. L. LEVY, THE ESTABLISHMENT CLAUSE 81 (1986);
see also E. GREENE, supra, at 2.
4. "[T]he mutability of a Constitutional principle, based on shifting political and social
judgments, undermines the chances for consistent application of the Constitution from one
generation to the next, a critical feature in its coherent interpretation." Regents of Univ. of
Cal. v. Bakke, 438 U.S. 265, 299 (1977). One can imagine the problems which could arise if
no authoritative weight were given to the original intent of the Framers. The application of
the written words would become as malleable as putty in the hands of the inventive
interpreter. In George Orwell's Animal Farm, the animals' original Bill of Rights was
gradually transformed into despotism because there was nothing anchoring it to its original
intent. G. ORWELL, ANIMAL FARM (1946). Of course, flexibility may be an instrument for
people is difficult, if not impossible, to divine. Despite this, the history surrounding the colonization of America and the general religious consensus held by the people at that time supports the assumption that the society they constructed would have accurately reflected their views on this sensitive issue of religious liberty. Therefore we might understand what their goals were behind the establishment clause by looking at the society they created.

It may be argued, however, that "original intent" is irrelevant to today's problems and that there is no reason to submit to its bondage any longer. This method of analysis does not use history other than to illustrate pragmatic concerns of cause and effect. It does not analyze church-state questions from a philosophical point of view (i.e. what "ought" to be) but rather from a utilitarian point of view (i.e. what effect does it have on society). This paper will presume that deference to the original intent of the Constitution is a prerequisite to its proper interpretation and application.

This article presents an historical outline of the relationship between church and state in America, emphasizing the application of the establishment clause. The analysis will then concentrate largely on twentieth century caselaw, culminating in the landmark case of Lemon v. Kurtzman7 which yielded the present standard of analysis in establishment clause cases, the "Lemon test." Attention will be given to the theories advanced prior to Lemon and to cases decided after it. Finally, alternative theories of analysis will be offered.

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5. "Our fathers were not only Christians; they were, even in Maryland by a vast majority, elsewhere almost unanimously, Protestants." 1 G. BANCROFT, HISTORY OF THE UNITED STATES 604 (1887).

6. In other words, history is studied in order to learn from experience "what is best for society." There are two pitfalls inherent in this analysis. First, it is in constant danger of slipping into a 'post hoc ergo propter hoc' fallacy (i.e. "before the fact therefore after the fact." The fallacy lies in the assumption that, in a sequence of events where B occurs after event A, A caused B even if, in reality, A and B are wholly unrelated.). Second, deeming something "good" or "best" for society is a very subjective determination and subject to debate as a separate issue. It may also beg the question of what ought to be done by the Court in a certain case.

II. HISTORY SURROUNDING THE FIRST AMENDMENT

"Having undertaken for the glory of God and advancement of the Christian faith, and the honor of our King and country, a voyage to plant the first colony in the northern parts of Virginia . . ."
- The Mayflower Compact, 1620

There were three primary methods by which religious practices were brought to the New World from Europe. First, settlers and companies who came for a myriad or reasons brought with them the social-religious practices of their native countries. Often, the English government would even compel its settlers to establish certain religious practices in their colonies to which all individuals were obliged to submit. Second, religious roots were transplanted to America by Christian sects fleeing persecution. Third, many people came as missionaries to preach the gospel to the Indians.

Although these groups were different in their specific tenets of belief, there existed strong common bonds between them, including a social value system founded upon the Judeo-Christian tradition, and more precisely, Protestant Christianity stemming from the Reformation.

Many of the sects sought not only asylum in the New World, but also to construct societies according to their beliefs. Almost

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8. **THE MAYFLOWER COMPACT OF 1620 (quoted in F. BELLAMY, WE HOLD THESE TRUTHS . . . 5 (1942)).**
9. **Everson v. Board of Educ. of the Township of Ewing, 330 U.S. 1, 9 (1946).**
10. **15 WORLD BOOK ENCYCLOPEDIA, Pilgrim, 415-16 (1965).**
11. **J. BREWER, THE UNITED STATES IS A CHRISTIAN NATION. 16-17 (1905); C. BEARD & M. BEARD, THE RISE OF AMERICAN CIVILIZATION 10 (1947).**
   - The first charter of Virginia, granted by King James I, in 1606 . . . commenced the grant in these words: "We, greatly commending, and graciously accepting of, their desires for the furtherance of so noble a work, which may, by the providence of Almighty God, hereafter tend to the glory of His Divine Majesty, in propagating the Christian Religion to such people as yet live in darkness and miserable ignorance of the true knowledge and worship of God."
13. "It is not an exaggeration to say that Christianity in some of its creeds was the principal cause of the settlement of many of the colonies . . . Beginning in this way and under these influences it is not strange that the colonial life had an emphatic Christian tone."
every colony either collected taxes for the support of some local church designated by the taxpayer or had one particular church which was preeminent and alone received government support.14 Even on the national level, "there was a paid chaplain in Congress even before the Revolutionary War ended. Also we find that prior to the founding of the National Congress all early provincial congresses in all thirteen colonies always opened with prayer."15 It is a mistake to assume that the religious settlers came to America solely to avoid state-religion and thus sought vehemently to prevent it here through the first amendment.16 Those who fled because of religious persecution and oppression sought freedom of expression, not only freedom from interference. When given the chance they clearly and liberally expressed their beliefs through government and law.17 This often resulted in burdens placed on members of religious minorities who were sometimes taxed to support the majority's church,18 or who, in some instances, were jailed for holding their unpopular beliefs or expressing them through civil disobedience.19

The liberal religious expression within government often led to local persecutions or civil burdens similar to those which existed in Europe and which caused many of the settlers to flee to America.20 Some attempt was eventually made through state constitutions to alleviate pressures placed on minority sects; "Christianity" or "Protestantism," rather than a specific church, was often declared to be the state-supported religion.21 This might have

14. For an extensive discussion of this practice and each state's policy on religion see L. LEVY, supra note 2, at 1-62.
15. F. SCHAEFFER, supra note 12, at 33.
16. Id. at 34.
17. J. BREWER, supra note 11, at 19-20; see supra notes 13-14 and accompanying text.
18. L. LEVY, supra note 2, at 2. "Massachusetts law required that a Baptist obtain a certificate proving that he regularly attended a church of his own denomination to be exempt from ministerial and church taxes." Id. Addressing this church attendance requirement, Reverend Isaac Backus stated "[a]ll America are alarmed at the tea tax, though if they please, they can avoid it by not buying the tea; but we have no such liberty." Id. (quoting Reverend Isaac Backus, Petition to the General Court, Dec. 2, 1774).
19. A. HOVEY, ISAAC BACKUS 195-97 (1859); L. LEVY, supra note 2, at 2-4, 16.
20. See supra notes 13-19 and accompanying text.
21. J. BREWER, supra note 11, at 19-20. This support of Christianity was often evidenced through religious tests for civil offices. E. GREENE, supra note 2, at 79-82. "In short, the makers of the Revolutionary Constitutions, while promising religious liberty, did not expect the state to be wholly neutral in matters of religion, and they usually took for granted a consensus of opinion in support either of Protestantism or of some form of Christianity." Id. at 82; L. LEVY, supra note 2, at 61.
been intended to grant relief to those minorities suffering persecution or hardship at the hands of the favored church.

Although, by the letter of many of their constitutions, the states (colonies) allowed freedom of conscience for all christians, the truth was that hardship remained, taxes for church-support continued, and civil restrictions were not lifted.\(^{22}\)

These persecutions angered many colonists\(^{23}\) and thus certainly played a part in the construction of the first amendment. What was to become one of the most influential opportunities to cure this ill came in 1786 when the Virginia legislature was to vote on instituting a "moderate tax or contribution annually for the support of the Christian religion, or of some Christian church, denomination or communion of Christians, or for some form of Christian worship."\(^{24}\) This bill had a secular purpose, seeking public peace and morality more so than strictly religious ends.\(^{25}\) Nonetheless it was strongly opposed by James Madison and Thomas Jefferson.\(^{26}\)

Madison, through a series of political maneuvers, was able to have the vote on the bill postponed in order to explore public opinion on this issue.\(^{27}\) He then published the famous Memorial and Remonstrance which stated his strong position against the bill.\(^{28}\)

Public consensus against the bill was overwhelming: over 100 letters and petitions were received, signed by over 11,000 people; 9 out of

\(^{22}\) See generally L. Levy, supra note 2, at 44-45 (discussing establishment of religion in the states). It should be mentioned that there were notable examples of religious tolerance. These included Pennsylvania, E. Greene, supra note 2, at 79, Rhode Island, and Delaware. L. Levy, supra note 2, at 25.

\(^{23}\) James Madison wrote in 1774:

That diabolical, Hell conceived principle of persecution rages among some ... [t]his vexes me the most of any thing whatever. There are at this [time] in the adjacent County not less than 5 or 6 well meaning men in close [jail] for publishing their religious sentiments, which in the main are very orthodox. I have neither patience to hear, talk, or think of any thing relative to this matter, for I have squabbled and scolded, abused and ridiculed so long about it, [to so little] purpose, that I am without common patience.


\(^{24}\) L. Levy, supra note 2, at 54. It has been recognized by the Supreme Court that Jefferson's and Madison's work in this account were of utmost influence in the framing and understanding of the religious clauses of the first amendment. 2 J. Story, Commentaries On The Constitution Of The United States 597 (1851).

\(^{25}\) L. Levy, supra note 2, at 54.

\(^{26}\) See infra notes 27-31 and accompanying text.

\(^{27}\) L. Levy, supra note 2, at 54-55.

\(^{28}\) Id. at 55.
10 opposed the bill.\textsuperscript{29} Madison's success and the public consensus were strong enough to provoke the Virginia legislature to not only reject the bill but also to enact the "Virginia Bill for Religious Liberty," originally written by Thomas Jefferson.\textsuperscript{30} The preamble to this bill read in part:

Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy [A]uthor of our religion, who being Lord both of body and mind, yet chose not to propogate it by coercions on either . . . that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . . .\textsuperscript{31}

Whether this type of direct church support is the only type of "establishment" the Framers wanted to prohibit by the first amendment is not entirely certain. There was also a great fear that the Anglican church, which already enjoyed great favor in many of the states, was going to send bishops to America to exert more control over the American churches.\textsuperscript{32} The people feared the national government sanctioning such a plot.\textsuperscript{33}

It should also be considered that the Bill of Rights was primarily an achievement of the Anti-Federalists in their struggle against the Federalists and the new constitution.\textsuperscript{34} The primary fear of the Anti-Federalists was encroachment of the national government on state's and individual's rights.\textsuperscript{35} Therefore it is expected that they would want to keep the national government from tampering with so "local" and intimate a field as religion. Religion

\textsuperscript{29} Id.
\textsuperscript{30} Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 12-13 (1946).
\textsuperscript{31} Id.
\textsuperscript{32} E. Greene, supra note 2, at 73-74.
\textsuperscript{33} Id.
\textsuperscript{34} THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 195-96 (R. Ketcham ed. 1986)
\textsuperscript{35} Id. at 16-17.
was to remain within the jurisdiction of the states alone. What they obviously did not anticipate was the massive expansion of the federal government and the adoption of the incorporation doctrine which has since applied the Bill of Rights to the state governments. This means that all of the restrictions which were originally placed only on the federal government now restrict the states as well. This dramatic change in the political structure of the United States practically undermined the Framers' original intent, and it requires that we now interpret the establishment clause so as to affect the Framers' and Ratifiers' original policy goals within the context of the new constitutional framework.

This brief history provides a glimpse at what the Framers were probably trying to accomplish by restricting the federal government's powers with respect to religion. It should be repeated however, that they did not seek to restrain the states' governments. As Justice Story wrote in 1833, in commenting on the first amendment, 'The whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions.' Many state governments continued in their strong religious support well into the 1800's. Although the Founders were probably strongly influenced by the rationalist "Enlightenment" philosophers such as Locke and Voltaire, the common people were not. This "higher learning" was

36. See supra note 2 and accompanying text.
38. See supra note 2 and accompanying text.
40. The Massachusetts Constitution provided for tax-supported churches until 1833, New Hampshire until 1819. L. Levy, supra note 2, at 38. There are numerous cases from the 1800's showing remarkable deference by state courts to overtly Christian laws and containing statements by judges to the effect that Christianity is, in some way, a nationally established religion. Such cases include: People v. Ruggles, 8 Johns. 290, 291 (N.Y. 1811) (indictment for blasphemy); Lindenmuller v. People, 33 Barb. 549, 561 (N.Y. 1861) (Sunday closing law); State v. Chandler, 1 Del (2 Harr.) 553, 555 (Del. 1837) (blasphemy); City Council v. Benjamin, 32 S.C.L. (2 Strob.) 508 (S.C. 1846) (Sunday closing); Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 400 (Pa. 1824) (blasphemy); Judefind v. State, 78 Md. 405 (1894) (Sunday closing). Also note the United States Supreme Court's comment in Holy Trinity Church v. United States, 143 U.S. 457, 471 (1891). "These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation." Id. at 471.
confined to universities and intellectual circles to which the Framers largely belonged; the people, not being privy to this type of education, remained largely unaffected creating a dichotomy in society. Generally, the attitude of the 'Enlightenment Thinkers' toward religion was "tolerance". This slowly spreading philosophy, along with the gradually shrinking involvement of government with religion, meant increasing amounts of freedom for people in religious minorities. This air of tolerance led one contemporary to write, "As Christians, religion curbs them not in their opinions, the general indulgence leaves everyone to think for themselves in spiritual matters; the laws inspect our actions, our thoughts are left to God." It was this liberal yet still strongly Christian climate that Alexis de Tocqueville wrote about in Democracy in America. It seemed to him that the American people were, in spite of the multiplicity of sects among them, agreed in thinking religion, and especially Christian morality, essential to the maintenence of a democracy. It is important to recognize that although some of the Framers probably believed in the Enlightenment's idea of tolerance and liberty, they hoped that the people would not stray from the tenets of their faith. The continuing strength of their faith would allow social morals to be maintained without government action.

It was not until the early 1900's that drastic social changes occurred in America, not the least of these changes being the metamorphosis of peoples' basic philosophies. Darwinism and the Industrial Revolution had swept upon the shores of America and begun to replace older religious values with more utilitarian, secular-
political concepts. In addition, this period witnessed a great influx of immigrants to America who differed in their ethics, religious practices, beliefs, and lifestyles the from earlier western European settlers. America's social cross-section became dramatically different from anything the Founders had witnessed. The phrase 'freedom of religion' would now have to take on a new form. Previously it had meant, for the most part, 'freedom within christianity', and, while the Framers might have meant freedom to all religions, they did so mostly in theory, not practice. The influx of "foreign religions" and the changes in social philosophy would mean a reworking of the relationship between church and state in America. In 1946, the establishment clause was made applicable to the states through the fourteenth amendment. This radically changed church-state jurisprudence throughout America and provided an increase in the number of cases on this issue.

The question to be answered by the Court in the Twentieth Century is: exactly how much interaction may the government have with religion? It is the difficulty in drawing this line that has caused problems and irregularities in church-state cases.

III. 20th Century Cases


In Everson v. Board of Education of Ewing, the Supreme Court faced the question of whether a state statute which provided reimbursement of bus fare to parents who sent their children to either public or Catholic schools was unconstitutional. The plaintiff's case rested on two major points of law. First, the statute taxed the private property of some in order to bestow it upon others for their personal use and thus violates the due process

49. Eastland, supra, note 12, at 42-43.
50. E. Greene, supra note 2, at 102-03.
53. Id. at 1.
54. Id. at 3.
clause of the fourteenth amendment. Second, the statute violated the establishment clause of the first amendment by forcing citizens "to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic faith."

The majority opinion, written by Justice Black, held that the New Jersey statute did not violate the Constitution under either amendment. On the first issue, Justice Black accepted the argument that the statute facilitated a valid state interest, i.e. the education of all children. He argued that "[t]he fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need."

On the second issue the Court held that the first amendment did not proscribe the state action in question. Justice Black reviewed the history of the first amendment, drawing attention to the specific evil that the Framers sought to remedy: overt state-sanctioning of the beliefs of one sect. This evil, he concluded, was not present in this case. He compared the New Jersey statute to the state's provisions of police, fire, sewer, and roadway services to religious institutions, denial of which is "not the purpose of the first amendment." Instead, the proper state posture should be one of neutrality "in its relations with groups of religious believers and nonbelievers; it does not require the states to be their adversary."

Justice Black stated a vague test:

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

55. Id. at 5. "This is said to violate the due process clause because the children are sent to these church schools to satisfy the personal desires of their parents, rather than in the public's interest in the general education of all children." Id. at 6.
56. Id. at 5.
57. Id. at 6-8, 17-18.
58. Id. at 6.
59. Id.
60. Id. at 17.
61. Id. at 8-16.
62. Id. at 17-18.
63. Id.
64. Id. at 18.
which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. 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."  

Justice Jackson dissented (with Justice Frankfurter joining) on the principle that Catholic schools are the heart of the Catholic church and, therefore, any support to those schools is governmental support of the Catholic church. He further argued that this Act was not aimed at a legitimate state interest: "The resolution which authorizes disbursement of this taxpayer's money limits reimbursement to those who attend public schools and Catholic schools . . . The New Jersey Act in question makes the character of the school, not the needs of the children, determine the eligibility of parents to reimbursement." Justice Jackson found the analogy to police, fire, and other public services faulty because the Act uses a religious test to determine those who will receive aid. Finally, he determined that the first amendment was intended to deny any religious sect control over public policy and taxes as well as to remove "religious contentions" from the political forum.

65. Id. at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).  
66. Id. at 18-28 (Jackson, J., dissenting).  
67. Id. at 24.  
68. Id. at 20.  
69. Id. at 25.  
70. Id. at 26-27.  
It was intended not only to keep the state's hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out
Justice Rutledge also dissented (joined by Justices Frankfurter, Jackson, and Burton) and argued for a much more draconian separation policy. Rutledge contended that the first amendment was designed to "create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."

Even though the burden imposed by the tax was minimal, Justice Rutledge argues that it is a "slippery slope". Once the door is opened, and such acts are condoned as "legitimate state interests," then it follows that complete subsidization of parochial schools is also justified.

All three opinions claim to apply the Framer's original intent in drafting the first amendment. The majority opinion accepted the validity of the Act because: 1) it was deemed to further a legitimate state interest; and, 2) it was found not to be the type of activity which would have been prohibited by the Framers. The two dissenting Justices saw the New Jersey Act as a clear violation of the establishment clause, even though the burden imposed was relatively light; the violation was one of type, the degree of violation being irrelevant.

**B. Zorach v. Clauson (1952)**

The application of the first amendment to state involvement of public life by denying to every denomination any advantage from getting control of public policy or the public purse.

*Id.* at 27.

71. *Id.* at 28-74 (Rutledge, J., dissenting).

72. *Id.* at 31-32.

73. *Id.* at 18-19 (Jackson, J., dissenting). Justice Jackson comments that the insignificance of the cost at first persuaded him that the tax was innocuous. *Id.* But further reflection revealed that it was still violative of historical separation principles. *Id.* at 19. He further concluded that it might even lead to government regulation in religious matters. *Id.* at 27. "The only line that can be so drawn is one between more dollars and less. Certainly in this realm such a line can be no valid Constitutional measure." *Id.* at 48-49 (Rutledge, J., dissenting).

74. *Id.* at 29 (Rutledge, J., dissenting). A "slippery slope" is a condition such that movement in the suggested direction would lead to ever increasing movement in that direction, just as placing one on a slippery hill would naturally cause a slide downhill.

75. *Id.* at 48.

76. See supra notes 53-65 and accompanying text.

77. See supra notes 66-75 and accompanying text.
The case involved a "released time" program in which students in public schools would be released during school hours to receive religious instructions. The program was paid for by private funds and was conducted off school grounds. Appellants contended that this case was substantially similar to *McCollum v. Board of Education* and represented the state placing its "weight and influence" behind certain religious instruction.

The court, citing *Everson*, reaffirmed that the separation between church and state must be "absolute" within the scope of the first amendment, permitting no exceptions. "The first amendment however, does not say that in every and all respects there shall be a separation of church and state."

Justice Douglas, writing for the majority, argued that Americans are, historically, a religious people, and it is in best keeping with that heritage for the government to cooperate with religious activities. Similar to Justice Black's test in *Everson*, Douglas' test for a violation of the establishment clause is vague. It does however require a finding of coercion or the affirmative sanctioning of one religious sect over another. To Justice Douglas, a reading of the first amendment that would prohibit this infringement on school schedules would represent an unconstitutional governmental position demonstrating "callous indifference to religious groups."

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79. *Id.* at 308.
80. *Id.* at 308-09. This is unlike *McCollum*, where the release-time program and religious instruction were conducted in classrooms and was therefore deemed unconstitutional. *McCollum v. Board of Educ.*, 333 U.S. 203 (1948). "Designed to serve as perhaps the most powerful agency for promoting cohesion . . . the public school must keep scrupulously free from entanglement in the strife of sects." *Id.* at 216-17 (Frankfurter, J., concurring).
82. Zorach, 343 U.S. at 309.
83. *Id.* at 312.
84. *Id.*
85. *Id.* at 313-14.
86. *Id.* at 314. "Government may not finance religious groups nor undertake religious instruction . . . nor use secular institutions to force one or some religion on any person . . . . [t]he government must be neutral when it comes to competition between sects . . . it may not thrust any sect on any person . . . [or] make religious observance compulsory . . . ." *Id.*
87. *Id.*
Justice Black dissented arguing that the distinction between the facts of this case and *McCollum* are immaterial. The state is still providing religious groups aid when it allows them to capitalize on compulsory school attendance rules. The real issue was not whether the state's intrusion into religious activities, either sanctioning or hindering, had been impermissively deep, but, whether it had entered this field at all. Notice that Justice Black had also written the majority opinion in *Everson* wherein he found the reimbursement program to be aid to the children, not the schools, and therefore not violative of the establishment clause.

Justice Jackson also dissented calling the statute an exercise of state "coercion" which effectively jailed students who did not wish to go to religious instruction. He argues that this decision is heavily biased against "irreligion" (i.e. nonreligion) and thus presents a substantial threat to freedom of religious practices in the future. His analysis entails a very strict reading of the establishment clause allowing no religious influences on government. However, he did not explore the possibility of establishing "irreligion" by making the government totally free from religion and promoting secularism.

**C. Board of Education v. Allen (1967)**

The opinion in *Board of Education v. Allen*, written by Justice White, upheld a New York statute which required school authorities to loan textbooks free of charge to all students (not schools) between grades seven and twelve, including students in private

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88. *Id.* at 315-20 (Black, J., dissenting).
89. *Id.* at 316.
90. *Id.* at 316-17.
91. *Id.* at 318.
93. Zorach, 343 U.S. at 323-25 (Jackson, J., dissenting).
94. *Id.* at 323.
95. *Id.* at 324.
96. *Id.* at 325. "The day that this country ceases to be free for irreligion it will cease to be free for religion - except for the sect that can win political power." *Id.*
97. This is the type of establishment many religious people complain of today. Irreligion in government does not simply imply a lack of traditional "religion" but rather its replacement by a different philosophy, sometimes called "humanism" or "secular humanism" which makes man the ultimate judge of right and wrong instead of God.
The school boards had sought judicial relief claiming that the statute was violative of the establishment clause and the fourteenth amendment.

The New York Court of Appeals held, and the U.S. Supreme Court affirmed, that the statute had a legitimate secular purpose: "to benefit all school children, regardless of the type of school they attend . . . ." There was an additional safeguard to the Act's religious neutrality in that only textbooks approved by the public school authorities could be loaned. This precluded the possibility of state funds going directly for a religious purpose; only secular books could receive approval.

Quoting from Abington School District v. Schempp, the Court applied a two-prong test for establishment clause questions: "[W]hat are the (1) purpose and (2) the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." This test had been subscribed to by eight Justices in the Schempp case and therefore represented the development of a standard test which could be used by the courts.

Applying this test to the express language of the statute, the Court found that its stated purpose was the furtherance of educational opportunities; therefore, the statute was deemed constitutional. By this holding, the Court showed great deference to the school board's discretion and integrity in carrying out the secular purpose of this Act.

In a concurring opinion, Justice Harlan agreed with the use of the two-prong test of Schempp and also offered an analysis of his own.

Where the contested governmental activity is calculated to

99. Id.
100. Id. at 238.
101. Id. at 241.
102. Id. at 244-45.
103. Id. at 245.
106. Id.
107. Id.
108. Id at 249-50 (Harlan, J., concurring).
achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State "so significantly and directly in the realm of the sectarian as to give rise to ... divisive influences and inhibitions of freedom", it is not forbidden by the religious clauses of the [first] amendment.\textsuperscript{109}

Justice Black dissented\textsuperscript{110} and accused the Court of breaching the wall of separation between church and state.\textsuperscript{111} He rigorously distinguished his majority opinion in \textit{Everson} in which parents whose children were bused to parochial schools received reimbursement from state tax revenues; \textit{Everson} had merely provided public transportation service whereas this statute supplied books, "which are the heart of any school."\textsuperscript{112} The evil was one of degree; in Justice Black's opinion the facts in \textit{Everson} did not cross the line of separation while the facts of this case did. However, it is difficult to see any meaningful distinction between busing and books with regard to the establishment clause. Justice Black held in \textit{Everson} that the state practice was legitimate because it helped children regardless of their religion and aided the children, not the schools.\textsuperscript{113} Why the same argument doesn't apply to lending school books is not clear.

Justice Douglas filed a lengthy dissent\textsuperscript{114} in which he argued that unlike providing busing, a public nurse, or scholarships, buying textbooks is impermissible state aid to religion: "The textbook goes to the very heart of education in a parochial school. It is the chief, although not solitary, instrumentality for propagating a particular religious creed of faith."\textsuperscript{115} Furthermore, he saw a dichotomy evident in textbooks, that is, some presented history, science, math, and economics from a "Christian" point of view while others had a

\begin{enumerate}
\item[109.] \textit{Id.} (quoting \textit{Schempp}, 374 U.S. at 307).
\item[110.] \textit{Id.} at 250-54 (Black, J., dissenting).
\item[111.] \textit{Id.} at 250-51.
\item[112.] \textit{Id.} at 253.
\item[113.] \textit{Everson v. Board of Educ. of Ewing}, 330 U.S. 1, 6 (1946).
\item[115.] \textit{Id.} at 257. Justice Douglas also points out that the school directors have significant latitude in choosing which textbooks will be ordered and thus are able to facilitate the greatest possible aid to their religious cause. \textit{Id.} at 255-56.
\end{enumerate}
'secular' perspective.116 This, he argued, enhanced the possibility that state support would be used to further religious interests by parochial school masters selecting books which supported their own beliefs.117 The statute in question, because of the discretionary power given to school directors, provides the possibility of the state eventually dominating the church.118 None of the dissenting opinions discussed or utilized the two-prong test stated in the majority opinion; they merely found the state program to be too supportive of religious ends.


The issue in Walz v. Tax Commission of the City of New York119 was whether the historic practice of granting religious organizations tax exemption for properties used solely for religious worship violated the establishment clause.120 The plaintiff argued that the tax-exemptions are an indirect form of state-subsidy of a religion.121

The majority opinion, written by Chief Justice Burger, first stated the general principle that had been used since Everson: that the first amendment does not permit either a government-established religion or government hostility towards religion.122 "Each value judgement under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so."123

Chief Justice Burger argued that the very existence of religion meant that there would be some degree of involvement between it and government.124 Therefore, the religious clauses were instituted to prevent "excessive entanglement" of the two.125 He then found

116. Id. at 256-62.
117. Id. at 256.
118. Id. at 262.
120. Id. at 666.
121. Id. at 667.
122. Id. at 669.
123. Id. (emphasis added). These rules embody both the general principles propagated by the Court since Everson and the newer 2-prong test brought out in Allen and Schempp. See supra notes 92, 104-05 and accompanying text.
124. Walz, 397 U.S. at 672.
125. Id. at 674.
that tax-exemption for churches is neither the advancement nor the inhibition of religion, rather, it is merely the recognition of a historical practice.\textsuperscript{126}

Thus, the Court now requires legislation to not only pass the "purpose" and "effect" tests of \textit{Allen}, but also its new "entanglement" test:\textsuperscript{127} "We must also be sure that the end result - the effect - is not an excessive government entanglement with religion . . . [and that the involvement] is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."\textsuperscript{128} Using this test, the Court found that taxing the churches would involve a greater degree of entanglement than leaving them tax-exempt. The Chief Justice also anticipated Justice Douglas' fears that allowing any breach in the wall or separation would eventually cause a flood: "If tax exemption can be seen as this first step toward 'establishment' of religion . . . [then] the second step has been long in coming."\textsuperscript{129}

Justice Brennan's concurring opinion \textsuperscript{130} stated a different test, taken from his opinion in \textit{Schempp}.\textsuperscript{131} Under this test the establishment clause forbade those involvements of religious with secular institutions which "(a) serve the essentially religious activities of religious institution; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice."\textsuperscript{132}

Like the majority, Justice Brennan felt that the history of the establishment clause and the history of the practice in question were persuasive and that the Framers were not trying to halt church-government interactions such as this.\textsuperscript{133} He also found two secular justifications for such a practice.

First, these organizations . . . contribute to the well-being of the community in a variety of nonreligious ways and

\textsuperscript{126} \textit{Id.} at 666-67.
\textsuperscript{127} \textit{Id.} at 674.
\textsuperscript{128} \textit{Id.} at 674-75.
\textsuperscript{129} \textit{Id.} at 679.
\textsuperscript{130} \textit{Id.} at 680-94 (Brennan, J., concurring).
\textsuperscript{133} \textit{Id.} at 694-95.
thereby bear burdens that would otherwise have to be met by general taxation, or be left undone, to the detriment of the community.\textsuperscript{134} Second, the government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities.\textsuperscript{135}

Justice Harlan also concurred,\textsuperscript{136} but he cited a slightly different analysis than that used by the Court. His test set forth three standards which should be achieved in establishment clause analysis: neutrality, voluntarism, and unity.\textsuperscript{137} Under Harlan’s analysis, neutrality means the state may not favor any religion or nonreligion over another, voluntarism means the state may not compel religious practices nor work to deter them, and unity means "political fragmentation on sectarian lines must be guarded against."\textsuperscript{138} Against the challenge that allowing such legislation "opens the gates to a flood of evil" (\textit{i.e.}, the slippery-slope problem) Harlan stated, "I, for one, however, do not believe that a "slippery-slope" is necessarily without a constitutional toehold."\textsuperscript{139}

Justice Douglas again dissented,\textsuperscript{140} framing the issue as whether "organized believers" should be allowed the tax benefit while nonbelievers, whether organized or not, must pay the tax.\textsuperscript{141} To Justice Douglas, if the legislation prefers believers over nonbelievers, it is unconstitutional.\textsuperscript{142} He also argued that the tax-exemption is, \textit{de facto}, a form of government subsidy and is therefore void under the establishment clause.\textsuperscript{143}

The opinions of Justice Douglas and that of the majority show a clear dichotomy in establishment clause interpretation. The majority argues that some minimal interaction between church and

\textsuperscript{134} \textit{Id.} at 687. This runs afoul of the distasteful situations described earlier. \textit{See supra} note 48 and accompanying text. \textit{See also} \textit{M. CURTI}, \textit{supra} note 41, at 107.

\textsuperscript{135} \textit{Walz}, 397 U.S. at 689.

\textsuperscript{136} \textit{Id.} at 694-700 (Harlan, J., concurring).

\textsuperscript{137} \textit{Id.} at 694-95.

\textsuperscript{138} \textit{Id.}

\textsuperscript{139} \textit{Id.} at 699-700.

\textsuperscript{140} \textit{Id.} at 700-27 (Douglas, J., dissenting).

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{Id.} at 701.

\textsuperscript{143} \textit{Id.} A similar argument may be found in \textit{E. GREENE}, \textit{supra} note 2, at 97.
state is permissible, indeed inevitable. Justice Douglas' opinion in this case and in Allen argues for a complete sterilization of government from religion.


Lemon v. Kurtzman involved a Pennsylvania statute which reimbursed nonpublic schools for teachers' salaries, textbooks, and teaching materials. The reimbursement was limited to specific nonreligious courses and could not be used in any context that would "express religious teaching, or the morals or forms of worship of any sect." Most of the eligible schools were affiliated with the Roman Catholic Church.

The case was combined for consideration with Earley et al. v. DiCenso et al., and Robinson, Commissioner of Education of Rhode Island et al. v. DiCenso et al. These cases dealt with a Rhode Island statute which provided a salary supplement for teachers in nonpublic schools in which the average expenditure per student on secular education was below that in a public school. The supplement was limited insofar as it could not make the nonpublic school teacher's salary greater than a public school teacher's. All teachers receiving this supplement were required to agree not to teach any courses in religion. Once again, the largest benefactors were the Roman Catholic schools.

144. See supra notes 119-29 and accompanying text.
145. See supra notes 114-18, 140-43 and accompanying text.
148. Lemon, 403 U.S. at 609.
149. Id. at 609-10. "It is further limited 'solely' to courses in the following 'secular' subjects: mathematics, modern foreign languages, physical science, and physical education." Id. at 610.
150. Id.
155. Id.
156. Id. at 608.
157. Id.
The stated legislative purposes of these Acts were similar; the legislatures found a crisis in that, due to rising costs and other factors, the quality of education being offered in the nonpublic schools was in jeopardy. These schools needed financial aid to attract able teachers and provide an adequate education for their students. The states responded with the statutes in question, and, to avoid giving impermissible aid to a set of religious beliefs, set up many safeguards to ensure that the money would be used to further the state interest of education, not any church's interest in religious instruction.

The legal analysis in the opinion written by Chief Justice Burger begins with an acknowledgement that the Everson decision represented the extreme of permissible government aid to religion. He then capsulized the main tests used in earlier Supreme Court decisions and stated what is now the three-prong "Lemon test." Citing Allen, Chief Justice Burger stated that "(1) the statute must have a secular purpose, and, (2) its principal or primary effect must be one that neither advances nor inhibits religion." Then, citing Walz, he added that "(3) the statute must not foster an excessive governmental entanglement with religion." Applying this test to the facts of the immediate case, the Court showed deference to the stated purpose of the Act and thus satisfied the first prong, legislative purpose. The Court then applied the second prong, primary impact, and found an imminent potential for violation. Then, in a curious twist, the Court abandoned this reasoning. It found that the very safeguards designed to protect against a violation of the second prong constituted a violation of the third prong - "the cumulative impact of the entire relationship arising under the statutes in each state.

158. Id. at 607, 609.
159. Id.
160. Id. at 607-10.
161. Id. at 612.
162. Id.
163. Id. (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968)).
164. Id. (citing Walz v. Tax Comm'n of the City of N.Y., 397 U.S. 664, 668 (1970)).
165. Id. at 613.
166. Id.
involves excessive entanglement between government and religion."^{167}

Chief Justice Burger provided an analysis to be used to determine whether a statute violates this ambiguous third prong, excessive entanglement "[W]e must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority."^{168}

The district court had found that the mostly Catholic schools were an integral part of the Catholic Church and, because of their strong religious influence, the state was obliged to provide substantial safeguards to ensure that the state aid only be used for secular education.^{169} However, in the Supreme Court this proved to be a problem for the statutes because there was an inherent danger in supplying teachers (or their salaries) as opposed to supplying inanimate aids such as books or transportation.^{170} The inherent danger was that a teacher, in such an atmosphere, may be prone to influence students toward his or her religious beliefs and was therefore not as easily monitored as a textbook would be.^{171} There were no allegations that this harm had actually been realized, but the Court was anticipating the potential harm it threatened.^{172}

Chief Justice Burger next presented a different concern of the third prong, that being the avoidance of political division along religious lines. "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division, along religious lines was one of the principal evils against which the First Amendment was intended to protect."^{173}

Finally, the Court distinguished *Walz* by the fact that there is not a history of state-aid to church schools.^{174} If *Everson*, as the Court stated, represented the outer limit of permissible government-

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167. *Id.* at 614. "These prophylactic contacts will involve excessive and enduring entanglement between state and church." *Id.* at 619.

168. *Id.* at 615.

169. *Id.* at 616.

170. *Id.* at 617.

171. *Id.*

172. *Id.* at 618.

173. *Id.* at 622. (citing Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1692 (1969)).

174. *Id.* at 624.
aid to religion, then the statutes in this case could not be allowed to stand since they represented a significant step beyond the limit set by Everson. As was stated by Justice Douglas in Zorach, "The problem like many problems in constitutional law, is one of degree."

IX. SINCE LEMON / ALTERNATIVES

The results of cases applying the Lemon test have been confused enough to destroy any predictability that might have flowed from a standard test. Cases involving: public school teachers used in remedial and supplemental programs in parochial schools, the state loaning textbooks and other educational services to parochial schools, a "shared time" program where public school teachers supplement nonpublic school curricula, and a state statute requiring balanced classroom teaching of evolution and creation-science have all been declared unconstitutional. Regardless of the merits of these decisions they are inconsistent with the following practices declared constitutional under the same test: a city sponsoring a creche display at Christmas, a state legislature opening each session with prayer led by a chaplain paid with state funds, and a tax-credit given to parents of children attending non-public (including parochial) schools.

The following is a discussion of possible alternatives to the present church-state analysis. These are being explored because, it is argued, the Lemon test has produced inconsistent and unsatisfactory results. Either a different test is needed to yield more consistent results, or the goals of society with respect to church-state relations need to be clarified so that the Lemon test may be used evenly and satisfactorily to achieve these goals.

175. Id.
177. See infra notes 177-83 and accompanying text.
In *Allen*, Justice Harlan stated an alternative test.\(^{185}\) He affirmed the general proposition set forth by Justice Goldberg in his concurring opinion in *Schempp* that "government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious beliefs."\(^{186}\) To apply this Justice Harlan says:

I would hold that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State so significantly and directly in the realm of the secretarian as to give rise to . . . divisive influences and inhibitions of freedom, it is not forbidden by the religious clauses of the First Amendment.\(^{187}\)

This analysis would likely allow more state actions than are permitted under *Lemon*. The test was explained further in *Walz* where Justice Harlan gave three points to be satisfied in establishment clause analysis: voluntarism, neutrality, and unity.\(^{188}\) With regard to the first two he quotes Justice Goldberg.\(^{189}\) The third prong, hinted at in the Justice Goldberg quote ("divisive influences"), is restated as a concern that the Court guard against "political fragmentation on sectarian lines."\(^{190}\) Harlan asserted that "[w]hat is at stake as a matter of policy is preventing that kind and degree of governmental involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strains a political system to the breaking point."\(^{191}\)

Although by looking only for some "impermissible degree" this third prong seems to allow liberal interaction between religion and government, it is an extremely vague standard that really only restates the essential problem in establishment clause analysis, that is, what is permissible? The Court conceded in *Walz* that an

185. See *supra* notes 108-09 and accompanying text.
187. *Id*.
189. See *supra* notes 109, 185 and accompanying text.
190. See *supra* note 138 and accompanying text.
absolute separation is impossible and stated that the Court's task is to find the boundaries that mark excessive entanglement.192

A much clearer test is suggested by Justice Black's opinions in *Everson* and *Zorach*.193 This analysis looks for any indication of coercion by the government in favor of religion.194 Once coercion is found, regardless of degree, the government is in violation of the establishment clause:

Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is exactly what I think the First Amendment forbids. In considering whether a state has entered this forbidden field the question is not whether it has entered too deep but whether it has entered at all.195

The coercion Justice Black found in *Zorach* was allowing students to take school time off so they might attend religious instruction classes.196 The majority opinion found no such coercion and, to the contrary, found the schools to be passive and merely cooperative with the actions of those who wished to attend the religious classes.197 Although requiring a finding of coercion would seem to provide a large degree of predictability for states, it is still subject to the discretion of the courts. This discretion can lead to results contrary to what one might reasonably expect the Court to reach. Such was the result reached by Justice Black in the *Zorach* case. It is precisely this lack of predictability that is a cause of concern in the Lemon test.

Chief Justice Rehnquist argues that the results of establishment clause questions should not be as harsh as they have been.198 His position is that the Framers merely meant to avoid the installation of a national church, similar to the condition in England at that

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192. *Id.* at 670.
196. *Zorach*, 343 U.S. at 316 (Black, J., dissenting)
197. *Id.* at 311.
198. *See infra* notes 198-99 and accompanying text.
time, or from discriminating between religious sects.¹⁹⁹

The Court apparently believes that the Establishment Clause . . . not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one. Nothing in the First Amendment or in the cases interpreting it requires such an extreme approach to this difficult question . . . .²⁰⁰

It is the thesis of this article that the consistency problem should not be resolved by sterilization²⁰¹ but rather by acceptance of the historical fact that the United States was, in some sense, a Christian nation. As was said by the Supreme Court in 1891, "[t]hese, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation."²⁰²

The Framers' intent in creating the establishment clause was at least this: to avoid a theocracy or a theocratic dictatorship. But they were not advocating a total separation of religion from government.²⁰³ Civil law must control the exercise of religion and other liberties to some degree in order to maintain social order,²⁰⁴ but these constraints should be narrowly tailored. The question


²⁰¹. Justice Douglas' position would have been to declare all of the state actions listed at the beginning of this section unconstitutional. That would certainly deal with the problem of inconsistency.

²⁰². Holy Trinity Church v. United States, 143 U.S. 457, 471 (1891). The words of the Pennsylvania Supreme Court written in Updegraph v. Commonwealth are helpful when defining what a "Christian state" is: "not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men." Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 400 (Pa. 1824). I contend that this is closer to the Framers' original intent than present ideas held by the Court and thus is an historically sound ideal for America.

²⁰³. The fact that they wanted to separate government from church activities and maintainence is plain, however, as is evident in their writings, government should be influenced by "religion" to the betterment of society. See supra notes 17, 48 and accompanying text.

²⁰⁴. For example, to prevent human sacrifices.
then faced is: what is the source of these rules that will control the freedoms allowed in America including the free exercise of religion?

Historically, the answer was social ethics based on the Judeo-Christian ideas of morality. However there has been a growing trend, fueled by the secularization of society and now in full force, to analyze and legitimize social policies solely on a utilitarian standard.

The first implication of this development is that there is no longer any recognizable body of morals that controls society, because there is no body of morals that society has agreed to accept. A second possible implication is that the legitimacy of religion and religious freedoms will become degraded and disrespected. A dangerous sign of this trend is when religious practices need to be legitimized by the courts according to a utilitarian amount of good works they carry out for society.

The Founders were primarily interested in maintaining the right to free exercise of religion and through the establishment clause they hoped to insure that the government would not impinge upon this (especially by establishing a national religion). This does not mean that religious influences are to be kept away from the government. On the contrary, the religious mores that were so strong in America's Revolutionary society were the very source of social order.

The establishment clause gives no bright-line test by which it is to be applied, and therefore is subject to reinterpretation generation after generation. To the Founders and then predominantly christian population, society should remain tightly connected to religion, specifically protestant christianity. An analysis of the society created by the Founders historically supports the proposition that there should be a christian foundation in our present society as well as a recognized christian influence in our courts and legislatures. The "Framer's Original Intent" argument then is applicable

206. See supra note 6 and accompanying text.
207. Walz v. Tax Comm'n of the City of N.Y., 397 U.S. 664, 687-89 (1969) (Brennan J., concurring). This type of analysis can pose a serious threat to religious freedom if it is pursued by the Court. Chief Justice Burger recognized this and avoided it. Id. at 674.
208. As apparently is argued by Justice Douglas in Allen and Walz. See supra notes 114-18, 140-43 and accompanying text.
209. See supra notes 13, 17, 48 and accompanying text.
to the question: what civil laws should be allowed to govern modern society? The Framers have left us with a slightly pliable rule with which each generation can determine what impact religion may have on government and vice versa. Those who would attack state actions as violative of the establishment clause should have the burden of showing that the law is undesirable for society and that there is some compelling reason for departing from our historical roots. Merely calling it a violation of the establishment clause is conclusory and circular.

Demographically, America is no longer a "christian nation" and many of the "christian" laws which were passed during the country's founding are now disregarded (for example Sunday closing laws, blasphemy laws, adultery laws, abortion laws, pornography laws, etc.). America has embarked on a journey with new navigators: social utilitarianism, rationalism, and personal autonomy. On a strictly rational level it is as violative of the establishment clause if ir-religion\textsuperscript{210} begins to be preferred over religion as when the government promotes a more traditional religion. Both are philosophies which aid people in directing their lives and in making important personal decisions. Historically though, America was, and is, a Christian nation; it should remain so. "[N]ot Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men."\textsuperscript{211} If America does not recognize and give proper deference to its heritage it faces a future without the moral/spiritual support of Christianity.\textsuperscript{212} "If Rationalism wishes to govern the world without regard to the religious needs of the soul, the French Revolution is there to teach us the consequences of such a blunder."\textsuperscript{213}


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\textsuperscript{210} See supra notes 96-97 and accompany text.

\textsuperscript{211} Updegraph v. Commonwealth, 11 Serg. and Rawle 394, 400 (Pa. 1824). See also supra note 201 and accompanying text.

\textsuperscript{212} Consider the ramifications presently facing us in having to justify laws in the following areas on a purely social-utilitarian basis: obscenity/pornography, prostitution, monogamy, usury, abortion, suicide, euthanasia.

\textsuperscript{213} F. SCHAFFER, supra note 12, at 45 (quoting A. DURANT, THE LESSONS OF HISTORY 50-51 (1968) (quoting Renan, 1866)). See also id., at 115.