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ARTICLES

THE ENTANGLEMENT TEST OF THE RELIGION CLAUSES—A TEN YEAR ASSESSMENT

Kenneth F. Ripple*

INTRODUCTION

During its 1979 Term, the Supreme Court of the United States passed the ten-year mark in its employment of the so-called “excessive entanglement” test of the religion clauses. During the past decade this concept has developed from a simple expression of one of the accepted policy considerations underlying interpretation of the religion clauses to an identifiably separate test in establishment clause analysis. In this latter role, the Court has employed the concept to accomplish two distinct, although analytically related, objectives. First, it has sought to identify those legal and administrative relationships between civil and religious authorities which are likely to cause religiously-based discord or lead to an unacceptable degree of governmental support for religion. It has also attempted to isolate those broader religious-civil relationships which might well lead to religiously-based political divisiveness in our society. In the last several Terms of Court, moreover, the Justices have explicitly incorporated this concept into free exercise analysis. There it has been employed both as an important governmental interest to be weighed against free exercise claims and as a measure of the free exercise claim itself.

Anniversaries are traditional occasions for reflection and reassessment. This particular anniversary presents an especially

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suitable occasion for such critical evaluation since, during this last Term, the Court itself noted quite candidly that, at least with respect to the establishment clause, it plans to engage in such a reassessment at its own conference table.1 The purpose of this Article is to contribute to this reappraisal by addressing three essential aspects of any such doctrinal re-evaluation. First, the Article will critically evaluate the impact of the entanglement concept on the jurisprudence of the religion clauses.2 Next, it will identify the practical problems inherent in the implementation of this test.3 Lastly, the probable future directions of “excessive entanglement,” assuming it remains a viable analytical tool, are tentatively appraised.4

I. ENTANGLEMENT: THE ANALYTICAL MILESTONES

As Justice Frankfurter wrote, “[a] rhythm . . . is manifest in the history of Supreme Court adjudication.”5 New concepts emerge gradually as older perspectives are found wanting or as new societal problems find their way into the judicial system. Once these new strains of thought take hold, they go through a process not entirely unlike the process of natural selection. Some demonstrate a robust vitality and broad applicability over a long time span. Others are of only temporary import and soon either disappear or are subsumed in another analytic framework. Dis-

1. Committee for Pub. Educ. v. Regan, 444 U.S. 646, 662 (1980). In Regan, the Court upheld a New York state statute which directed payment to non-public schools of the costs they incurred in complying with certain state-mandated requirements, including requirements as to testing and as to reporting and recordkeeping. See discussion at text accompanying notes 100-09 infra. In concluding the majority opinion, Justice White wrote:

   This is not to say that this case, any more than past cases, will furnish a litmus-paper test to distinguish permissible from impermissible aid to religiously oriented schools. But Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause.

2. See notes 5-143 & accompanying text infra.
3. See notes 144-86 & accompanying text infra.
4. See notes 187-245 & accompanying text infra.
cernment of the "rhythm" of the "excessive entanglement" concept is therefore vital in assessing its present impact on church-state questions and in attempting to forecast future developments.

A. The Early Development

Although its roots can be easily identified in earlier cases,6 the "excessive entanglement" test was first explicitly articulated in *Walz v. Tax Commission.*7 There, the Court was confronted with an establishment clause challenge to a New York State constitutional provision and its implementing statute which granted tax exemptions to religious organizations for property used for religious, educational, or charitable purposes.8 In an opinion for the Court, the newly-installed Chief Justice, having concluded that the "legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion . . . neither sponsorship nor hostility,"9 went on to "be sure that the end result—the effect—is not an excessive government entanglement with religion."10 Noting that exempting churches from taxation involved less governmental involvement than taxing them11 and that the practice of granting exemptions enjoyed widespread historical acceptance in the United States,12 he concluded that "[t]here is no genuine nexus between tax exemption and establishment of religion."13

In *Walz,* the Court's excessive-entanglement analysis could easily have been construed as simply a pragmatic rephrasing of the "primary effect" test,14 which required that the primary effect of legislation neither advance nor inhibit religion.15 The follow-

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8. *Id.* at 666, 667 n.1.
9. *Id.* at 672.
10. *Id.* at 674.
11. *Id.* at 674-75.
13. 397 U.S. at 675.
15. *See* text accompanying note 10 *supra.* Under this interpretation the Chief Justice may be said to be using excessive entanglement as a measure of whether the primary effect of the statute is to advance or inhibit religion—the greater the entanglement, the greater the possibility that the statute is advancing or inhibiting religion.
ing Term, however, through the pen of the same Justice, the Court made clear in *Lemon v. Kurtzman*\(^{16}\) that "excessive entanglement" was a hurdle separate from and additional to the "purpose-effect" test.\(^{17}\)

In this second "excessive entanglement" case, the Court was confronted with challenges to Rhode Island and Pennsylvania statutes that provided "state aid to church-related elementary and secondary schools."\(^{18}\) The Pennsylvania statute authorized the state to reimburse non-public schools directly for expenditures for teachers' salaries, textbooks, and instructional material.\(^{19}\) Reimbursement was limited to expenditures for certain "secular" subjects which were also taught in the public schools. To obtain reimbursement, the private school officials were required to maintain accounting procedures that identified the separate cost of the secular educational service and to submit those accounts to state audit.

The Court began its analysis by listing the three tests developed by prior cases in the area: the secular purpose test, the primary effect test, and the excessive entanglement test.\(^{20}\) After summarily determining that the plan did not have the advancement of religion as its purpose,\(^{21}\) the Court passed over the "primary effect" test\(^{22}\) and struck down the statutory scheme as involving "excessive entanglement between government and religion."\(^{23}\) Acknowledging that total separation of church and state is impossible, the Court described the "line of separation"\(^{24}\) as be-

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Paradoxically, this use of excessive entanglement became more pronounced after the concept became an independent part of the establishment clause test. See text accompanying notes 64-73 infra.

16. 403 U.S. 602 (1971). A second decision was issued in this case affirming the district court's handling on remand. Lemon v. Kurtzman, 411 U.S. 192 (1973) [*Lemon II*]. Except as otherwise noted, all discussion of *Lemon* in this Article refers to the first Supreme Court decision in this case.

17. In School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963), Justice Clark synthesized the "purpose-effect" test as follows:

> If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.


18. 403 U.S. at 606.

19. 403 U.S. at 609 n.3.

20. *Id.* at 612-13.

21. *Id.* at 613.

22. *Id.* at 613-14.

23. *Id.* at 614.

24. *Id.*
ing "far from . . . a 'wall.'" Rather, said the Chief Justice, it is "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." He then undertook to determine whether the entanglement was excessive by examining the character and purposes of the benefited institutions, the nature of the aid provided by the state, and the nature of the resulting relationship between the government and the religious authority.

The Court concluded:

The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.

The Rhode Island statute, also in issue, permitted supplemental salary payments to non-public school teachers of secular subjects. The Court similarly concluded that the state aid, "carefully conditioned . . . with pervasive restrictions," would require "comprehensive, discriminating, and continuing state surveillance" to ensure that the legislature's restrictions were obeyed. This surveillance would involve an "excessive and enduring entanglement between Church and state."

The Court next considered what it termed a "broader base of entanglement": the "divisive political potential" of these aid programs. Echoing the thoughts of Justice Harlan in his separate concurrence in *Walz* and the oft-cited commentary by Professor Freund, it set forth several sentences that may well occupy a great deal of judicial attention in the future:

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system . . . but political division along religious

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25. Id.
26. Id.
27. Id. at 615.
28. Id. at 621-22.
30. 403 U.S. at 619. The Court explained the need for such restrictions by noting that "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment." Id.
31. Id. at 622.
32. 397 U.S. at 695.
lines was one of the principal evils against which the First Amendment was intended to protect... The potential divisiveness of such conflict is a threat to the normal political process.34 Assistance programs such as the ones in issue, concluded the Court, would "tend to confuse and obscure other issues of great urgency"35 since pressure for increased assistance would inevitably follow. Significantly, this assessment was principally an historical judgment.36 While the tax exemptions of Walz would cause no political divisiveness, aid programs to schools could not rely upon such historical acceptance.37

Even these early cases38 clearly demonstrate the most significant direct effect of this "excessive entanglement" concept on religion clause jurisprudence. They introduce into religion clause analysis what can best be termed a "prophylactic dimension." Administrative relationships between religious and civil authorities are forbidden not only when they result in government support or direction of religious enterprises but also when they are "pregnant with dangers of excessive government direction"39 of such enterprises. This "prophylactic dimension" thus also seeks to safeguard one of the root values protected by the religion clauses—"strife avoidance."40 Relationships which might cause...
religiously-based disputes are forbidden—whether or not any real friction between the church and the civil state is actually present.

Underlying this criterion is the assumption that when religious and civil society operate at close quarters the “flash point” for discord is particularly low. To avoid impairing either the proper workings of government or the vitality of religion, the contact points between the two must be drastically limited both quantitatively and qualitatively. When the relationship of religion and government becomes a matter of political debate, there is a special danger of interfering with the normal workings of the political society. An atmosphere is created, the Court assumes, which either “could divert attention from the myriad issues and problems that confront every level of government” or could result in “political power intruding into the legitimate and free exercise of religious belief.”

The introduction of “excessive entanglement” into traditional establishment clause analysis in Walz and Lemon clearly heightened, at least conceptually, the proverbial “wall of separation.” While Lemon rhetorically characterized the “wall” as “a blurred, indistinct, and variable barrier,” it also emphatically described the “excessive entanglement” concept as tending “to confine rather than enlarge the area of permissible state involvement with religious institutions.” The objective was “to prevent, as far as possible, the intrusion of either into the precincts of the other.”

B. The Rhythm Unfolds

Walz and Lemon introduced the “excessive entanglement” concept into establishment clause analysis. This developmental plateau having been reached, however, the rhythm of doctrinal growth changed markedly as the Court integrated the new concept into the pragmatics of decision making. Indeed, “excessive entanglement” was not very prominent when the Court returned to the religion clauses in the 1973 Term.

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41. See Walz, 397 U.S. at 695 (Harlan, J., concurring) (“programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation”).
42. 403 U.S. at 623.
43. Id.
44. Id. at 614.
45. Id.
46. Id.
49. See note 38 & accompanying text supra.
While "excessive entanglement" figured in three cases, it was the basis of decision in only one, Hunt v. McNair.50 There the Court engaged in no real doctrinal innovation. Its holding was fact-specific; it simply found that a South Carolina bond financing arrangement which benefited church-related colleges did not produce "excessive entanglement."51

In the other two cases, Committee for Public Education v. Nyquist52 and Sloan v. Lemon,53 the "excessive entanglement" was not the basis for decision. Nyquist did demonstrate, however, another significant attribute of the "excessive entanglement" concept. There, the Court dealt with several New York statutes54 which provided for direct monetary grants to "qualifying" non-public schools for maintenance and repair, tuition reimbursement for parents whose children attend non-public elementary and secondary schools, and a tax deduction plan for parents failing to qualify for the tuition reimbursement plan. In declaring these programs violative of the establishment clause, Justice Powell, speaking for the Court, relied principally on the "primary effect" test.55 However, although it was not necessary to address the matter, he deliberately paused to note that the aid program posed "grave potential for entanglement in the broader sense of continuing political strife over aid to religion."56 Referring to the opinion of his predecessor, Justice Black,57 in Everson v. Board of Education,58 Justice Powell declared that "competing efforts to gain or maintain the support of government"59 by religious groups have precipitated "competition among religious sects for political and religious supremacy"60 and "occasioned considerable civil strife."61 Aid programs, continued the Justice, become entrenched and "generate their own aggressive constituencies."62 When this

50. 413 U.S. 734 (1973).
51. Id. at 745-49. The Court relied principally on Tilton v. Richardson, 403 U.S. 672 (1971), described in note 38 supra.
52. 413 U.S. 756 (1973).
53. 413 U.S. 825 (1973). Sloan was decided the same day as Nyquist and was found to be indistinguishable from it. Id. at 830.
54. 413 U.S. at 762 n.7, 764 n.12, 765 n.17.
55. Id. at 779, 783.
56. Id. at 794.
59. 413 U.S. at 796.
60. Id.
61. Id.
62. Id. at 797.
phenomenon is juxtaposed with the deeply emotional area of church-state relationships, "the potential for seriously divisive political consequences," concluded the Justice, "needs no elaboration." 63

These 1973 Term cases, in addition to emphasizing that "excessive entanglement" was well-established as an independent "prophylactic" criterion in establishment clause jurisprudence, also stressed that the test could have a significant effect on the Court's implementation of one of the other prongs of the traditional analysis, the "primary effect test." For instance, speaking of "political entanglement" in Nyquist, Justice Powell wrote that while such problems alone may not be sufficient to "warrant the invalidation of state law," 64 they did constitute a "warning signal" 65 of other pitfalls under the "purpose" or "effect" standards. "Excessive entanglement" thus assumed another role as an "early warning system" for more traditional establishment clause hurdles. 66

This secondary role for "excessive entanglement" has significant conceptual and practical consequences which could shift the axis of religion clause jurisprudence. There is some indication that, with the aid of its new-found warning light, the Court may consider more charitably the relevance and probity of evidence submitted on the question of primary effect. 67 For instance, while the indications are admittedly far from clear, the "excessive entanglement" concept appears to have had precisely that effect in Meek v. Pittenger. 68 Despite the precedent of an earlier decision upholding a strongly analogous textbook loan scheme, 69 the Court demonstrated a new rigidity and, in an opinion by Justice Stewart, struck down the direct loan of institutional materials and equipment to non-public schools on "primary effect" grounds. Justice Stewart distinguished this loan from the textbook situation on the grounds that, while textbooks were loaned to students, the mate-

63. Id.
64. Id. at 798.
65. Id.
66. The Court may well have foreseen this dual role for "entanglement" in the earlier cases. The "warning light" metaphor of Justice Powell in Nyquist was taken directly from the opinion of the Court in Lemon where the majority had noted that "[a]s well as constituting an independent evil . . . involvement or entanglement between government and religion serves as a warning signal." 403 U.S. at 624-25.
67. In Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973), a companion case to Nyquist, the Court struck down a New York statute providing reimbursement to parochial schools for certain expenses incurred in administering examinations and in recordkeeping. It based its finding of unconstitutional effect partially on the fact that teachers might use the funds to support religious educational activities. Id. at 480.
rial at issue here was loaned directly to the schools. Furthermore, he noted, seventy-five percent of the non-public schools qualifying for the twelve-million-dollar aid package were church-related institutions.\textsuperscript{70}

However, as Justice Rehnquist pointed out in his separate opinion, the textbook program approved in that earlier decision also required the close cooperation of the non-public schools attended by the students to whom the loans were made.\textsuperscript{71} Furthermore, while the percentage of non-public schools receiving loans of instructional material under the particular act in question was high, public schools received the same assistance under other statutes. Therefore, the non-public schools comprised a much lower percentage of the total recipients of such aid from the state.\textsuperscript{72} As Justice Stewart had noted several pages earlier in \textit{Meek}, "it is of no constitutional significance whether the general program is codified in one statute or two."\textsuperscript{73}

An explanation for Justice Stewart's holding must therefore be found elsewhere. One significant clue is his willingness to find an unconstitutional "primary effect" without direct proof that it does in fact exist. He simply assumes that the combination of what he characterizes as pervasively religious schools and the significant amount of the aid will inevitably produce such an illicit relationship between the state's aid program and the school's administration. It is that "entanglement" to which he seems to object.

\textit{Meek} had another and far more direct role in the development of the "rhythm"\textsuperscript{74} of the "excessive entanglement" concept: it constituted the high water mark in the application of the test. In assessing the constitutionality of "auxiliary services"\textsuperscript{75} made available to non-public school pupils in their own facility, the Court, explicitly relying on the entanglement test of \textit{Lemon}, held that the district court had erred "in relying entirely on the good

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\textsuperscript{71} 421 U.S. at 391 (Rehnquist, J., concurring in part and dissenting in part).

\textsuperscript{72} \textit{Id.} at 389-90 (Rehnquist, J., concurring in part and dissenting in part).

\textsuperscript{73} \textit{Id.} at 360 n.8 (majority opinion).

\textsuperscript{74} See text accompanying note 5 \textit{supra}.

\textsuperscript{75} "Auxiliary services" included:

- counseling, testing, and psychological services, speech and hearing therapy, teaching and related services for exceptional children, for remedial students, and for the educationally disadvantaged, and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

421 U.S. at 352-53.
faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly non-ideological posture is maintained." 76 The precautions required to ensure that teachers play a strictly nonideological role "necessarily give rise," asserted Justice Stewart, "to a constitutionally intolerable degree of entanglement between church and state." 77 As in Lemon, the discussion of administrative entanglement was supplemented by an assertion of the danger of political entanglement resulting from the prospect of "repeated confrontation between proponents and opponents of the auxiliary-services program" 78 in the annual appropriations process.

This rigid insistence on keeping public and religious educators at arms' length was curiously tempered by a footnote notation that diagnostic speech and hearing services do not present the same entanglement problem as the other auxiliary services and "seem to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools." 79 This recognition—however grudging—that the policy considerations of the entanglement theory must, at some point, meet the head winds of equal protection was somewhat reinforced by the separate opinion of the Chief Justice. 80 Having authored the strong "separatist" language of Walz and Lemon, he now not only stressed the equal protection limitations on "excessive entanglement" but noted that, in denying equal protection, the Court might also encroach upon free exercise values:

Affluent parents, by employing private teaching specialists, will be able to cope with this denial of equal protection, which is, for me, a gross violation of Fourteenth Amendment rights, but all others will be forced to make a choice between their judgment as to their children's spiritual needs and their temporal need for special remedial learning assistance. One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic view that carefully limited aid to children is not a step toward establishing a state religion—at least while this Court sits. 81

This mid-period in the development of the "excessive entanglement" concept was thus characterized by a reinforcement of the

76. Id. at 369.
77. Id. at 370.
78. Id. at 372.
79. Id. at 371 n.21.
80. Id. at 386-87 (Burger, C.J., concurring in part and dissenting in part).
81. Id. at 387 (Burger, C.J., concurring in part and dissenting in part).
key "prophylactic dimension," the consequent development of the concept's secondary role as a warning signal for more basic establishment clause difficulties, and, finally, the seminal realization that this amorphous concept had to be limited in some principled fashion to avoid head-on conflicts with other constitutional considerations. Justice Frankfurter's "rhythm" was unfolding.

C. The Development of a Shorthand

When the Court again made what was fast becoming an annual visitation to establishment clause jurisprudence, it entered the new stage in the development of the "excessive entanglement" concept foreshadowed by the footnote in *Meek* 82 and the separate opinion of the Chief Justice. 83 Fortunately, at least for the Court, the case at hand, *Roemer v. Board of Public Works* 84 was a comparatively comfortable one with which to make such a transition. There, the Court sustained noncategorical grants to private institutions of higher learning. The statute in question explicitly required that such funds not be used for sectarian purposes. After rehearsing the past cases and confirming the applicability of Lemon's three-part test, 85 the Court acknowledged that it had reached a new plateau in the development of establishment clause jurisprudence. In a characteristic display of candor, Justice Blackmun frankly stated that the Court saw "little room for further refinement of the principles" 86 and set out not "to unsettle those principles . . . or to expand upon them substantially, but merely to insure that they are faithfully applied in this case." 87 His ensuing "excessive entanglement" analysis, while acknowledging that the process was not an "exact science," 88 was exceptionally loyal to that goal. The findings of the district court 89 were rigidly analyzed against the characterizations of institutions and of civil-religious relationships articulated in *Tilton v. Richardson*. 90

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82. See note 79 & accompanying supra.
83. See notes 80-81 & accompanying text supra.
84. 426 U.S. 736 (1976).
85. Id. at 748-54.
86. Id. at 754.
87. Id.
88. Id. at 766.
90. 426 U.S. at 761-67. See note 38 supra. The aided institutions, concluded the *Roemer* majority, were not so pervasively sectarian as to require the Court to scrutinize the conduct of specific educational programs for ideological indoctrination. 426 U.S. at 762. The Court found that, although these grants were not "one-time, single purpose" grants, the district court's finding that audits would be "quick and nonjudgmental" was supportable, and further, that the process was "not likely to be any more entangling than the inspections and audits incident to the normal process of the colleges' accreditations by the State." Id. at 763-64. Similarly—and significantly—
Attitudinally, the Court seemed bent on avoiding the rigid tone of *Meek*. Doctrinally, the Court was in a "holding pattern."

When it made its next annual pilgrimage to this area in *Wolman v. Walter*, the Court demonstrated to an even greater degree than in *Roemer* a propensity to rely on the factual characterizations developed in the earlier cases. Indeed, the Court quite pointedly declined to undertake any reassessment of the "standard religious profile" of the schools in question and instead seemed relieved that, like the district court, it was able to conclude that "the character of these schools is substantially comparable to that of the schools involved in *Lemon v. Kurtzman*." In terms of the doctrinal development of the "excessive entanglement" concept, the analysis was clearly a summing up of what had gone before, not an attempt to break new ground. Indeed, the Court reapplied and reemphasized the policy concerns developed in the early cases. For example, both the "prophylactic dimension" and the close conceptual affinity of "entanglement" and "effect" were evident when it voided provisions in the Ohio Code which permitted state provision of field trip "transportation and services" to non-public schools. The Court held that, under the "effect" test, the "field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable by-product." It then went on, with citation and quotation from *Lemon*, to hold also that the close supervision of non-public teachers necessary to ensure secular use of field trips would create "excessive entanglement."

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92. *Id.* at 235 n.4. The Court's footnote may be read as intimating that all appel-leees acquiesced in the application of the "standard religious profile." The brief of the private appel-leees indicated, however, that while they preferred a disposition that did not rest on such a profile, they also argued that the schools in question were distinctly different from those in *Lemon*. *Id.* (citing Brief for Appellees Grit et al. at 13-14, *Wolman v. Walter*, 433 U.S. 229 (1977)).
93. *Id.* at 235 (quoting district court in the case, 417 F. Supp. 1113, 1116 (N.D. Ohio 1976)).
94. *Id.* at 252.
95. *Id.*
96. *Id.* at 254.
97. *Id.*
98. The Court upheld supplying standardized examinations to non-public school students under a scheme which did not involve the non-public school teacher in either
When the ink dried on Wolman, the development of the “excessive entanglement doctrine” in establishment clause jurisprudence appeared to have reached a semipermanent resting place. Its basic features—“prophylactic” function, warning light for the “purpose” and “effect” tests—had been articulated and applied. An attempt had been made to integrate the concept into constitutional jurisprudence by reconciling the methodology with other constitutional considerations. After struggling with the amorphous nature of the concept, the Court had fallen back on its initial formulations and its original factual assumptions and applied the resulting characterizations in almost litmus-test fashion.

D. The Beginning of the End?

The Court celebrated the decennial year of the “excessive entanglement” test by handing down an opinion which may mark the beginning of a new stage in establishment clause analysis. At the pen of Justice White—no enthusiastic supporter of the “excessive entanglement” test—the Court, in Committee for Public Edu-

99. The “excessive entanglement” concept was again applied in an establishment clause context in New York v. Cathedral Academy, 434 U.S. 125 (1977). A New York statute provided reimbursement to sectarian schools for certain state-required services. In April 1972, these payments were ruled unconstitutional by a district court. Committee for Pub. Educ. v. Levitt, 342 F. Supp. 439 (S.D.N.Y. 1972). New York then passed a statute purporting to authorize reimbursement for the 1971-72 school year. In Cathedral Academy the Court held the second statute unconstitutional. The Court distinguished Lemon v. Kurtzman, 411 U.S. 192 (1973) (Lemon I), on the ground that, in this case, the injunction of the district court expressly enjoined payments for amounts “heretofore . . . expended.” Thus the statute purported to modify the federal court’s injunction, 434 U.S. at 128-30 (emphasis supplied by the Court). The Court also noted that a detailed audit in the state court of claims to determine whether any funds were used for sectarian purposes “would constitute a significant encroachment on the protection of the First and Fourteenth Amendments.” 434 U.S. at 132.

ucation v. Regan. sustained under the now-traditional three-pronged Lemon formula a New York statute that authorized public reimbursement of sectarian non-public schools for the costs of administering state-required and state-prepared tests and for complying with the reporting requirements of state law. Relying on its sanction of a similar Ohio scheme in Wolman v. Walter, the Court found that the statute had a secular purpose and effect. The fact that, unlike the Ohio situation, some of the tests were graded by the teachers was found to be without constitutional significance since these teachers could not control the content of the examination. Similarly, the existence of a direct cash reimbursement to the religious school did not invalidate the scheme since the statute provided for the maintenance of specific safeguards to insure that such reimbursements covered only secular services.

The Court then turned to the “excessive entanglement” test to inquire whether the maintenance of separate accounts for reimbursable expenses and their audit by state authorities rendered the scheme constitutionally infirm. It found the reimbursement process to be “straightforward and susceptible to the routinization that characterizes most reimbursement schemes.” Justice White then added that “[o]n its face, therefore, the New York plan suggests no excessive entanglement, and we are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated.”

Earlier cases had professed a similar refusal to attribute bad faith to private school teachers. These cases had often assumed, nevertheless, the inevitability of impermissible entanglement. By contrast, here the Court refused to indulge such assumptions. This refusal of the Court to assume the inability of civil and religious authorities to engage in simple business arrangements is reinforced by its somewhat gratuitous statement that, after Wolman and Regan, Meek v. Pittenger should not be read as assuming that the religious character of sectarian schools necessarily makes all state assistance to their sectarian activities suspect.

Immediately following this caution, Justice White indicated, as noted previously, the probability of further doctrinal revision in the establishment clause area. It would be premature to pre-
dict, solely on the basis of Regan’s cautious language, that the excessive entanglement test has lost its vitality. Clearly, however, it celebrated a subdued anniversary. The Court demonstrated, at least, an awareness of the problems associated with the continued use of the test and, indirectly, its impact on the jurisprudence of the religion clauses.

E. A Doctrinal Transplant: Entanglement and Free Exercise

As “excessive entanglement” in the context of classical establishment clause analysis was settling into a rather “automated” pattern, the concept became recognizable in another context—the free exercise clause. Of course, in a very real sense, traditional free exercise analysis has long included what may be termed an “entanglement” concept even though that terminology never really became part of regular professional parlance. In a long line of cases, beginning with Watson v. Jones and culminating in Serbian Orthodox Diocese v. Milivojevich and Jones v. Wolf, American courts have forbidden, on free exercise grounds, the involvement of civil courts in disputes which, while superficially civil, require resolving questions of religious dogma or discipline. The basic rationale of these cases was simply stated in Kedroff v. St. Nicholas Cathedral: religious freedom encompasses the “power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”

During the last few Terms, however, the Court has articulated an “excessive entanglement” approach in free exercise cases which seems to bear many of the same characteristics and to foster many of the same policy considerations as the establishment clause variety of Walz, Lemon, and their progeny. In this setting, “excessive entanglement” has been suggested as a reason for restricting activity of church personnel which would abnormally obstruct the political process; in short, it has operated as a defense to

110. 80 U.S. (13 Wall.) 679 (1871).
113. Jones v. Wolf, 443 U.S. 595 (1979), does recognize, however, the possibility of a civil court’s determining questions of church ownership by resort to “neutral principles” not requiring review of matters of doctrine. In one sense, as noted by the dissent, id. at 610, this holding can be viewed as a rather moderate position with respect to “entanglement” dangers. From another perspective, however, it must be noted that the Court stressed that it would not tolerate even partial reliance on matters of religious doctrine and polity in applying these “neutral principles.” Id. at 605. Notably, it left undisturbed the pronouncement of Milivojevich that even “marginal” review of allegations of arbitrariness by church tribunals was forbidden. Id. at 609 n.8.
114. 344 U.S. 94 (1952).
115. Id. at 116.
a free exercise claim.\textsuperscript{116} It has also been given as a reason for restricting government action that might hamper the freedom of ecclesiastical officials; here, it has acted as a measure of the free exercise claim.\textsuperscript{117}

The first of these two approaches appeared in *McDaniel v. Paty.*\textsuperscript{118} There, the Court confronted a Tennessee constitutional provision and statute which disqualified ministers from serving as legislators.\textsuperscript{119} In a plurality opinion,\textsuperscript{120} the Chief Justice, joined by Justices Powell, Rehnquist, and Stevens, first asserted that the minister's free exercise rights were not absolute,\textsuperscript{121} since the statute operated against the minister because of his status and not his belief. However, his "activity" still enjoyed significant free exercise protection that could be outweighed only by "'interests of the highest order.'"\textsuperscript{122} Tennessee had asserted that its interest in preventing the establishment of religion was "of the highest order."\textsuperscript{123} The plurality found, however, that since "the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of antiestablishment interests or less faithful to their oaths of civil office than their unordained counterparts,"\textsuperscript{124} it was not even necessary to evaluate the legitimacy of the professed legislative objective.

Justices Brennan, Stewart, and Marshall (at least one of whose votes was necessary to the Court's judgment) saw no real distinction between one's beliefs and one's calling to the ministry. Consequently, they concluded, in the words of Justice Brennan, that

\begin{quote}
[T]he State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association. The Establishment Clause does not license government to treat religion and those who teach or
\end{quote}

\begin{footnotes}
\item 116. *See* notes 118-28 & accompanying text infra.
\item 117. *See* notes 129-38 & accompanying text infra.
\item 118. 435 U.S. 618 (1978).
\item 119. *Id.* at 621. Article 9 § 1 of the State Constitution disqualified ministers from serving as legislators. The state legislature applied this provision to candidates for delegate to the State's 1977 limited constitutional convention when it enacted ch. 848, § 4, of the 1976 Tenn. Pub. Acts.
\item 120. Justice Blackmun did not participate in the decision or consideration of this case.
\item 121. *Torcaso v. Watkins,* 367 U.S. 488 (1961), had established an absolute prohibition against "the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept." *Id.* at 494. (footnote omitted).
\item 122. 435 U.S. at 628 (plurality opinion) (quoting *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972)).
\item 123. *Id.*
\item 124. *Id.* at 629 (footnote omitted).
\end{footnotes}
practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.\footnote{125}

In *McDaniel*, the Court's basic analysis followed the traditional free exercise pattern of measuring the free exercise claim against an asserted important government interest. The asserted government interest here was to prevent entanglement of church and state in the civil law-making function of the legislature, and the concomitant "sectarian bickering."\footnote{126} In nullifying the statute, the Court found that this asserted interest was not sufficiently important to justify an infringement of the minister's free exercise rights. This result is clearly in harmony with the tradition of favoring free exercise claims against asserted establishment clause concerns.\footnote{127} However, the plurality's methodology in reaching that result must prompt some serious reflection as to whether, in other contexts, the balance between the two clauses would still be struck so readily in favor of giving free exercise concerns some "breathing space." While perhaps simply a demonstration of judicial restraint in deciding the case as narrowly as possible, the plurality's strong reliance on the history of the benign participation of clergy in our legislature may indicate that, absent such a tradition of easy accommodation, entanglement values will not be treated quite so perfunctorily when weighed against free exercise claims.\footnote{128}

The "excessive entanglement" analysis arose again in another free exercise context during the last Term of Court. In *NLRB v. Catholic Bishop of Chicago*,\footnote{129} the Court held that church-operated schools teaching both religious and secular subjects were not within the scope of the National Labor Relations Act. Thus, church officials could not be compelled to recognize or to bargain with unions organized by lay teachers in the parochial schools. The case involved five regular Catholic high schools in the diocese

\footnote{125. *Id.* at 641 (Brennan, J., concurring). While not joining Justice Brennan's opinion, Justice Stewart wrote separately and expressed the same basic reasoning. *Id.* at 642-43 (concurring opinion).}

\footnote{126. *Id.* at 641 (Brennan, J., concurring).}

\footnote{127. Recognizing the symbiotic relationship of the two clauses, the Court has, over the years, shown a pronounced tendency to favor free exercise values over marginal establishment clause concerns. See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 296-98 (1963) (Brennan, J., concurring). *See generally* L. Tribe, *American Constitutional Law* §§ 14-4 to -6 (1978).}

\footnote{128. Such a reliance on history may also explain why, in regard to the supply of more modern social services, the *Meek* Court showed little concern for the argument, made by one Justice in a separate opinion, that a "crabbed attitude" toward classifying "auxiliary services" as permissible "general welfare" services had severe free exercise as well as equal protection implications. 421 U.S. at 385-87 (Burger, C.J., concurring in part and dissenting in part).}

\footnote{129. 440 U.S. 490 (1979).}
of Fort Wayne-South Bend, and two secondary schools in the Archdiocese of Chicago that were once preparatory seminaries but which, in recent years, had been open to students "having a potential for the priesthood or for Christian leadership."130 When unions petitioned the National Labor Relations Board (NLRB) for certification as exclusive bargaining representatives for the lay teachers in these schools, the Board sustained jurisdiction over the petitions on the ground that, while its policy was to decline jurisdiction over "completely religious" organizations, entities which were simply "religiously associative" were properly within its authority.

The Supreme Court, affirming the court of appeals' denial of enforcement of the NLRB order,131 held—that the National Labor Relations Act did not grant the NLRB jurisdiction over church schools that teach both religious and secular subjects. In essence, the Court reasoned that to construe the Act to include such schools would present "a significant risk that the First Amendment [would] be infringed."132 Reciting the "religious profile" of parochial schools developed in Lemon, Meek, and Wolman and the "key role played by teachers in such a school system,"133 the Justices concluded that "[g]ood intentions by government—or third parties—can surely no more avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining than in the well-motivated legislative efforts consented to by the Church-operated schools which we found unacceptable in Lemon, Meek, and Wolman."134 Therefore, in the absence of a clear intention by the Congress to include parochial school teachers within the Board's jurisdiction, the Court declined to construe the Act in such a way as to place in question its constitutionality.

The Court explicitly noted that the appellate court had concluded that both the free exercise clause and the establishment clause foreclosed the Board's jurisdiction.135 In its own opinion, the Court also continually referred to "the Religion Clauses"136 and did not present a separate analysis of the case under each of the two clauses. Certainly, both clauses are implicated. For instance, if the Act had been construed to cover the parochial schools in question, the NLRB would arguably have been re-

130. Id. at 492.
133. Id. at 501.
134. Id. at 502.
135. Id. at 496.
136. Id. at 499-500.
quired to determine the orthodoxy of the views of teaching personnel. Sustaining the governing bishop would arguably implicate the establishment clause. On the other hand, sustaining the teachers would arguably impair the free exercise rights of the bishop.

That the Court realized that this case could be viewed from the perspective of either of the religion clauses is not exceptional. What is noteworthy is its assumption that the policy concerns of both clauses can be viewed through use of the entanglement concept. In one sense, the use of this standard makes more sense in the free exercise area than in establishment clause analysis. Its use in the former would at least be compatible with the Court's long tradition of interpreting free exercise protections as broadly as possible. However, the Court itself showed no particular sensitivity to this factor and instead seemed to assume that "excessive entanglement" was simply a standard equally applicable to both of the religion clauses. This articulation of the free exercise interest through "excessive entanglement" terminology emphasizes the dominant theme of the earlier cases: prophylactic separation of the religious and civil elements of society. It also suggests the possibility that the Court views the two Clauses as expressing the common theme of separation. Jefferson's "wall" may indeed be higher than it was a decade ago.

137. The court of appeals noted:

We are unable to see how the Board can avoid becoming entangled in doctrinal matters if, for example, an unfair labor practice charge followed the dismissal of a teacher either for teaching a doctrine that has current favor with the public at large but is totally at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle acceptable to some, but contrary to Catholic moral teachings. The Board in processing an unfair labor practice charge would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity.

559 F.2d at 1125, aff'd, 440 U.S. 490 (1979).

138. In its free exercise aspects, the Court's analysis fits comfortably within the traditional patterns. The case is logically consistent with the Watson-Serbian Orthodox line of cases since, if jurisdiction had been sustained, the NLRB would have been required to pass upon matters of educational policy in the process of determining the rights of organized teachers. Similarly, the Court's analysis can be viewed as involving the traditional balancing of free exercise claims and the police power.

139. The "natural antagonism between a command not to establish religion and a command not to inhibit its practice," see J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 849 (1978), so prominent in the state action cases, see, e.g., School Dist. of Abington Township v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring); Everson v. Board of Educ., 330 U.S. 1, 16 (1947), is not obvious in state regulation cases. Regulation can be beneficial as well as oppressive and thus constitute, depending on the particular context, either an aid to religion or an inhibiting factor. In either instance the state has ceased to be neutral toward religion.

140. See L. TRIBE, supra note 127, § 14-5, at 824 & n.5.
The Rhythm—A Summary

Up to this point, the scope of the inquiry has been strictly confined: to perceive the “rhythm” of the Court in the development of the “excessive entanglement” concept.

The past decade has seen the “excessive entanglement” concept serve two basic purposes in establishment clause analysis. First, it has become a separate and independent hurdle which a statutory scheme must pass to be sustained against an establishment clause challenge. As such, entanglement has added a new “prophylactic” dimension to establishment clause analysis. Relationships which tend to produce government support of religious enterprises or tend to endanger religious-civil peace are forbidden before the “flash point” is reached. As a practical matter, excessive entanglement has significantly lowered the burden of proof required to support a claim that a statutory scheme has the “primary effect” of establishing a religion. In short, under establishment clause analysis, “preventive separation” of the religious and civil entities of our society—without more—has become a recognizable value in constitutional jurisprudence.

Moreover, this emphasis on separation has also manifested itself in the suggestion that “non-entanglement” is a government interest to be weighed against a free exercise claim. “Excessive entanglement” has also been used to articulate a free exercise claim—a claim thus found to be ripe even before any actual government attempt to interfere with religious practices.

Consequently, despite dicta to the contrary throughout the cases, there has been a decided reemphasis by the Court of the Madisonian view that both religious and secular interests are best advanced when each leaves the other completely unfettered. As a result, despite the warning of Walz that “[t]o equate the two [clauses] would be to deny a national heritage with roots in the Revolution itself,” there appears to be a tendency on the part of the Court to regard the religion clauses as expressing a single policy consideration of separation.

143. 397 U.S. at 673.
At the same time, the long-term vitality of this trend is open to question. The Court's latest decision in Regan suggests a certain mistrust of at least the practical implications of excessive entanglement and a general willingness to reassess the present tests of establishment clause violations. Any such reassessment will have to take into consideration two additional factors: first, the practical utility of further use of the entanglement concept; and second, the probable impact of its continued use on those areas of American life which have been the traditional areas of concern under the religion clauses. These two considerations are treated in the sections that follow.

II. ENTANGLEMENT: THE IMPLEMENTATION OF THE TEST

In addition to recognizing its impact on the constitutional policy of the religion clauses, the Supreme Court will have to consider, in any general reassessment of the "entanglement test," the practical problems inherent in its implementation. Even if the Court is willing to accept the policy directions to which it leads, a test not susceptible to fair and moderately efficient judicial management is a poor candidate for retention and a substitute must be sought.

A. The Problem: Judicial Subjectivity

The practical problem inherent in the entanglement test can be rather simply stated. In Lemon v. Kurtzman, the Court set forth a three-pronged inquiry to determine the existence of excessive entanglement. The relevant factors are: (1) the character and purposes of the institutions that are benefited, (2) the nature of the aid that the State provides, and (3) the resulting relationship between the government and the religious authority. In any context, determining the "character and purpose of the institutions" and "the resulting relationship between the government and the religious authority" would involve an evaluative process far more subtle than simple fact-gathering. In such situations, the Justices enter the world of the subjective where their evaluation is subject to forces "seldom fully in consciousness... [but]... so near the surface... that their existence and influence are not likely to be disclaimed..." Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man..." Such subjectivity or reference to

144. See Part I supra.
146. Id. at 615.
"constitutional facts" outside the record has always been a part of constitutional litigation. Indeed, its role has always been especially pronounced in religion clause litigation. As Justice Jackson noted in *McCollum v. Board of Education*, the Justices are often left with "no law but [their] own prepossessions." However, the excessive entanglement test invites a whole new degree of subjectivity and thus represents, in a very real sense, the ultimate defeat of attempts to use neutral principles to interpret the religion clauses. Here, "the character and purpose of the institutions" and "the resulting relationship between the government and the religious authority" must be assessed not simply to ascertain proof of a primary effect to foster religion but to determine the more nebulous issue of the probability of such an effect taking place in the future. In short, the "prophylactic dimension" of the test requires a whole new degree of judicial subjectivity.

For example, to implement the entanglement analysis it had mapped out for itself, the *Lemon* Court had to make certain fundamental judgments about the religiously affiliated schools involved in the litigation and about the probable resulting relationship between the schools and the civil government. For part of that inquiry, it could rely on the finding of the district court that the parochial schools constituted "an integral part of the religious mission of the Catholic Church." However, the Justices had no basis in the record for concluding that "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." Indeed, as Justice White pointed out in dissent, the most direct evidence of record was to the contrary. Similarly, the Court's

148. See Karsl, Legislative Facts in Constitutional Litigation, 1960 SUP. CT. REV. 75. See also P. BREST, PROCESS OF CONSTITUTIONAL DECISIONMAKING 894-953 (1975).
149. 333 U.S. 203 (1948).
150. Id. at 238 (Jackson, J., concurring).
153. Id. at 618.
154. Id. at 667 (White, J., dissenting). Justice White noted:

The Court points to nothing in this record indicating that any participating teacher had inserted religion into his secular teaching or had had any difficulty in avoiding doing so. The testimony of the teachers was quite the contrary. The District Court expressly found that "[t]his concern for religious values does not necessarily affect the content of secular subjects in diocesan schools. On the contrary, several teachers testified at trial that they did not inject religion into their secular classes, and one teacher deposed that he taught exactly as he had while em-
conclusion that the administrative arrangement set up to implement the required audit system was "pregnant with the dangers of excessive government direction of church schools"\(^5\) is a conclusion not grounded in the district court's findings.

*Meek v. Pittenger*\(^5\) provides an even better example of the subjectivity inherent in the "excessive entanglement" analysis. There, despite trial court findings to the contrary,\(^157\) the Court held that the "auxiliary services" provisions of the Pennsylvania statute would cause "excessive entanglement" because "a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists."\(^158\)

When the Court turns to an assessment of "political entanglement," an even greater opportunity for reliance on the subjective is present. An assessment of how politics and religion will mix in any given political environment necessarily involves a personal judgment based in large part on the Justice's own political experience, observation, and, possibly, tolerance for the methods of a particular religious sect. It is a judgment easily swayed by the contemporary political climate and by the influences of regionalism from which no member of the Court entirely escapes.

In short, by requiring the Justices to predict the probability of unconstitutional effect, the entanglement test has introduced an abnormally high degree of judicial subjectivity into the Court's assessment of the nature of religious institutions and of the relationships which those institutions develop with governmental entities. The degree of entanglement deemed "excessive" often appears to be the product of personal judgments about certain religions and their institutions by a decision-maker who may or may not have any real exposure to the particular sect in question. The Justices have often based their conclusions on factual assumptions upon which the record is either silent or to the contrary.\(^159\)

### B. History—the Unsuccessful Restraint on Subjectivity

The Court itself seems to have sensed the difficulty of this subjective approach. For the Justices who originally framed this

\(^{155}\) Id. at 620 (majority opinion).
\(^{156}\) 421 U.S. 349 (1975).
\(^{157}\) 374 F. Supp. 639, 657 (E.D. Pa. 1974) ("The notion that by setting foot inside a sectarian school a professional therapist or counselor will succumb to sectarianization of his or her professional work is not supported by any evidence."). *See also* Meek v. Pittenger, 421 U.S. 349, 392 (1975) (Rehnquist, J., concurring in part and dissenting in part.)
\(^{158}\) 421 U.S. at 370.
\(^{159}\) *See* notes 152-58 & accompanying text *supra*. 
tool of religion clause adjudication, a good deal of its potential for
the subjective was to be curbed by recourse to the lessons of his-
tory. Justice Harlan, specially concurring in \textit{Walz}, wrote that
"What is at stake as a matter of policy is preventing that kind and
degree of government involvement in religious life that, as history
teaches us, is apt to lead to strife and frequently strain a political
system to the breaking point."\textsuperscript{160} This same theme was relied
upon by the Chief Justice when, in the same case, he repeated
Justice Holmes' oft-quoted comment that "'A page of history is
worth a volume of logic.'"\textsuperscript{161} Indeed, history was probably the
determinative factor in both \textit{Walz} and \textit{Lemon}. While the prop-
erty tax exemption of \textit{Walz} was a practice deeply embedded in
our national life, the aid schemes at issue in \textit{Lemon} could claim
no similar historical roots.\textsuperscript{162} The whole notion of political divi-
siveness was, as Justice Harlan's comment presaged, especially
rooted in lessons drawn by the Justices from their reading of
American history. As the Chief Justice wrote in \textit{Lemon}:

It conflicts with our whole history and tradition to permit ques-
tions of the Religion Clauses to assume such importance in our
legislation and in our elections that they could divert attention
from the myriad issues and problems that confront every level
of government. . . . The history of many countries attests to
the hazards of religion's intruding into the political arena or of
political power intruding into the legitimate and free exercise of
religious belief.\textsuperscript{163}

After the initial cases, however, history was apparently not
often a factor in the Court's treatment of the entanglement con-
cept—to the chagrin of one of its architects, the Chief Justice.\textsuperscript{164}
The Court's use of entanglement in the later cases\textsuperscript{165} relied to a

\textsuperscript{161} Id. at 675-76 (opinion of the court) (quoting New York Trust Co. v. Eisner,
256 U.S. 345, 349 (1921)).
\textsuperscript{162} 403 U.S. at 624 ("We have no long history of state aid to church-related edu-
cational institutions comparable to 200 years of tax exemption for churches.").
\textsuperscript{163} Id. at 623.
\textsuperscript{164} For instance, in \textit{Meek v. Pittenger}, the Chief Justice found the Court's hold-
ing with respect to the entanglement possibilities of the auxiliary services (see discussion
accompanying notes 80-81 supra) "extravagant." 421 U.S. at 385 (Burger, C.J.,
concurring in part and dissenting in part). He argued that "there is no basis in 'expe-
rience or history' to conclude that a State's attempt to provide . . . the remedial assist-
ance necessary for all its children poses the same potential for unnecessary
administrative entanglement or divisive political confrontation which concerned the
Court in \textit{Lemon v. Kurtzman}, supra." Id. at 385-86 (quoting Committee for Pub.
Educ. v. Nyquist, 413 U.S. 756, 802). The Chief Justice also dissented from that part
of the Court's opinion in \textit{Wolman v. Walter} which struck down field trips partially on
the ground that such assistance would constitute excessive entanglement. 433 U.S. at
255. There the Court had not asserted any historical basis for its decision.
\textsuperscript{165} Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Board of Pub. Works, 426
great degree on the factual stereotypes developed in the earlier cases, but not upon the history, to explicate the consequences of aid in such circumstances. In a sense, then, the methodology was cut from one of its principal intellectual moorings. Before urging that the line be once again fastened, however, it seems appropriate and fair to ask whether history can realistically serve as an accurate guide in measuring the possibility of modern-day entanglement.

While the history of the religion clauses may be somewhat helpful in establishing certain basic doctrinal propositions about the nature of the constitutional guarantees, the precise contours of the protection contemplated by the framers seem to have eluded, rather systematically, courts and scholars. Clearly, as Justice Brennan noted in School District of Abington Township v. Schempp, in the area of church-state relations “an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems.” What little discussion did take place among the framers presupposed a world far different from that in which modern religion clause adjudication takes place. As Professor Giannella emphasized in his seminal article, the relationship of church and state must change as our notions of the role of the civil state and of the role of religion change. Significantly, the changes that have taken place in both those notions directly bear on the usefulness of the “excessive entanglement” concept. On the one hand, civil government today is hardly the government of limited concern and responsibility with which the framers were acquainted. At the same time, contemporary American religious practices have become more “associational,” more “community service oriented.” Indeed, today the term “religion” must, for constitutional purposes, be made to include many groups whose focus is decidedly more anthropocentric than theocentric.

166. See text accompanying notes 84-99 supra. See also Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part and dissenting in part).
169. Id. at 234 (Brennan, J., concurring).
170. Giannella, supra note 167, at 1382: “This concept [church/state separation] must be continually reformulated if it is to adapt to changing ideas concerning the types of human experience encompassed by the term ‘religion’ and the kinds of action within the proper domain of the state.”
171. See L. TRIBE, supra note 127, § 14-1.
These very pronounced shifts in the nature of both civil government and religion have, quite obviously, drastically increased the opportunity for "overlap" or "entanglement" between the two. At the same time, however, the dangers inherent in such an "overlap" have apparently diminished with time. Justice Powell emphasized this point when, despite his usual high regard for the place of history in constitutional analysis, he remarked in *Wolman*:

> At this point in the 20th Century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights . . . . The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines is remote . . . .

In short, greater overlap in church-state functions may mean more entanglement but not necessarily more *excessive* entanglement.

C. *A Substitute for History—the Standard Profile*

The Court’s use of a standard profile of religious institutions appears to have compounded rather than resolved the problem. As the doctrinal analysis set out in the first part of this Article indicates, beginning with the cases in October Term 1974 the Court exhibited a progressively more pronounced tendency to avoid in-depth exploration of individual facts concerning particular religious institutions and the consequences of their relationships with particular government entities. Simultaneously, it also displayed a distinct unwillingness to reexamine its earlier characterizations of the types of institutions and relationships that had been before it previously and now surfaced in similar, although not identical, forms. Instead, there was an increased reliance on the stereotypical institutional “profiles” constructed in the

173. *McGowan v. Maryland*, 366 U.S. 420 (1961). Observed Justice Frankfurter: As the state’s interest in the individual becomes more comprehensive, its concerns and the concerns of religion perforce overlap. State codes and the dictates of faith touch the same activities. Both aim at human good, and in their respective views of what is good for man they may concur or they may conflict. *Id.* at 461-62.

174. 433 U.S. at 263.

175. *See* note 92 & accompanying text *supra*.

176. *See* notes 68-99 & accompanying text *supra*.

177. A particularly graphic example of the Court’s lack of interest in the trial record occurred in *Meek v. Pittenger*, where the testimony at trial not only failed to show the possibility of entanglement with respect to “auxiliary services” but affirmatively indicated the feasibility of the arrangement contemplated by the statute. *See, e.g.*, Appendix at 50-62, *Meek v. Pittenger*, 421 U.S. 349 (1975) (testimony of Dr. William D. Boesenhofer); *id.* at 64-70 (testimony of Ms. Pauline Stopper); *id.* at 70-81 (testimony of Mr. David Horowitz).
early cases. In effect, characterizations previously given certain religious institutions or certain religious-civil relationships in earlier cases became presumptively conclusive. For instance, in the later "parochaid" cases, the institutions and relationships at issue were measured against the "givens" apparently established once and for all in Lemon and Tilton. Similarly, the Court's conclusion in Meek that Pennsylvania's "auxiliary services" scheme ran afoul of the entanglement test was largely based upon its conclusion in Lemon despite the fact that the cases involved a distinctly different religious-civil relationship. The Court's conclusions about political divisiveness in the same programs rested heavily on its earlier characterizations in both Lemon and Nyquist. Indeed, by the time of Wolman v. Walter, the Court's analysis not only showed little independent evaluation of the relationships involved but even manifested a preference for deciding church-state issues by reference to these standard profiles.

Reliance on earlier developed models, "profiles," and characterizations has several important implications. Quite obviously, it drastically reduces the chance for later reappraisal or even refinement by the Court itself. First impressions become lasting ones and, at a time when the country's religious life is undergoing significant change, later parties have little opportunity to improve

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178. The aid scheme at issue in Lemon basically contemplated parochial school officials' accounting for the expenditure of public funds for sectarian activities and raised the possibility of disputes over whether a given activity under the control of parochial school teachers was sectarian. 403 U.S. at 615-622. In Meek, the Commonwealth's personnel would have entered the parochial schools to provide the "auxiliary services" encompassed within the program. Involved, therefore, was the surveillance of state personnel and the possibility of disputes between the parochial school and Commonwealth officials over the proper scope of their duties with respect to these auxiliary services. 421 U.S. at 372.


180. Significantly, many of these changes in the country's religious life directly affect church-state relationships. For instance, with respect to Catholic schools, the subject of many of the "entanglement test" cases, there was, according to the research of the National Opinion Research Center (NORC) at the University of Chicago, a decline of one-third in the enrollment of Catholic children of primary and secondary age in parochial schools between 1964 and 1974. A. Greeley, The American Catholic 167-69 (1977). Most of that decline was apparently due to the unavailability of places and not to any lack of confidence on the part of Catholics in the role of those schools. Id. During the same time, however, most schools experienced a pronounced increase in the proportion of lay faculty members as religious teachers became more and more scarce. See, e.g., Roman Catholic Diocese of Cleveland, Facing the Future: Catholic Secondary Education in the Diocese of Cleveland, summarized in Catholic High Schools: A Local Study, 9 Origins 717, 722-23 (1980). In some areas, apparently due to shifting populations, the percentage of non-Catholic students enrolled in such schools also dramatically increased.

There has also been a significant increase in the participation of organized religions in the country's political life. See, e.g., Statement of the National Council of Churches on the Resumption of Draft Registration, in 9 Origins 608, 608-09 (1980);
the Court's understanding of contemporary developments in this complex area. As the lower federal and state courts become more aware of the Supreme Court's tendency to rely on the past's conventional wisdom, they will have no real incentive to explore in any depth the particular facts of any given religious-civil relationship. From the viewpoint of lower court judges, it will be safer to rely on the evaluations already given similar, but by no means identical, facts and relationships in earlier Supreme Court cases. Indeed, there is some indication that that process has already taken hold. In *Catholic Bishop of Chicago v. NLRB*, for instance, the Seventh Circuit relied on the Supreme Court's earlier description in the "parochial" cases of the parochial schools as pervasively religious institutions.


181. See, e.g., *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976), aff'd in part, rev'd in part sub. nom. *Wolman v. Walter*, 433 U.S. 229 (1977), where the district court concluded that "[a]lthough the stipulations of the parties evidence several significant points of distinction, the character of these schools is substantially comparable to that of the schools involved in *Lemon v. Kurtzman*, 403 U.S. 602, 615-618 . . . (1971)" *Id.* at 1116. Yet, the court also noted that the stipulations with respect to the Catholic schools presented a situation very unlike the situation in *Lemon*, 403 U.S. at 615-19. In the schools at issue in *Wolman*, almost 70% of the teachers were lay teachers. Although a majority were Catholic, they included members of almost all religious faiths. Non-Catholic children were not required to attend classes on religion. Most religious teachers did not wear religious garb. Secular courses were taught basically as they were in the public schools. 417 F. Supp. at 1116. The entire stipulation is also set out in Appendix at 30-33, *Wolman v. Walter*, 433 U.S. 229 (1977).

182. 559 F.2d 1112 (7th Cir. 1977), *id.*, 440 U.S. 490 (1979).

Of course, it can be argued that this reliance by the Court on earlier characterizations has at least one salutary implication: it has brought a degree of predictability to the church-state area (a factor of great consolation to Justice Brennan in Wolman). However, this beneficial "fallout" is of minimal compensation when weighed against the possibility that, in an era of rapid and subtle change both in government and in religion, the admittedly delicate balance between the two will be resolved largely on the basis of stereotypes already almost a decade old.

D. Still Missing: Internal Discipline

In re-evaluating the entanglement test, the Court will have to confront the reality that, despite a decade of experience, it has yet to find a satisfactory internal discipline which will curb excessive judicial subjectivity. History can no longer realistically play a significant role in assessing modern relationships between religious and civil power. The substitute shorthand of reliance on standard profiles is no better. It has introduced a new and unnecessary rigidity into church-state relations at a time when societal needs may well require a more sensitive scrutiny of religious-civil relationships.

While the Court has recently demonstrated a heightened awareness of these difficulties, it has yet to decide how—or whether—it will adjust its doctrinal course to take these shortcomings into account. In confronting this issue, the Court will no doubt turn, as this Article does now, to how a test, with the ideological bias described in Part I and the practical difficulties described in this Part, may affect the direction of the religion clauses.

III. ENTANGLEMENT: ITS FUTURE PATH

It has always been particularly difficult to predict future


184. See text accompanying notes 91-93 supra.

185. See United States v. Kras, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting): "It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live."

trends in religion clause jurisprudence. As Professor Choper noted in his own attempt\textsuperscript{187} seventeen years ago, the earlier warning of John Cortney Murray is bound to have a "chilling effect" on any effort in this regard:

No one who knows a bit about the literature on separation of church and state, that for centuries has poured out in all languages, will be inclined to deny that hardly another problem in the religious or political order has received so much misconceived and deformed statement, with the result that the number of bad philosophies in the matter is, like the scriptural number of fools, infinite.\textsuperscript{188}

That "chilling effect" is substantially compounded by the Chief Justice's caution in \textit{Walz} against reliance on sweeping utterances in opinions when considering church-state questions upon which the Court has not yet squarely passed.\textsuperscript{189}

The future pattern of development of "excessive entanglement" is, of course, even less amenable to prediction. As indicated in the earlier parts of this Article, its inherent subjectivity is exacerbated by the Court's failure to identify any effective method of internal discipline in its application. Consequently, the "personal predilections"\textsuperscript{190} of the Justices soon become part of the "conventional wisdom" of religion clause jurisprudence.

Another serious problem impedes any effort to predict future trends in this area. The particular situations which are likely to come before the Supreme Court in the future are only now emerging and have not been refined in the crucible of lower court litigation or in the legislative or administrative process.\textsuperscript{191} In the case of many of these potential issues, the developmental process has progressed sufficiently to permit assessment of the potential magnitude of the problems they raise. It can now be said with some certainty that the "excessive entanglement" concept has at least the potential for both altering the basic axis of church-state relations and affecting, in subtle but significant ways, other constitutional freedoms.

\textbf{A. "Divisiveness" and Other First Amendment Rights}

The cases already decided by the Court make it quite clear that the concept of "excessive entanglement" is grounded in an assumption that one of the basic values protected by the religion


\textsuperscript{188} \textit{Id.} at 329 (quoting Murray, \textit{Law or Prepossessions?}, \textbf{14} \textit{Law & Contemp. Prob.} 23 (1949)).

\textsuperscript{189} 397 U.S. at 670-72.

\textsuperscript{190} \textit{See} text accompanying note 150 \textit{supra}.

\textsuperscript{191} \textit{See} text accompanying notes 237-44 \textit{infra}. 
clauses is the avoidance of strife between the religious and civil components of American society. Essential to that assumption is the judgment that religiously motivated activity has a particularly grave potential for causing discord in the civil society. Since the early cases, there has been some cause for significant concern that these general principles might carry slow-germinating doctrinal seeds which, at a future time, would suggest a reappraisal of the traditionally privileged place of political and associational rights of religious institutions and individual citizens motivated by religious principles.

To some members of the original Walz-Lemon majority, the existence of this potential at this point in the development of the test would probably seem strange indeed. They apparently felt it had been laid to rest in those early cases. For instance, in Walz, the Chief Justice went out of the way to remark that

\[\text{adherents of particular faiths and individual churches frequently take strong positions on public issues . . . . Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.}\]

Indeed, this comment, coupled with the warning, compliments of Justice Cardozo, about "the tendency of a principle to expand itself to the limit of its logic," ought to have put the matter to rest. Certainly American historical experience reveals that churches and church groups have long exerted powerful political influence on legislation at both the national and state levels.

However, other dicta, especially in the discussion of "political divisiveness," has kept the issue alive. For instance, in Lemon, the majority cautioned:

\[\text{Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system . . . but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect . . . The potential divisiveness of such conflict is a threat to the normal political proc-}\]

192. 397 U.S. at 670.
193. Id. at 678-79 (quoting B. CARDOZO, supra note 147, at 51).
194. For example, the general secretary of the United States Catholic Conference testified before the Democratic National Convention's Platform Committee on such diverse topics as hunger and malnutrition, health care, housing, racial integration in public education, communications, criminal justice, foreign aid, human rights, Middle East policy, and African policy. Statement of the Most Reverend Thomas C. Kelly, Secretary, United States Catholic Conference, before the Democratic Platform Comm. (1980). This report is summarized in The Long Island Catholic, June 19, 1980, at 4, 12.
To have States or communities divide on the issues presented by state aid... would tend to confuse and obscure other issues of great urgency...\textsuperscript{195}

The Court also exhibited a certain apprehensiveness in its approach to the situation posed in \textit{McDaniel v. Paty}.\textsuperscript{196} While the Court found that concern for the entanglement caused by a single minister's sitting in the state legislature was insubstantial, the plurality appeared somewhat cautious in confirming across the board the political equality of religiously based activity. The reassuring language of \textit{Walz} was noticeably absent and the possibility of the Court's reacting differently to less conventional ecclesiastical participation in civil matters was haunting. The chance of such a later interpretation of \textit{McDaniel} certainly did not escape Justice Brennan, who, in a separate concurring opinion,\textsuperscript{197} stressed that the political rights of religiously-oriented elements in our society were entitled to the same protections as those of other members.

When \textit{McDaniel} is read in conjunction with other recent actions of the Court, a sense of insecurity about future trends with respect to the political expression rights of religiously-oriented groups and individuals lingers. For instance, the Court's willingness in \textit{Buckley v. Valeo}\textsuperscript{198} to balance such government interests as "the actuality and appearance" of corruption against personal freedoms of political speech and association in sustaining both the contribution limitations and the disclosure and record-keeping provisions of the Federal Election Campaign Act\textsuperscript{199} may well indicate an increased readiness to "balance" such freedoms against other "important interests," including, perhaps, a concern against establishment of religion expressed in entanglement terms. For some, Justice Blackmun's opinion in \textit{Roe v. Wade},\textsuperscript{200} in stringently limiting those areas where the state might regulate abortion, was partially motivated by a concern to keep the civil state and its decision-making process untainted\textsuperscript{201} by the "highly charged and distinctly sectarian religious controversy that the abortion issue had predictably come to stir."\textsuperscript{202}

\begin{flushright}
195. 403 U.S. at 622-23.
197. \textit{Id.} at 629-42.
199. 424 U.S. at 6 n.1.
202. \textit{Id.} at 22.
\end{flushright}
On the other hand, the use of the “entanglement” concept as a limitation on freedom of expression has found little support among scholars. Indeed, at least one commentator who originally seemed to see some workability in the theory has now apparently given more weight to the caution of Walz. This prudence by the Court and commentators is, no doubt, due in part to a realization of the danger of chipping away at freedom of expression and in part to the significant free exercise implications in any restriction on the speech or associational rights of religious bodies or those affiliated with them. Indeed, the ensuing political and social isolation of religious groups could, paradoxically, lead to even greater divisiveness and to the creation of new, religiously-based “discrete and insular minorities.”

Beyond McDaniel, “excessive entanglement” has thus shown little promise of gaining any significant respectability as an important government interest capable of restricting political rights. However, “entanglement,” especially “political entanglement,” also serves, according to Lemon and Nyquist, as a “warning signal” of other establishment clause problems. This influence of the political divisiveness argument on the “purpose” and “effect” tests has not been overlooked by present-day litigators. Statutes whose sole purpose is to enforce a particular religious doctrine have been held to violate the Establishment Clause. Since the advent of the “excessive entanglement” concept, plaintiffs attacking legislation which has the prominent support of a religious group have taken a new tack. The goal appears to be not so much to convince the Court that the legislation ought to be voided on this ground (that the legislation is the product of political pressure by a political group) alone but to prevail on “purpose” or “effect” grounds without having to demonstrate that the sole reason for the enactment was to legislate the religious doctrine of a given faith. Proponents of this argument regularly acknowledge, as did

203. Compare Tribe, note 201 supra, with L. Tribe, supra note 127, § 14-12, at 867.


205. See text accompanying note 65 supra.

206. In Epperson v. Arkansas, 393 U.S. 97 (1968), the Court voided an Arkansas statute which prohibited the teaching of Darwin’s theory of evolution “for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.” Id. at 103 (emphasis added). The Court emphasized that no suggestion was made that the law could be justified “by considerations of state policy other than the religious views of some of its citizens.” Id. at 107. “It is clear,” wrote Justice Fortas, “that fundamentalist sectarian conviction was and is the law’s reason for existence.” Id. at 107-08.

207. See note 206 supra.
the Court in Lemon, that religiously affiliated persons and ecclesiastical entities possess the same political rights of speech and association as other citizens. Their argument is that there is an operative difference, at least for those associated with religion, between “participation” and “pressure.”

For instance, in Harris v. McCrae, a class action challenging restrictions on the use of federal Medicaid funds for abortions, the plaintiffs argued that the restrictions contained in the so-called “Hyde Amendment” had the purpose and effect of establishing in public law the views of a particular religion. They further submitted that the amendment was unconstitutional as the product of excessive entanglement between lawmakers and specific church groups. In his opinion for the Court, Mr. Justice Stewart had little trouble holding, on the facts of the particular case, that “it does not follow that a statute violates the Establishment Clause because it ‘happens to coincide or harmonize with the tenets of some or all religions.’” The simple fact that “the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.”

By its inclusion of the phrase “without more,” the Court left open, once again, the possibility that, under certain circumstances, religiously affiliated groups or individuals may indeed have to tread more cautiously than others in the political arena. Precisely what circumstances would precipitate such a restriction is left ambiguous. There are certainly both practical and theoretical difficulties with the distinction between “participation” and “pressure” urged by the litigants in McCrae.

There are both practical and theoretical difficulties with this approach. Practically, it would be an impossible task to distinguish between “participation” and “pressure.” All too often “pressure” is the label assigned by the loser to successful legislative representation efforts. On a more theoretical plane, such an inquiry would seem to require an investigation of the legislative process that would normally far exceed the traditional bounds of legitimate judicial inquiry. Furthermore, such a standard would hardly foster government neutrality toward the influence of religion or religious principles in public policy decisions. Rather, it would amount to a constitutional policy decision limiting reli-

208. 100 S. Ct. 2671 (1980).
209. 100 S. Ct. at 2689.
210. Id. (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).
211. Id.
gion’s influence on the acts of the legislature even if, in the “mar-
ketplace of ideas,” religiously-oriented thought could prevail.

Beyond purely jurisprudential considerations, there is also
the imponderable as to how much considerations of “excessive en-
tanglement” have altered attitudes in other areas of national life. It is now well established that Supreme Court decisions can and
regularly do influence public opinion drastically. It thus seems
to ask whether, since the advent of the “political divisiveness”
concept, the other institutions of our political society have become
less hospitable to the “input” of religious groups. There are cer-
tainly concrete indications of such a trend. If such a develop-
ment is in fact based on supposed “excessive entanglement”
considerations, the Lemon Court’s citation to Justice Cardozo’s
comment about the “tendency of a principle to expand itself to the
limit of its logic” ought to provoke critical reexamination of
that trend.

As for the influence of the “excessive entanglement” test on
other first amendment rights, it is safe to assert that, to this date,
there has been no concrete doctrinal development which indicates
that the test has in fact caused the curtailment of any rights of free
expression. Indeed, it does not seem likely that the Court would
consciously take such a step. However, judicial attitudes can pro-
duce incrementally significant changes in jurisprudential direction
without an explicit doctrinal revision. From this perspective, the
plurality opinion in McDaniel and the arguments concerning reli-
gious “pressure” on legislative efforts are developments worthy of
recognition. Their presence on the contemporary litigation scene
ought to provoke serious doubts as to whether whatever benefits
the entanglement test may deliver are worth the danger to our
freedoms of expression.

B. Government Regulation and Free Exercise

As noted in the earlier parts of this Article, the past several
decades have witnessed a very significant increase in the overlap
of governmental and religious functions in our society. During
this period, American religious bodies have sought increased par-
ticipation in civil affairs. Simultaneously, there has been a sub-

213. See, e.g., National Abortion Rights Action League, Public Opinion Polis
Since the Supreme Court Decisions of 1973 1 (summarizing Lou Harris & Associates,
on abortion after Roe v. Wade, 410 U.S. 113 (1973)).
214. See, e.g., U.S. COMMISSION ON CIVIL RIGHTS, CONSTITUTIONAL ASPECTS OF
THE RIGHT TO LIMIT CHILDBEARING 27-43 (1975).
215. See note 193 supra.
216. See text accompanying notes 167-73 supra.
The statute books are replete with so-called “religious exceptions” which, in the past, have been the traditional device employed to obviate any free exercise problem. However, as Professor Whelan has recently pointed out:

[d]uring the last ten years, American Church leaders have become increasingly concerned about governmental definitions and regulations of churches and religious activities. A small but growing number of religious leaders of all faiths fear that the golden age of religious exemptions has ended. They believe that we are already in the twilight of substantially increased governmental regulation.

He cites in particular changes in the Internal Revenue Code through the Tax Reform Act of 1969, which increased the importance of distinctions between various forms of church organizations, the 1972 amendments to the Civil Rights Act of 1964 and the enactment, in 1974, of the Employee Retirement Income Security Act (ERISA). The merits or demerits of each of these recent attempts to narrow religious exemptions and others like them is beyond the scope of this Article. However, it is important for present purposes to assess the probable role of the “excessive entanglement” concept in this area.

Traditionally, the Supreme Court has recognized two sorts of “religious exemptions” from state and federal regulatory schemes. Mandatory exemptions have been those required by the free exercise clause and may, in general, be defined as those which are essential to ensure the continued practice of a religion but which do not endanger a very important governmental interest. Permissible exemptions have been those which the state or federal government may grant to religious activity in order to accommodate the citizen’s desire for religious activity without sacrificing an important civil interest, actually supporting the church, or preferring one religion over another. The trend in governmental regulatory patterns which has precipitated current church concern can

be characterized as a tendency to deemphasize free exercise values. Increasingly many statutory exceptions are viewed as optional and thus subject to countervailing state concerns. The result is fewer and more tightly drawn religious exemptions which are simply not compatible with the churches' view of their contemporary role.

The Court's recent decision in Catholic Bishop of Chicago v. NLRB may be read as providing some "breathing space" in this ever more intimate relationship by fusing the concept of "excessive entanglement" from the establishment clause cases with the Watson-Serbian Orthodox religious dispute cases. The traditional free exercise analysis is not reformulated but "excessive entanglement" is used as a descriptive tool for the identification and appraisal of the free exercise claim. By using "excessive entanglement" as a measure of religious impairment, the Court also imported from establishment clause analysis the "prophylactic" characteristics of that concept. Consequently, the Court may henceforth be more willing to bar the application of a given regulatory scheme to religion because it has the potential for constant interference with the activities of the religious sect.

Catholic Bishop of Chicago is, however, an easy case to "overread." While employing the liberal descriptive tool of "excessive entanglement" to assess the degree of religious impairment, it also made clear that, in the case before the Court, the degree of government involvement was pervasive. To fulfill its responsibilities under the Act, the NLRB would have involved itself in "nearly everything that goes on in the schools." The decision contains no real indication that the Court would find "excessive entanglement" an appropriate measure of impairment in other regulatory situations where the scheme could be effectuated through a relatively simple set of objective rules which required minimal government involvement in religious matters.

225. There has also developed increased monitoring of the use of exempt status. See, e.g., Note, The Internal Revenue Service as a Monitor of Church Institutions: The Excessive Entanglement Problem, 45 Fordham L. Rev. 929 (1977).


227. See notes 110-11 & accompanying text supra.

228. 440 U.S. at 503.

229. It is difficult, therefore, to justify the wariness of some members of the judiciary with respect to deciding questions requiring a definition of religious belief because of "excessive entanglement" concerns. See, e.g., Gavin v. Peoples Natural Gas Co., 464 F. Supp. 622 (W.D. Pa. 1979), rev'd on other grounds, 613 F.2d 482 (3d Cir. 1980). See generally Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974), cert. denied, 419 U.S. 996 (1974). But see Steeber v. Benilde-St. Margaret's High School, (47 U.S.L.W. 2308 (D. Minn. 1978). While the courts have traditionally avoided questions of the correctness of any religious view or judgment, they have regularly decided whether, in fact, there was a religious motivation for an action or whether a religious belief is sincerely held. See, e.g., Theriault v. Carlson, 495 F.2d 390 (5th Cir.), cert. denied,
More significantly, Catholic Bishop of Chicago does not purport to replace or even alter substantially the basic free exercise analysis which permits even a significant regulation of religious activity when necessary to attain an important government interest. Indeed, from this perspective, Catholic Bishop of Chicago must be considered a relatively straightforward case. Jurisdiction over elementary and secondary schools is a rather recent expansion of NLRB jurisdiction and certainly not central to its statutory task of maintaining labor peace pursuant to the national commerce power.\textsuperscript{230}

More difficult cases will, no doubt, soon be before the Court, in which the balance between free exercise concerns and the asserted government interest will be a closer one.\textsuperscript{231} At this point it

\textsuperscript{230} Note, The Religion Clauses and NLRB Jurisdiction over Parochial Schools, 54 Notre Dame Law. 263, 264-68 (1978).

\textsuperscript{231} Illustrative of the type of case that would pose such a difficult policy choice for the Court is the controversy over whether the Internal Revenue Service may cancel a church-related educational institution's exemption under I.R.C. § 501(c)(3) when the school excludes a particular race on the ground that such discrimination is mandated by the dogma of the controlling institution. Bob Jones Univ. v. United States, No. 79-1215 (4th Cir., decided Dec. 30, 1980) (revocation of university's tax-exempt status violates neither the Internal Revenue Code nor the first amendment).

These cases are discussed in Note, The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools, 93 Harv. L. Rev. 378 (1979).

To the extent that the cancellation of exemptions is viewed as involving an administrative weighing of the social advantages and disadvantages of a particular religious or religious practice, the rationale of Catholic Bishop of Chicago may be persuasive. In Walz, the Court noted that "the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions." 397 U.S. at 674. On the other hand, the government interest at stake in requiring that tax benefits not be used to perpetuate racial discrimination is substantially greater than the concern protecting the "stream of commerce" from marginal impairment of a local parochial school's
is indeed far too early to gauge accurately the effect of the "excessive entanglement" concept on the Court's future efforts to reconcile the demands of an ever-expanding regulatory structure and of the free exercise clause. In all probability, the concept will not become controlling in any such analysis since the Court has not abandoned its traditional methodology of weighing free exercise claims against the asserted government interest. It may well, however, have the practical effect of increasing the burden on those attempting to sustain a pervasive regulatory scheme by identifying, at least in theory, situations where an impairment of free exercise rights is possible. Of course, this later role is functionally similar to one of the roles which the concept plays in establishment clause analysis. Not surprisingly, therefore, the Court can expect here the same lack of precision and the same lack of internal discipline.

In any general reassessment of religion clause analysis, the Court will therefore have to confront the issue of whether, despite its tendency to produce unacceptably high levels of subjectivity, the test ought to play even the limited role described above in free exercise clause analysis. In one sense, a better argument can be made for tolerating its infirmities in this context than in the establishment clause area. Here, its "prophylactic dimension" at least contributes to the Court's long-standing tradition of giving free exercise concerns a broad reading. On the other hand, it seems somewhat doubtful whether the employment of "excessive entanglement" will really contribute to a stable relationship between civil and ecclesiastical entities in our society or whether it

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232. See text accompanying notes 118-38 supra.
233. See text accompanying notes 64-71 supra.
234. See text accompanying note 186 supra.
235. See text accompanying notes 38-43 supra.
236. See text accompanying note 140 supra.
will simply serve to make the "wall of separation" a little less flexible. Perhaps that judgment should await the experience of further litigation.

C. Future Civil—Religious Cooperative Ventures

While the focus of most "excessive entanglement" cases has been the religious school, our society is filled with other areas where civil and religious activities constantly overlap. The open-ended, ad hoc approach of the Court to the concept of "excessive entanglement" still makes it difficult to predict how the Court might treat other situations which it has not yet had the opportunity to reduce to automatic formulae.

Most of the principal religious-civil relationships in contemporary American life have already passed scrutiny, implicitly or explicitly, under the purpose and effect tests. Also, in most cases these relationships have been part of American life for a sufficiently long period to allow the civil-religious relationship to develop an historical "track record." If the Court's faith in the historical approach to entanglement situations holds, new "excessive entanglement" problems may not occur. On the other hand, if the Court does reduce its reliance on the historical approach, renewed scrutiny of traditional religious-civil relationships might persuade the Court that recent developments, viewed in the context of "excessive entanglement's" re-emphasis on separation, have increased the possibility of civil-religious strife.

For instance, the existence of Chaplains' Corps in the various components of the armed forces of the United States, staffed by clergy holding the rank of commissioned officers, has long been accepted as meeting both the purpose and the effect tests. Reinforcement of this conclusion is found in the fact that the scheme also protects the free exercise rights of the citizen "called to the colors." Certainly, the Court, at least until events of the last decade, would have found it difficult to ignore a long and trouble-free relationship in this area between the civil and religious sectors of society. However, the possibility for conflict became clear during the Vietnam War when some religious congregations sug-

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237. See text accompanying notes 167-74 supra.
238. See School Dist. of Abington Township v. Schempp, 374 U.S. 203, 296-97 (1963) (Brennan, J., concurring) (noting that provisions for churches and chaplains at military establishments is a practice "the striking down of which might seriously interfere with certain religious liberties" protected by the First Amendment. In that same case, Justice Stewart pointed out that "a lonely soldier stationed at some faraway outpost could surely complain that a government which did not provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion." Id. at 309 (Stewart, J., dissenting). See also Giannella, Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement, 1971 SUP. CT. REV. 147.
gested that clergymen in uniform could not properly fulfill their obligation to address moral issues relating to the conduct of that war. One very large American congregation, the American Baptist Convention, even took the position that the churches had a right of "primary jurisdiction" over chaplains accused of military offenses since, under the applicable statutes, a chaplain's commission is dependent on the continuing certification of his Church.239 Under these circumstances, it seems unduly complacent to conclude that the military chaplaincy in its present form is immune from serious attack under the "excessive entanglement" concept.240 Of course, to admit that there is potential for serious attack is not to concede the validity of the arguments. There are, for instance, the strong countervailing considerations of military exigency which may indeed require that all persons accompanying the armed forces in a support capacity be subject to the military chain of command and to the sanctions of military discipline.241

A very high percentage of American hospitals are under the sponsorship of religious sects. These hospitals maintain a variety of working relationships with agencies of the civil government. The sponsoring religious sects no doubt benefit from these relationships in terms of the accompanying prestige and exposure to the rest of the community. However, the benefits to that civil community in terms of health care services are certainly far greater.242 Since the early case of Bradfield v. Roberts,243 the constitutionality of these arrangements has not been seriously questioned. In Bradfield, the Court sustained the religious hospital's use of land which the city had donated by refusing to "pierce the corporate veil" of the hospital's secular charter and by declaring

239. Newsweek, Mar. 27, 1972, at 99. The focal point of the debate was the court-martial case of United States v. Jensen, tried at the Naval Air Station, Cecil Field, Florida. In that proceeding a Navy Chaplain, Commander Andrew Jensen, was charged with having committed adultery with two parishioners who were naval service dependents. The American Baptist Convention took the position that the allegations should have been first presented to the Church and the Church permitted to take disciplinary action. Id. Commander Jensen was subsequently acquitted. N.Y. Times, Apr. 1, 1972, at 24, col. 3.


243. 175 U.S. 291 (1899).
that those challenging the arrangement had the burden of proving that the hospital's operation was for a religious purpose. Today, the allocation of the burden of proof would be the same. However, the "excessive entanglement" concept would certainly make the purposes stated in the corporate charter non-determinative. Moreover, it is not at all difficult to foresee the possibility of a court's finding, in light of the growing differences among religious groups in matters of medical ethics—a disparity the Court has already noticed in another context—that a relationship, feasible in the past, now creates a possibility of religious strife.

Here, as in the case of the Chaplains' Corps, to note the increased possibility of such a challenge under the "excessive entanglement" concept is not necessarily to accept the correctness of that viewpoint. There are very strong arguments in favor of the current accommodation. Even if the current disparity of professional viewpoints on matters of medical ethics does increase the potential for religious strife, that possibility must be assessed in light of the long history of cooperation between religious groups and civil governments on medical service matters. It is reasonable to assume that a long-term partnership can undergo stresses which might have a far more pernicious effect in other contexts. It would also seem appropriate for the Court to weigh the possibility of religious strife against the actuality of the traditionally warm relationship which exists between American communities and the hospitals which serve them. Certainly, if the entanglement concept were to be applied, it would make sense for the Court to limit wherever possible its application to the immediate stress point and not to prohibit cooperation in other areas of medical services.

The suggestion that such traditional areas of civil-religious cooperation might be exposed to new attack illustrates graphically the possibilities inherent in the use of such an open-ended methodology for giving meaning to the important guarantees of the religion clauses. In one sense, the existence of this potential may have a salutary effect. It may cause religious and civil leaders to give detailed, advance attention to the known "stress points" of civil-religious working relationships. A demonstration that the matter has received careful forethought and that precautionary measures to avoid religiously-based strife have been implemented may well be at least partially effective in keeping the Court's entanglement analysis within meaningful bounds.

245. In Roe v. Wade, 410 U.S. 113 (1973), for example, the Court noted the "polarization" of the medical profession on the issue of abortion. Id. at 143. That polarization is at least partially religiously based.
CONCLUSION

The reappraisal of the entanglement test by the Supreme Court must necessarily involve examination from three perspectives: the impact of the test on the overall doctrinal development of the religion clauses; the practical problems inherent in the implementation of the test; and the possible future developments if the Court continues to use it.

In considering the impact of the test on the overall development of the religion clauses, one must recognize that the underlying principle protected by the "excessive entanglement" concept has long been recognized as one of the core strengths of our democratic society. Madison recognized the theoretical necessity of confining religion and civil government to their own respective spheres;\textsuperscript{246} de Tocqueville observed the salutary consequences of adherence to that standard.\textsuperscript{247} Perhaps the expanding role of civil government and the newly-emphasized "social mission" of many large churches has convinced those who enjoy the unique perspective of American life which membership on the Court provides\textsuperscript{248} that this value needs to be reemphasized as a significant constitutional standard. There is, however, nothing in the facts of the cases coming before the Court that would tend to support that judgment. Indeed, as Justice Powell noted in \textit{Wolman}, "[t]he risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote . . . ."\textsuperscript{249} It is therefore conceivable that the Court has used the "entanglement test" without much reflection on its overall impact on the direction of religion clause jurisprudence.

Even if the Court is willing to accept this doctrinal impact of the "entanglement test," the question remains, as Justice White has reiterated recently,\textsuperscript{250} whether the articulation of this constitutional value through the "excessive entanglement" concept is a useful judicial methodology. As employed by the Supreme Court over the past decade, it has emerged largely as a criterion without an internal discipline. The Court is still left with little but its "own predilections" when it comes to determining whether the inevitable civil-religious entanglement is in fact "excessive." The originally conceived standard of history is helpful in assessing

\begin{itemize}
  \item \textsuperscript{246} See Madison, supra note 142.
  \item \textsuperscript{247} A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 154-55 (Mentor ed. 1956).
  \item \textsuperscript{248} Tidewater Oil Co. v. United States, 409 U.S. 151, 175 (1972): "Across the screen each Term come the worries and concerns of the American people—high and low—presented in concrete, tangible form." (Douglas, J., dissenting).
  \item \textsuperscript{249} 433 U.S. at 263.
  \item \textsuperscript{250} Roemer v. Board of Pub. Works, 426 U.S. 736, 767-70 (White, J., concurring).
\end{itemize}
some of the more traditional religious-civil relationships but is of only marginal utility in assessing newer areas of contact between those spheres. The only alternative found by the Court has been the quasi-codification of its early holdings into the litmus tests of *Roemer* and *Wolman*. Judicial factual assessments of one time and one place thus become the operative standards of constitutional adjudication in the long term.

With respect to future directions, the open-ended nature of the "excessive entanglement" concept exposes to subtle and imprecise reassessment many other areas of constitutional adjudication. Traditional areas of church-state cooperation, long permitted under past standards of review, now seem exposed to reassessment on the ground that the relationship poses the danger, although not necessarily the actuality, of future religiously-based strife.

Even if the Court does wish to see the "wall of separation" become a bit higher, there are serious questions as to whether it has selected an appropriate tool. Perhaps it has simply increased the probability that future cases will rest to an even greater extent on the personal predilections of current members of the Court or, even worse, on those of past members of the Court whose predilections have become the conventional wisdom of the "standard profiles." In short, the benefit derived from the test seems quite remote when compared with the risks involved in using such an undisciplined judicial methodology.